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POMEROY'S  
EQUITY JURISPRUDENCE  
AND  
EQUITABLE REMEDIES

SIX VOLUMES

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POMEROY'S  
EQUITY JURISPRUDENCE

IN FOUR VOLUMES

By JOHN NORTON POMEROY, LL.D.

FOURTH EDITION, ANNOTATED AND MUCH ENLARGED

AND SUPPLEMENTED BY

A TREATISE ON EQUITABLE REMEDIES

IN TWO VOLUMES

By JOHN NORTON POMEROY, JR.

SECOND EDITION

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BANCROFT-WHITNEY COMPANY  
SAN FRANCISCO  
THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY  
ROCHESTER, N. Y.

1919







A TREATISE  
ON  
EQUITY JURISPRUDENCE,

AS ADMINISTERED IN

THE UNITED STATES OF AMERICA;

ADAPTED FOR ALL THE STATES,

AND

TO THE UNION OF LEGAL AND EQUITABLE REMEDIES

UNDER THE REFORMED PROCEDURE

By JOHN NORTON POMEROY, LL.D.

FOURTH EDITION

BY

JOHN NORTON POMEROY, JR., A.M., LL.B.

Professor of Law in the University of Illinois

IN FOUR VOLUMES

VOLUME IV

BANCROFT-WHITNEY COMPANY  
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ROCHESTER, N. Y.

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TREATISE  
ON  
EQUITY JURISPRUDENCE

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PART FOURTH

(xv)



## PART FOURTH.

### THE REMEDIES AND REMEDIAL RIGHTS WHICH ARE CONFERRED BY THE EQUITY JURISPRUDENCE.

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#### PRELIMINARY SECTION.

##### ANALYSIS.

§ 1315. General object.

§ 1316. Classification.

§ 1317. Remedies acting *in rem* or *in personam*.

§ 1318. Remedies *in personam* beyond the territorial jurisdiction.

§ 1315. **General Object.**—The general nature, kinds, and classes of equitable remedies, both those belonging to the exclusive and to the concurrent jurisdictions, have been fully described in a former volume.<sup>1</sup> The main purpose of the discussions in this Part Fourth is to determine under what circumstances, for the protection of what primary rights and interests, legal or equitable, on the occasion of what wrongs or violations of duty, and between what parties, equity *will exercise its jurisdiction* by granting either these remedies which are peculiar to courts of equity, or those which are essentially legal in their nature and are administered concurrently by courts of law and of equity. In other words, my object is to show *what* remedies may be conferred by equity, and *when* its jurisdiction will be exercised by granting them. The entire discussion is based upon the general principles and doctrines which define the equi-

§ 1315, <sup>1</sup> See *ante*, vol. 1, §§ 112–116; *Ibid.*, §§ 134, 135; and *Ibid.*, §§ 170–172.



table jurisdiction and determine its exercise, as explained in a previous volume.<sup>2</sup>

§ 1316. **Classification.**—The classification presented in the former volume, and referred to in the preceding paragraph, was intended merely for purposes of general description, and in order to present the active remedial system in one body. For the discussions of this Part Fourth I shall adopt the following classification, by which all equitable remedies are collected and arranged in eight separate groups: 1. The First Group contains those remedies which are purely ancillary and provisional, which do not affect any primary right nor confer any ultimate relief.<sup>1</sup> 2. The Second Group consists of remedies purely preventive.<sup>2</sup> 3. The Third Group consists of remedies which *indirectly* establish or protect interests and primary rights, whether those interests and rights are legal or equitable.<sup>3</sup> 4. The Fourth Group consists of remedies by which estates, interests, and primary rights, either legal or equitable, are *directly* declared, established, or recovered, or the enjoyment thereof is fully restored.<sup>4</sup> 5. The Fifth Group consists

§ 1315, <sup>2</sup> See vol. 1, pt. 1, c. 1, 2.

§ 1316, <sup>1</sup> These are interpleader and receivers.

§ 1316, <sup>2</sup> It includes injunctions for all possible purposes; and in this connection I treat of equitable defenses in legal actions as a substitute for injunctions to restrain actions at law.

§ 1316, <sup>3</sup> They are reformation and re-execution, and cancellation, surrender up or discharge of instruments.

§ 1316, <sup>4</sup> This entire group contains three main classes: 1. Suits by which purely *legal* estates are established, and the enjoyment thereof is recovered; including assignment of dower; establishment of disputed boundaries; partition of land, and partition of personal property. 2. Suits by which some *general* right, either legal or equitable, is established; including bills of peace; bills *quia timet*; quieting title; suits to establish a will; suits to construe a will. 3. Suits by which some *particular* estate, interest, or rights, legal or equitable, is established; including statutory suit to quiet title; removing a cloud from title; strict foreclosure of a mortgage or pledge; redemption of mortgages or pledges.

of remedies by which *equitable obligations* are specifically and directly enforced.<sup>5</sup> 6. The Sixth Group consists of remedies in which the final relief is *pecuniary*, but is obtained by the enforcement of a *lien* or *charge* upon some specific property or fund.<sup>6</sup> 7. The Seventh Group consists of remedies in which the final relief is wholly *pecuniary*, and is obtained in the form of a general pecuniary recovery.<sup>7</sup> 8. The Eighth Group contains certain additional remedies which have been created and conferred by statute in several of the states, and which therefore do not belong to the original jurisprudence of equity nor to the general equitable jurisdiction.<sup>8</sup>

**§ 1317. Remedies Acting in Personam or in Rem.<sup>a</sup>—** Before taking up these various divisions in their order, I shall present with more of practical detail some incidents common to many large classes of equitable reme-

§ 1316, <sup>5</sup> This group contains three main classes: 1. Specific performance of contracts; 2. Specific enforcement of obligations arising from trusts; 3. Specific enforcement of obligations arising from relations analogous to trusts; including suits against fiduciary persons; suits against corporations and their officers; administration suits against executors and administrators.

§ 1316, <sup>6</sup> Embracing foreclosure of mortgages of real and personal property and of pledges, by judicial sale; enforcement of equitable liens; marshaling of securities; enforcement of the equitable contracts of married women; and creditors' suits.

§ 1316, <sup>7</sup> This group contains the following particular suits: By assignees of things in action, equitable assignees of a fund, etc.; by persons entitled to participate in a common fund; for contribution in general; suits growing out of suretyship, for exoneration, contribution, or subrogation; suits growing out of partnership; suits for an accounting in general; recovery of damages.

§ 1316, <sup>8</sup> In this statutory group should be placed suits for divorce; proceedings in the nature of an inquisition, for the appointment of committees over lunatics, persons of unsound mind, and habitual drunkards; statutory suits to dissolve and wind up corporations; or to remove corporate officers for cause, or for the appointment of officers.

§ 1317, (a) For a fuller treatment of the subject of this paragraph, see Pom. Equitable Remedies, §§ 12-15.

dies which have been alluded to in a previous volume. The fundamental doctrine of equity as originally administered has already been explained: that its remedies and decrees operated *in personam* upon defendants, and not *in rem* upon the subject-matter; that a decree was not of itself a legal title, nor did it transfer title to the plaintiff.<sup>1</sup> This original doctrine has been abrogated for all classes of remedies to which it could apply by statutory legislation in a large number of the states.<sup>2</sup>

§ 1317, <sup>1</sup> See *ante*, vol. 1, §§ 134, 135, 170, 428–431, where this doctrine is fully explained; *Penn v. Lord Baltimore*, 1 Ves. Sr. 444; 2 Lead. Cas. Eq., 4th Am. ed., 1806; *Proctor v. Ferebee*, 1 Ired. Eq. 143, 36 Am. Dec. 34.

§ 1317, <sup>2</sup> This legislation is, of course, confined to remedies which in some way relate to or deal with title or estates, legal or equitable, in specific property. The most important modifications referred to in the text are the following: In some statutes of the first type the language is positive and peremptory that the decree shall operate to transfer the title, etc.; in others it is permissive,—the court may provide in the decree that it shall operate to transfer the title in case the defendant neglects or refuses to obey its mandates. Similar variations are found in the statutes of the second type. The following are the most important of these statutes:—

*Alabama*: Code 1876, p. 848, secs. 3899 (3469).

*Arkansas*: Gantt's Dig. of Stats. 1874, p. 675, secs. 3640, 3641; p. 836, secs. 4783, 4785, 4787.

*Connecticut*: Pub. Acts 1875, p. 63, c. 97, sec. 26.

*Delaware*: Rev. Stats. 1874, p. 571, c. 95, sec. 12.

*Georgia*: Code 1882, p. 1106, sec. 4209 (4150).

*Illinois*: Hurd's Rev. Stats. 1880, p. 191, c. 22, secs. 46, 47.

*Indiana*: Davis's Rev. Stats. 1876, p. 237, secs. 542, 544, 549.

*Iowa*: 2 Miller's Rev. Code, 1880, p. 722, secs. 2886, 2888.

*Kansas*: Dassel's Comp. Laws 1881, p. 654, art. 17, c. 80, sec. 400.

*Kentucky*: Bullitt's Codes 1876, p. 79, secs. 394, 396.

*Louisiana*: Code of Practice 1875, sec. 636.

*Maine*: Rev. Stats. 1871, p. 582, c. 77, sec. 7; c. 111, secs. 6, 7, 8.

*Maryland*: Rev. Code 1878, p. 643, art. 65, sec. 73.



This legislation may be reduced to two general types: 1. That by which the decree itself, without any act of the defendant or of an officer on his behalf, becomes a title, and vests a legal estate in the subject-matter in the plaintiff; 2. That by which a commissioner, master, or other officer of the court executes the decree, and through his conveyance or other official act transfers the legal estate from the defendant to the plaintiff, or otherwise vests the plaintiff with title. Both these types are often found in the statutes of the same state, and they are subject to minor modifications, as shown by the footnote, which contains a list of the states and of the statutes. In all cases where an instrument is directed to be executed by an officer, the statutes provide that it shall have

*Massachusetts*: Pub. Stats. 1882, p. 797, c. 142, sec. 1.

*Michigan*: 2 Comp. Laws 1871, p. 1541, c. 176, sec. (5099) 63; pp. 1419-1421, c. 162, secs. (4530) 1, (4536) 7, (4538) 9, (4541) 12.

*Minnesota*: Young's Gen. Stats. 1878-80, p. 818, c. 75, sec. 32; p. 611, c. 58, secs. 1, 7.

*Mississippi*: Rev. Code 1880, p. 535, c. 59, sec. 1954.

*Missouri*: 1 Rev. Stats. 1879, p. 464, secs. 2760, 2761.

*Nebraska*: Brown's Comp. Stats. 1881, p. 585, sec. 429b; p. 587, sec. 451; pp. 249-251, secs. 323, 329, 331, 334.

*New Hampshire*: Gen. Laws 1878, p. 489, c. 209, sec. 9.

*New Jersey*: Rev. of Stats. 1877, p. 115, sec. 63.

*New York*: Code Civ. Proc. (new code), sec. 718.

*North Carolina*: Tourgee's Code Civ. Proc. 1878, sec. 215.

*Ohio*: Seney's Code Civ. Proc. 1874, secs. 375, 395; Rev. Stats. 1879, secs. 5318, 5399.

*Oregon*: Gen. Laws 1874; Code Civ. Proc., sec. 402.

*Tennessee*: 2 Stats. 1871 (Thompson and Steger's ed., 1872), secs. 4478, 4484, 4485, 4486, 4487, 4488.

*Texas*: Rev. Stats. 1879, p. 210, art. 1338.

*Vermont*: Rev. Laws 1880, p. 204, c. 43, secs. 766-770.

*Virginia*: Code 1873, p. 1164, c. 182, sec. 1.

*West Virginia*: Kelly's Rev. Stats. 1878, p. 929, c. 163, sec. 1; c. 22, sec. 1.

The following cases illustrate the provision that the decree itself is a title, or operates to transfer the title: *King v. Bill*, 28 Conn. 593;

exactly the same effect as if executed by the party himself. These statutes do not generally interfere with the original power of courts of equity to enforce obedience to their decrees by the parties themselves, and to punish such parties for their disobedience by attachment, fine, imprisonment, or sequestration. The operation of these statutes is confined to the territorial limits and jurisdiction of the states in which they are respectively enacted. It does not extend to decrees of the United States courts. The effect of equitable remedies granted and decrees rendered by the United States courts, in the absence of legislation by Congress, is governed by the original doctrine of equity; their decrees do not transfer title; they must be executed by the parties, and obedience is compelled by proceedings in the nature of punishment for contempt, attachment, or sequestration.<sup>3</sup> There are, of

Price v. Sisson, 13 N. J. Eq. 168; Griffith v. Phillips, 3 Grant Cas. 381; Young v. Frost, 1 Md. 377, 403; Taylor v. Boyd, 3 Ohio, 337, 17 **Am. Dec.** 603; Randall v. Pryor, 4 Ohio, 424; Penn v. Hayward, 14 Ohio St. 302; Battle v. Bering, 7 Yerg. 529, 27 **Am. Dec.** 526; Gitt v. Watson, 18 Mo. 274; Hoffman v. Stigers, 28 Iowa, 302.

Whenever the decree itself thus operates to transfer title, a reversal of the decree on appeal necessarily destroys this effect *as between the parties themselves*, divests the title from the party to whom it had been transferred, and reverts it in the party from whom it had passed. But if the decree had been executed by means of a conveyance, and the title had thus passed to a *bona fide* purchaser, before the appeal, a reversal may not divest him of the title or compel him to reconvey: See *ante*, Stats. of Delaware; Taylor v. Boyd, 3 Ohio, 337, 17 **Am. Dec.** 603. As to the time when the title passes by operation of the decree, whether from the date of the decree or by relation from the date of the commencement of the suit, see Shotwell v. Lawson, 30 Miss. 27, 64 **Am. Dec.** 145; King v. Bill, 28 Conn. 593.

§ 1317, <sup>3</sup> This is so, although the property which is the subject-matter of the decree is situated within a state which has legislated in the manner above described; Watkins v. Holman, 16 Pet. 25, 26; Briggs v. French, 1 Sum. 504; Lyman v. Lyman, 2 Paine, 11, 13; Tardy v. Morgan, 3 McLean, 358; Massie v. Watts, 6 Cranch, 148; Shepherd v. Comm'rs of Ross Co., 7 Ohio, 271.

course, classes of remedies to which this legislation cannot apply,—as, for example, decrees prohibiting any act, general pecuniary recoveries, analogous to money judgments at law, and many purely ancillary or provisional reliefs.

**§ 1318. Remedies in Personam Beyond the Territorial Jurisdiction.**<sup>a</sup>—The power to act *in personam*, through their remedies, is still held by all courts of equity, even in presence of the foregoing legislation. Of this nature must always be the remedies when the subject-matter, either real or personal property, is situated beyond the territorial jurisdiction of the court, in another state or country. The jurisdiction to grant such remedies is well settled. Where the subject-matter is situated within another state or country, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which *directly* affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts toward it, and it is thus ultimately but *indirectly* affected by the relief granted. As examples of this rule, suits for specific performance of contracts, for the enforcement of express or implied trusts, for relief on the ground of fraud, actual or constructive, for the final accounting and settlement of a partnership, and the like, may be brought in any state where jurisdiction of defendant's person is obtained, although the land or other subject-matter is situated in another state, or even in a foreign country.<sup>1</sup> On the

§ 1318, <sup>1</sup> This rule applies to the United States courts as well as to the state courts, and is also well settled in England: *Penn v. Lord Baltimore*, 1 Ves. Sr. 444; 2 Lead. Cas. Eq., 4th Am. ed., 1806; *Cald-*

§ 1318, (a) For further treatment of this subject, see *Pom. Equitable Remedies*, §§ 16–18.



other hand, where the suit is strictly local, the subject-matter is specific property, and the relief when granted is such that it *must* act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated.<sup>2</sup>

well v. Carrington's Heirs, 9 Pet. 86; Watkins v. Holman, 16 Pet. 25; Massie v. Watts, 6 Cranch, 148; Briggs v. French, 1 Sum. 504; Carrington's Heirs v. Brents, 1 McLean, 167; Watts v. Waddle, 1 McLean, 200; Tardy v. Morgan, 3 McLean, 358; Moore v. Jaeger, 2 McAr. 465; Wood v. Warner, 15 N. J. Eq. 81; Brown v. Desmond, 100 Mass. 267; Davis v. Parker, 14 Allen, 94; Pingree v. Coffin, 12 Gray, 288, 304; Gardner v. Ogden, 22 N. Y. 327, 332-339, 78 Am. Dec. 192; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Bailey v. Ryder, 10 N. Y. 363; De Klyn v. Watkins, 3 Sand. Ch. 185; Cleveland v. Burrill, 25 Barb. 532; Sutphen v. Fowler, 9 Paige, 280; Hawley v. James, 7 Paige, 213, 32 Am. Dec. 623; Mead v. Merritt, 2 Paige, 402; Dickinson v. Hoomes's Adm'r, 8 Gratt. 353; Moore v. Hood, 9 Rich. Eq. 311, 70 Am. Dec. 210; Ross v. Southwestern R. R. Co., 53 Ga. 514; Guild v. Guild, 16 Ala. 121; Topp v. White, 12 Heisk. 165; Penn v. Hayward, 14 Ohio St. 302; Henry v. Doctor, 9 Ohio, 49; Wills v. Cowper, 2 Ohio, 124; Olney v. Eaton, 66 Mo. 563.

§ 1318, <sup>2</sup> For example, a suit to abate a nuisance, and, it seems, a suit to determine the title to specific land: Miss. & Mo. R. R. v. Ward, 2 Black, 485; North Ind. R. R. v. Mich. Cent. R. R., 15 How. 233; 5 McLean, 444; Massie v. Watts, 6 Cranch, 148. As to injunctions restraining threatened acts in another state, see Western Union Tel. Co. v. West etc. R. R., 8 Baxt. 54; Atlantic etc. Tel. Co. v. Baltimore etc. R. R., 14 Jones & S. 377.

## FIRST GROUP.

REMEDIES PURELY ANCILLARY AND  
PROVISIONAL.

## CHAPTER FIRST.

## INTERPLEADER.

## ANALYSIS.

- § 1319. Description of this group.
- § 1320. General nature and objects of interpleader.
- § 1321. The claims, legal or equitable.
- § 1322. Essential elements.
- § 1323. *First.* The same thing, debt, or duty.
- § 1324. *Second.* Privity between the opposing claimants.
- § 1325. *Third.* Plaintiff a mere stakeholder.
- § 1326. *Fourth.* No independent liability to one claimant.
- § 1327. By bailees, agents, tenants, and parties to contracts.
- § 1328. Pleadings and other procedure.
- § 1329. Interpleader in legal actions by statute.

**§ 1319. Description of This Group.**—The distinguishing characteristic of the remedies belonging to this group is, that they determine no primary rights, and grant no final reliefs, either directly or indirectly. They are, in fact, instruments and means by which the court is enabled more conveniently and perfectly to adjudicate upon the *ultimate* rights and interests of the parties, and to award the *final* reliefs, in the further judicial proceedings to which they are auxiliary, and of which they are really the preliminary stage. These remedies are therefore, in every sense of the terms, ancillary and provisional.

**§ 1320. Interpleader—General Nature and Object.<sup>a</sup>—**

I purpose in this chapter to describe the general equitable jurisdiction to grant the remedy of interpleader independent of statute; and afterwards to notice briefly the modern statutes, some of which may perhaps have enlarged that jurisdiction, but most of which have simply conferred a similar jurisdiction upon courts of law, to be exercised in certain kinds of legal actions.<sup>1</sup> Where two or more persons, whose titles are connected by reason of one being derived from the other, or of both being derived from a common source, claim the same thing, debt, or duty, by different or separate interests, from a third person, and he, not knowing to which of the claimants he ought of right to render the debt or duty, or to deliver the thing, fears he may be hurt by some of them, he may maintain a suit and obtain against them the remedy of interpleader. In his bill of complaint he must state his own rights and their several claims, and pray that they may interplead, so that the court may adjudge to whom the thing, debt, or duty belongs, and he may be indemnified. If any suits at law have been brought against him, he may also pray that such pro-

§ 1320, 1 Under the ancient common law, the relief of interpleader was allowed in two special cases in a legal action by a court of law: when two or more persons had made a joint bailment and then brought separate actions of detinue against the depositary for the thing bailed; and when the thing came into the holder's possession by finding, and two or more persons claiming to be owners sued him in separate actions of detinue. Modern statutes, English and American, have enabled courts of law to grant a similar relief, in a summary manner, in certain legal actions, but this legislation has no connection with the ancient common-law jurisdiction above mentioned. For a more full account of this common-law relief, see Mitford's Eq. Pl., Jeremy's ed., 141, 142; *Crawshaw v. Thornton*, 2 Mylne & C. 1.

§ 1320, (a) For annotations to this chapter, and some additions to the text, see Pom. Equitable Remedies, chap. II. For annotations to this paragraph, see Id., §§ 37-41.

ceedings be restrained until the right be determined.<sup>2</sup> The object of the suit is, that the conflicting claimants shall litigate the matter among themselves, without involving the stakeholder in their controversy, with which he has no interest. It is plain, therefore, that the plaintiff can obtain no *specific* relief. So far as he is concerned, upon his filing the bill, and surrendering up the thing or money into the custody of the court, *his* remedy

§ 1320, <sup>2</sup> This description is taken, with some additions and alterations to conform to later decisions, from Mitford's Equity Pleading, 58, 59. As to the general nature of the remedy, see *Crawshay v. Thornton*, 2 Mylne & C. 1; *Sieveking v. Behrens*, 2 Mylne & C. 581; *Glyn v. Duesbury*, 11 Sim. 139, 147; *Langston v. Boylston*, 2 Ves. 101, 103, 109; *Jones v. Thomas*, 2 Smale & G. 186; *Prudential Ass. Co. v. Thomas*, L. R. 3 Ch. 74; *Farley v. Blood*, 30 N. H. 354; *Lincoln v. Rutland etc. R. R.*, 24 Vt. 639; *Dorn v. Fox*, 61 N. Y. 264; *Shaw v. Coster*, 8 Paige, 339, 35 Am. Dec. 690; *Mohawk etc. R. R. v. Clute*, 4 Paige, 384; *Bedell v. Hoffman*, 2 Paige, 199; *Badeau v. Rogers*, 2 Paige, 209; *Bell v. Hunt*, 3 Barb. Ch. 391; *Richards v. Salter*, 6 Johns. Ch. 445; *Atkinson v. Manks*, 1 Cow. 691; *Cady v. Potter*, 55 Barb. 463; *Mount Holly etc. Tp. Co. v. Ferree*, 17 N. J. Eq. 117; *Strange v. Bell*, 11 Ga. 103; *Burton v. Black*, 32 Ga. 53; *Hayes v. Johnson*, 4 Ala. 267; *Michigan etc. Co. v. White*, 44 Mich. 25; *Cogswell v. Armstrong*, 77 Ill. 139; *Hathaway v. Foy*, 40 Mo. 540; *Orr Water Ditch Co. v. Larcombe*, 14 Nev. 53; *Pfister v. Wade*, 56 Cal. 43.

*Rationale of the Remedy.*—It is sometimes supposed that the remedy of interpleader is allowed to avoid the risk of two recoveries. This is entirely a mistaken view. If a party has in any way made himself liable, even for the same demand, to two claimants, he is not entitled to an interpleader. It is the essential fact that he should actually be liable to only one of the claimants. The true *rationale* of interpleader is, that the party thereby avoids the risk of being vexed by two or more suits. Even though there is no danger of his being compelled to pay the same demand twice, the danger of two suits against him, with the consequent trouble and expense, is the sufficient ground for the remedy: *Crawford v. Fisher*, 1 Hare, 436, 441; *East and West India Dock Co. v. Littledale*, 7 Hare, 57, 60; *Langston v. Boylston*, 2 Ves. 101; *Sablicieh v. Russell*, L. R. 2 Eq. 441; *Greene v. Mumford*, 4 R. I. 313; *School District v. Weston*, 31 Mich. 85; *Pfister v. Wade*, 56 Cal. 43. In *Crawford v. Fisher*, Wigram, V. C., said: "The office of an interpleading



is exhausted by the decree that the defendants do interplead with each other, and that he be freed from or indemnified against their demands, and that he recover his costs; with the result of their dispute he has no concern. The ground of the jurisdiction is plain. The party seeking the remedy is exposed to the hazard, vexation, and expense of several actions at law for the same demand, while he is ready and willing to satisfy that

suit is, not to protect a party against a *double liability*, but against double vexation in respect of *one* liability. If the circumstances of a case show that the plaintiff is liable to both claimants, that is no case for interpleader. It is of the essence of an interpleading suit that the plaintiff shall be liable to one only of the claimants; and the relief which the court affords him is against the vexation of two proceedings on a matter which may be settled in a single suit." The supreme object of an interpleader is to protect the plaintiff,—the stakeholder,—and not the claimants against him; to protect him from the danger and vexation of two opposing suits for the same demand by those claimants, while he is ready and willing to pay the demand to the one who is judicially ascertained to be entitled to it: *Trigg v. Hitz*, 17 Abb. Pr. 436; *Farley v. Blood*, 30 N. H. 354; *Mich. etc. Co. v. White*, 44 Mich. 25; *Newhall v. Kastens*, 70 Ill. 156; *Nelson v. Barter*, 2 Hem. & M. 334; 33 L. J. Ch. 705; 10 Jur., N. S., 832. Such danger must be real; a mere suspicion of risk will not be sufficient to support a bill: *Blair v. Porter*, 13 N. J. Eq. 267; and this danger must not only exist when the bill is filed, but must continue until the decree: *Kerr v. Union Bank*, 18 Md. 396.

Such being the theory of the remedy, it is not essential that any suit should have been actually commenced by either claimant against the plaintiff: *Angell v. Hadden*, 15 Ves. 244; *Morgan v. Marsack*, 2 Mer. 107; *Farley v. Blood*, 30 N. H. 354; *Richards v. Salter*, 6 Johns. Ch. 445; *Yates v. Tisdale*, 3 Edw. Ch. 71; *Schuyler v. Pelissier*, 3 Edw. Ch. 191; *Strange v. Bell*, 11 Ga. 103; *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592. It is enough that the conflicting claimants make their respective claims and threaten suit: *Langston v. Boylston*, *supra*; *Providence Bank v. Wilkinson*, 4 R. I. 507, 70 Am. Dec. 160; *Briant v. Reed*, 14 N. J. Eq. 271; *Yarborough v. Thompson*, 3 Smedes. & M. 291, 41 Am. Dec. 626. The plaintiff must, however, positively allege an actual claim made by each defendant: *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 82.

demand in favor of the claimant who establishes his right thereto. For this liability the law furnishes no adequate remedy, and in most instances no remedy whatever.

§ 1321. **The Claims, Legal or Equitable.**<sup>a</sup>—The equitable jurisdiction exists, although both or all the conflicting claims against the stakeholder are legal,<sup>1</sup> since it depends upon the fact that distinct claims are made, rather than upon their intrinsic nature as being legal or equitable. It is not necessary, however, that all the claims should be legal; the remedy is granted when one of them is legal and the other equitable.<sup>2</sup> Indeed, if one

§ 1321, <sup>1</sup> *Lowndes v. Cornford*, 18 Ves. 299.

§ 1321, <sup>2</sup> *Lowndes v. Cornford*, *supra*; *Morgan v. Marsack*, 2 Mer. 107; *Wright v. Ward*, 4 Russ. 215; *Paris v. Gilham*, Coop. 56; *Martinius v. Helmuth*, 2 Ves. & B. 412; *Smith v. Hammond*, 6 Sim. 10; *Crawford v. Fisher*, 10 Sim. 479; *Hamilton v. Marks*, 5 De Gex & S. 638; *Prudential Ass. Co. v. Thomas*, L. R. 3 Ch. 74; *Duke of Bolton v. Williams*, 4 Brown Ch. 297, 309; *Farley v. Blood*, 30 N. H. 354; *Richards v. Salter*, 6 Johns. Ch. 445; *Yates v. Tisdale*, 3 Edw. Ch. 71; *Schuyler v. Pelissier*, 3 Edw. Ch. 191; *Lozier's Ex'rs v. Van Saun's Adm'rs*, 3 N. J. Eq. 325; *Oil Run Petroleum Co. v. Gale*, 6 W. Va. 525; *Strange v. Bell*, 11 Ga. 103; *Burton v. Black*, 32 Ga. 53; *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592; *Whitney v. Cowan*, 55 Miss. 626, 647; *Newhall v. Kastens*, 70 Ill. 156. In England the necessity of a resort to equity is removed, although the equity jurisdiction is not at all affected, by the statute of 1 & 2 Wm. IV, c. 58, sec. 1, as amended and enlarged by the common-law procedure act (23 & 24 Vict., c. 126, sec. 12), which enabled a court of law, on motion, to direct what amounts to an interpleader in actions of debt, assumpsit, trover, and detainue. Under the present system of procedure, equitable claims may be adjudicated upon in an interpleader issue connected with a legal action: *Rusden v. Pope*, L. R. 3 Ex. 269; *Engelback v. Nixon*, L. R. 10 Com. P. 645; *Duncan v. Cashin*, L. R. 10 Com. P. 554; *Attenborough v. London and St. Katharine's Dock Co.*, L. R. 3 C. P. D. 450; see *Langton v. Horton*, 3 Beav. 464. Analogous statutes have been passed in many American states.

§ 1321. (a) For annotations to this paragraph, see *Pom. Equitable Remedies*, §§ 42, 43.

or more of the conflicting claims are purely equitable, there is the stronger reason for a resort to the equity jurisdiction; and prior to recent legislation in England and in the United States, such a resort was indispensable under those circumstances.

**§ 1322. Essential Elements.**<sup>a</sup>—From the description given in a previous paragraph, and from the whole course of authorities, it is clear that the equitable remedy of interpleader, independent of recent statutory regulations, depends upon and requires the existence of the four following elements, which may be regarded as its essential conditions: 1. The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded; 2. All their adverse titles or claims must be dependent, or be derived from a common source; 3. The person asking the relief—the plaintiff—must not have nor claim any interest in the subject-matter; 4. He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder. As the original equitable jurisdiction is founded, to a great extent, upon these four propositions, I shall examine them separately.

**§ 1323. First. The Same Thing, Debt, or Duty.**<sup>a</sup>—The same thing, debt, or duty must be claimed by both the parties against whom the interpleader is demanded.<sup>1</sup>

**§ 1323,** <sup>1</sup> *Desborough v. Harris*, 5 De Gex, M. & G. 439, 455. In *Glyn v. Duesbury*, 11 Sim. 139, 148, Shadwell, V. C., said: "*Where the claims made by the defendants are of different amounts, they can never be identical; but where they are the same in amount, that circumstance goes far to determine their identity. The amount, however, may not be*

**§ 1322,** (a) For annotations to this paragraph, see Pom. Equitable Remedies, § 44.

**§ 1323,** (a) For additions and annotations to this paragraph, see Pom. Equitable Remedies, §§ 44–46.

This requisite results from the very nature and object of the remedy. If the subject in dispute has a bodily existence,—is a *thing*,—there can be no doubt nor question as to the identity. The difficulty in applying the rule arises where the subject is a chose in action; and then the identity must be determined in each particular case, not by any general rules, but by the nature, constitution, and incidents of the debt, demand, or duty itself.

sufficient of itself to determine the identity; for the amount may be the same and the debt may be different." This *dictum* was approved in *Pfister v. Wade*, 56 Cal. 43. In my opinion, however, that portion of the *dictum* which is italicised—the statement that claims of different amounts can never be identical—is incorrect; it seems alike opposed to principle and to authority. Where both defendants claim one, single, undivided *debt*, technically so called, the statement is undoubtedly true; a difference in their amounts would be fatal to their identity. But it is clearly not necessarily so where the claims are for unliquidated damages. Where, for example, a chattel is in the plaintiff's hands, to which both defendants claim title, they do not sue to recover the article itself, but allege a *technical* conversion, and seek to recover damages,—the value of the chattel. Here the claim of the defendants would not be for a "thing," nor for a "debt," but it would be for a "duty,"—a *chose in action*. If each defendant alleged a different value, and claimed a different amount of damages, the *duty* asserted would still be identically the same in each demand. Another instance of difference in the amounts claimed by the different defendants, where the debt or duty may still be the same, occurs in cases where a fund being in plaintiff's hands, the whole of it is claimed by one defendant, and parts of it are claimed by the others. With regard to such cases, *Christiancy, J.*, said, in *School District v. Weston*, 31 Mich. 85: "Upon the great weight of authority, both English and American, a much more liberal and reasonable rule has been established, and bills of interpleader have been frequently maintained, where the several claimants, instead of claiming the whole fund or matter in dispute, have claimed different portions of the fund, when the aggregate of all the claims exceeded the full amount of the fund; and the complainant being, as in the present case, virtually a stakeholder, and unable to determine to whom or in what proportions the payments should be made." In this case the plaintiff had let a contract for building a school-house for a specified sum to a con-



§ 1324. **Second. Privity Between the Opposing Claimants.**<sup>a</sup>—A second requisite is, that the adverse titles of the claimants must be connected, or dependent, or one derived from the other, or both derived from a common

tractor, and portions of this contract price were claimed by subcontractors and material-men, the total amount of their claims exceeding the whole contract price. See, also, as examples of such partial claims, *Yates v. Tisdale*, 3 Edw. Ch. 71; *Fargo v. Arthur*, 43 How. Pr. 193; *Newhall v. Kastens*, 70 Ill. 156; *Board of Education v. Seoville*, 13 Kan. 17. Where the same property had been taxed to the owner in two counties, in some cases for different amounts, in others for the same amount, a bill of interpleader by the owner to determine which of the counties was entitled to the tax has been maintained: See *Thomson v. Ebbets*, Hopk. Ch. 272; *Mohawk etc. R. R. v. Clute*, 4 Paige, 384, 391; *Redfield v. Supervisors*, Clarke Ch. 42; *Dorn v. Fox*, 61 N. Y. 264; but, *per contra*, see *Greene v. Mumford*, 4 R. I. 313. It is difficult to perceive how the tax levied by two different counties, even though the amount of each tax is the same, is one and the same debt or duty, so as to sustain a bill of interpleader.

Where a *chose in action* is the subject-matter, it is impossible to lay down any general rule by which its identity shall be determined. The circumstances of each case can alone disclose whether the same debt or duty is claimed by all the defendants: See *City Bank v. Bangs*, 2 Paige, 570; *Briant v. Reed*, 14 N. J. Eq. 271; *Dodd v. Bellows*, 29 N. J. Eq. 127; *Leddel's Ex'r v. Starr*, 20 N. J. Eq. 274; *Salisbury Mills v. Townsend*, 109 Mass. 115; *Oil Run Petroleum Co. v. Gale*, 6 W. Va. 525; *Pfister v. Wade*, 56 Cal. 43.

In other cases, one defendant claiming rent for certain premises, and the other claiming damages for their use and occupation, the demands were held not to be the same: *Dodd v. Bellows*, 29 N. J. Eq. 127; *Johnson v. Atkinson*, 3 Anstr. 798. If the conflicting claims relate to a specific "thing" in the plaintiff's possession, the identity is clear, and the value alleged is immaterial: *Cady v. Potter*, 55 Barb. 463. In *Lozier's Ex'rs v. Van Saun's Adm'rs*, 3 N. J. Eq. 325, a bill of interpleader was sustained, where the controversy was as to which of the defendants was entitled to receive payment of certain notes made by plaintiff's testator, although the amount to be paid was not ascertained; the amount, it was held, could not vary the rights of the claimants.

§ 1324, (a) For annotations to this paragraph, see *Pom. Equitable Remedies*, § 47.

source. It is not every instance of conflicting claims against a person for the same thing, debt, or duty which will entitle him to the remedy of an interpleader. Where there is no privity between the claimants, where their titles are independent, not derived from a common source, but each asserted as wholly paramount to the other, the stakeholder is obliged, in the language of the authorities, to defend himself as well as he can against each separate demand; a court of equity will not grant him an interpleader.<sup>1</sup>

§ 1324, 1 Pearson v. Cardon, 2 Russ. & M. 606, 609-612; Crawshay v. Thornton, 2 Mylne & C. 1, 19-24; Nickolson v. Knowles, 5 Madd. 47; Cooper v. De Tastet, Tam. 177; Pfister v. Wade, 56 Cal. 43. This doctrine, which was left somewhat doubtful by the previous cases, was finally settled by the decision of Lord Brougham in Pearson v. Cardon, and of Lord Cottenham in Crawshay v. Thornton. It finds its most frequent application in cases of a tenant interpleading his landlord and a third person claiming under paramount title, of a bailee interpleading his bailor, and an adverse claimant asserting a paramount title, and of an agent interpleading his principal and an adverse paramount claimant. Examples of these cases are given in a subsequent paragraph.

Such being the doctrine, it is a manifest imperfection of the equity jurisdiction that it should be so limited. A person may be, and is, exposed to danger, vexation, and loss from conflicting *independent* claims to the same thing, as well as from claims which are dependent; and there is certainly nothing in the nature of the remedy which need prevent it from being extended to both classes of demands. It is not surprising, therefore, that courts have sometimes ignored this doctrine in their decisions, or have been ready to admit exceptions to its operation. In the common-law procedure act of 1860; which provides for a summary interpleader by motion in legal actions, it was enacted that the order of interpleader may be made "though the titles of the claimants have not a common origin, but are adverse to and independent of each other." In *Attenborough v. London etc. Dock Co.*, L. R. 3 C. P. D. 450, which was an interpleader proceeding in a legal action, the court of appeal held that the statute above quoted had abrogated this doctrine as laid down in *Crawshay v. Thornton*, at all events in the proceedings authorized by the statute. Bramwell, L. J., who was one of the commissioners who drew up the statute, said (p. 456): "From my own knowledge as one of the common-law commissioners, I can say that it

§ 1325. **Third. Plaintiff a Mere Stakeholder.**<sup>a</sup>—The person seeking the relief must not have nor claim any interest in the subject-matter. He must occupy the position of a stakeholder. He must stand entirely indifferent between the conflicting claimants, and be ready and willing to surrender the entire thing in dispute, or to pay the entire debt, or render the entire duty, without any charge, deduction, or commission as against the one rightfully entitled. He cannot mingle up a demand of his own upon the property or fund, with the demand that the other persons shall interplead. As soon as the decree is made that the defendants do interplead, and that he be indemnified, the plaintiff must be wholly without the controversy.<sup>1</sup> The interest, however, which

was intended to do away with the effect of that decision.” Baggallay, L. J., a very eminent equity lawyer, said (p. 458): “I may go further, and say that, in my opinion, if, after the common-law procedure act of 1860, a bill of interpleader had been filed, raising facts like those in *Crawshay v. Thornton*, any judge of the court of chancery would have felt himself no longer bound by the somewhat narrow principle laid down by Lord Cottenham, but would have acted upon the fuller powers contained in that statute.” The Code of Civil Procedure of California, as lately amended, in section 386, goes even further, and provides for an interpleader, “although the titles or claims have not a common origin, *or are not identical*.” This last provision, that the claims need not be identical, is certainly unnecessary and most unreasonable; it violates the whole ground and reason upon which the remedy is based; if interpreted literally by the courts, it would remove almost every limitation upon this kind of suit, and render it a means of vexation and annoyance. There is no valid objection to the requisite that the opposing claims should be identical; the only question has been, What *is* such identity? Experience shows the danger of legislative intermeddling with doctrines long settled and approved by the consenting judgments of able courts.

§ 1325, 1 *Mitchell v. Hayne*, 2 Sim. & St. 63; *Langston v. Boylston*, 2 Ves. 101; *Moore v. Usher*, 7 Sim. 383; *Bignold v. Audland*, 11 Sim. 23; *Hoggart v. Cutts*, Craig & P. 197; *Lincoln v. Rutland etc. R. R.*,

§ 1325, (a) For annotations to this paragraph, see *Pom. Equitable Remedies*, §§ 48–51.

shall defeat the relief must be in the very *thing or fund* itself which is the subject-matter of the controversy and of the suit. An interest in the legal question at issue to be determined by the result of the litigation will not

24 Vt. 639; *Atkinson v. Manks*, 1 Cow. 691; *Shaw v. Coster*, 8 Paige, 339, 35 **Am. Dec.** 690; *Lozier's Ex'rs v. Van Saun's Adm'rs*, 3 N. J. Eq. 325; *Kerr v. Union Bank*, 18 Md. 396; *Burton v. Black*, 32 Ga. 53; *Adams v. Dixon*, 19 Ga. 513, 65 **Am. Dec.** 608; *Anderson v. Wilkinson*, 10 Smedes. & M. 601; *Cullen v. Dawson*, 24 Minn. 66. While the plaintiff cannot set up a claim, charge, or lien upon the fund, which shall enter into the litigation, and form a part of the controversy: *Wakeman v. Dickey*, 19 Abb. Pr. 24; it seems this rule is not without exceptions. It does not apply where the claim is admitted by both defendants: *Cotter v. Bank of England*, 2 Dowl. Pr. 728; and see *Attenborough v. London etc. Co.*, L. R. 3 C. P. D. 450; *Gibson v. Goldthwaite*, 7 Ala. 281, 42 **Am. Dec.** 592; *Webster v. McDaniel*, 2 Del. Ch. 297. If the plaintiff has a claim or charge on the fund, he may waive it, and maintain the suit: *Jacobson v. Blackhurst*, 2 Johns. & H. 486. It necessarily follows from the doctrine of the text that if the plaintiff expressly denies his liability in whole or in part to one of the defendants, he strikes at the very foundation of the remedy, and shows that he is not indifferent: *Moore v. Usher*, 7 Sim. 383; *Greene v. Mumford*, 4 R. I. 313; *Patterson v. Perry*, 14 How. Pr. 505; *Cogswell v. Armstrong*, 77 Ill. 139. As to the effect of a dispute or uncertainty with respect to the amount of the fund or debt for which plaintiff is liable, see *City Bank v. Bangs*, 2 Paige, 570; *Consociated Pres. Soc. v. Staples*, 23 Conn. 544; *Chamberlain v. O'Connor*, 1 E. D. Smith, 665; *Bender v. Sherwood*, 15 How. Pr. 258; *Patterson v. Perry*, 14 How. Pr. 505.

The stakeholder—the person in possession of the thing or fund, or from whom the debt or duty is owing, and against whom two or more conflicting claimants assert their demands—must necessarily be the plaintiff. No interpleader suit can be maintained by one of the contestants against the other contestant and the stakeholder. See *Sprague v. West*, 127 Mass. 471; *Hyman v. Cameron*, 46 Miss. 725; *Hathaway v. Foy*, 40 Mo. 540. Furthermore, the plaintiff must be in possession of the fund, or have it in his custody, so that he can deliver or pay it in pursuance of the decree. If he has already delivered the thing or paid the fund to one of the contestants, no suit for interpleader can be maintained: *Mount Holly etc. Co. v. Ferree*, 17 N. J. Eq. 117; *Tiernan v. Rescaniere's Adm'rs*, 10 Gill & J. 217; *Vosburgh v. Huntington*, 15 Abb. Pr. 254; *Martin v. Maberry*, 1 Dev. Eq. 169.



prejudice the plaintiff's right to the relief; nor, it seems, a charge, lien, or claim upon the very thing or fund itself which is admitted to be valid by both the defendants. To sum up the doctrine, the plaintiff can only obtain the remedy of an interpleader; and the circumstances must be such that the entire rights of both defendants to the thing, fund, debt, or duty can be fully adjusted and determined in the one suit.<sup>2</sup>

**§ 1326. Fourth. No Independent Liability to One Claimant.**<sup>a</sup>—The party seeking the relief must have incurred no independent liability to either of the claimants. Such an independent liability may be incurred in two classes of cases: 1. In the first place, the agent, depositary, bailee, or other party demanding an interpleader, in his dealings with one of the claimants, may have expressly acknowledged the latter's title, or may have bound himself by contract, so as to render himself liable upon such independent undertaking, without reference to his possible liability to the rival claimant upon the general nature of the entire transaction. Under these circumstances, as the plaintiff is liable at all events to one of the defendants, whatever may be their own respective claims upon the subject-matter as between themselves, he cannot call upon these defendants to interplead. He does not stand indifferent between the claimants, since one of them has a valid legal demand

§ 1325, <sup>2</sup> If, therefore, the plaintiff has, with respect to other property not the subject-matter of the present suit, an interest that one of the defendants shall succeed, because the decision thus made will be favorable to his own future litigation concerning that other property,—this is no objection to his maintaining a suit for an interpleader: *Oppenheim v. Leo Wolf*, 3 Sand. Ch. 571; *McHenry v. Hazard*, 45 Barb. 657; *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592.

§ 1326, (a) For annotations to this paragraph, see *Pom. Equitable Remedies*, §§ 52, 53.

against him at all events.<sup>1</sup> Even if the acknowledgment or promise has been obtained by fraud or mistake, the right of the party thus deceived to be relieved in equity from his liability cannot be considered and sustained in an interpleader suit. 2. In the second class of cases, the independent liability of the plaintiff to one of the defendants arises from the very nature of the original relation subsisting between them, without reference to any collateral acknowledgment of title, or promise to be bound. The most important examples of such relations are those subsisting between a bailee and his bailor, an agent or attorney and his principal, a tenant and his landlord, and the like. In pursuance of the doctrine above stated, if a bailee is sued by his bailor, or an agent by his principal, or a tenant by his landlord, and at the same time a third person asserts a claim of title adverse and paramount to that of the bailor, principal, or landlord, a suit of interpleader cannot, in general, be maintained against the two conflicting claimants, since,

§ 1326, 1 *Crawshay v. Thornton*, 2 Mylne & C. 1, 19-24; *Suart v. Welch*, 4 Mylne & C. 305; *Jew v. Wood*, *Craig & P.* 185; *Pfister v. Wade*, 56 Cal. 43; *Tyus v. Rust*, 37 Ga. 574, 95 Am. Dec. 365; *Hatfield v. McWhorter*, 40 Ga. 269; *Cullen v. Dawson*, 24 Minn. 66. As to the effect produced by the English statute of 1860, interpreted by the decision in *Attenborough v. London etc. Co.*, L. R. 3 C. P. D. 450, and the amendment of section 386 of the California Code of Civil Procedure, see *ante*, in note under § 1324. Another instance of the doctrine is, where the plaintiff, in stating the case in his bill, is obliged to admit himself to be a wrong-doer to either one of the defendants; he thus shows an independent liability to that defendant, and is not entitled to an interpleader; *Slingsby v. Boulton*, 1 Ves. & B. 334; *Morgan v. Fillmore*, 18 Abb. Pr. 217; *United States v. Vietor*, 16 Abb. Pr. 153; *Mount Holly etc. Co. v. Ferree*, 17 N. J. Eq. 117; *Dewey v. White*, 65 N. C. 225; *Hatfield v. McWhorter*, 40 Ga. 269; *Tyus v. Rust*, 37 Ga. 574, 95 Am. Dec. 365. If the liability has been occasioned by some act of the plaintiff himself, he is not entitled to the remedy: See *Desborough v. Harris*, 5 De Gex, M. & G. 439, 455; *Cochrane v. O'Brien*, 2 Jones & L. 380.

from the very nature of the relation, there is an independent personal liability, with respect to the subject-matter, of the bailee to his bailor, of the agent to his principal, and of the tenant to his landlord.<sup>2</sup>

**§ 1327. By Bailees, Agents, Tenants, and Parties to Contracts.**<sup>a</sup>—The general doctrine which determines the rights of bailees, agents, tenants, and contracting parties to interplead their principals, bailors, landlords, and the like, and claimants who assert antagonistic paramount titles, has been stated in the preceding paragraph.<sup>1</sup>

**§ 1326,** <sup>2</sup> For cases illustrating this conclusion, see the next following paragraph and notes thereunder. Since the cases of bailees, agents, and tenants are so important, and since the chief difficulties connected with the remedy of interpleader have arisen in its application to such persons, I have given a separate paragraph to the examination of these relations.

**§ 1327,** <sup>1</sup> I have collected and arranged in this note some of the most important cases which deal with such classes of persons.

*Bailees and agents.*—A bailee or agent cannot maintain an interpleader suit against the bailor or the principal and a third person who asserts an independent, antagonistic, and paramount title to the fund: *Nickolson v. Knowles*, 5 Madd. 47; *Dixon v. Hamond*, 2 Barn. & Ald. 310, 313; *Cooper v. De Tastet*, Tam. 177, 181, 182; *Smith v. Hammond*, 6 Sim. 10; *Pearson v. Cardon*, 2 Russ. & M. 606, 609, 610, 612; *Crawshay v. Thornton*, 2 Mylne & C. 1, 19–24; *Cook v. Earl of Rosslyn*, 1 Giff. 167; *Atkinson v. Manks*, 1 Cow. 691, 703–706; *United States Trust Co. v. Wiley*, 41 Barb. 477; *Lund v. Seamen's Bank*, 37 Barb. 129; *United States v. Vietor*, 16 Abb. Pr. 153; *Vosburgh v. Huntington*, 15 Abb. Pr. 254; *First Nat. Bank v. Bininger*, 26 N. J. Eq. 345; *Tyus v. Rust*, 37 Ga. 574, 95 Am. Dec. 365; *Hatfield v. McWhorter*, 40 Ga. 269; *Crane v. Burntrager*, 1 Ind. 165; *White Water etc. Co. v. Comegys*, 2 Ind. 469. Nor can an attorney maintain such a suit against his client and a third person who claims the money which he has collected, by an independent and antagonistic title: *Marvin v. Ellwood*, 11 Paige, 365; but see, *per contra*, *Goddard v. Leech*, Wright, 476. For the same reason, where A claims as legatee under a will, and B claims the property by a title paramount to that of the testator, the executor cannot

**§ 1327,** (a) For annotations to this paragraph, see Pom. Equitable Remedies, §§ 53–57.

The rule is not, however, of universal application. There are cases in which a bailee, agent, or tenant may interplead his bailor, principal, or landlord, and a third person setting up an opposing claim to the thing, fund, or duty. These cases may be described by one general formula, as those in which the title of the

compel them to interplead; he is under a direct liability to the legatee: *Adams v. Dixon*, 19 Ga. 513, 65 Am. Dec. 608. On the other hand, there are cases in which a bailee or an agent may interplead his bailor or his principal with third persons claiming adversely. Wherever the third person claims the thing, fund, debt, or duty from the bailee or agent under a title *derived from* the bailor or the principal, created by the latter's own act subsequently to the bailment or agency,—such as his assignment, agreement, sale, mortgage, trust, or lien given by him,—the bailee or agent may compel the parties to interplead. There is in such a case no denial of the original title; the only dispute is concerning the effect of the subsequent act, and as to which of the claimants is thereby entitled to the thing or fund. On this general ground an attorney may interplead his client and a person who sets up a derivative claim from such client: *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592. And where money is in the hands of an agent, and the principal has created a lien or charge on the fund, in favor of a third person, in respect to which a controversy has arisen, the agent may compel his principal and the other claimant to interplead: *Smith v. Hammond*, 6 Sim. 10; *Wright v. Ward*, 4 Russ. 215–220. And where the principal has assigned the fund in the agent's hands, or the bailor has transferred his interest in the thing bailed: *Crawford v. Fisher*, 1 Hare, 436, 440; *Smith v. Hammond*; *Wright v. Ward*; *Tanner v. European Bank*, L. R. 1 Ex. 261; *Gibson v. Goldthwaite*. For a like reason an interpleader is permitted where a bailor or principal has given orders for the property to two different persons who set up conflicting claims, since their titles are derivative, and not antagonistic: *Pearson v. Cardon*, 2 Russ. & M. 606; 4 Sim. 218; *Atkinson v. Manks*, 1 Cow. 691. The decision in *Schuyler v. Pelissier*, 3 Edw. Ch. 191, goes too far. An interpleader by the bailee is also allowed where a joint bailment has been made, or a transaction in the nature of a joint bailment, to await the happening of some event or the determination of some dispute: *Suart v. Welch*, 4 Mylne & C. 305; *City Bank v. Skelton*, 2 Blatchf. 14; *First Nat. Bank v. West River R. R.*, 46 Vt. 633; *Perkins v. Trippe*, 40 Ga. 225. For special cases, see *Mason v. Hamilton*, 5 Sim. 19; *Crellin v. Leyland*, 6 Jur. 733. It



opposing claimant is *derivative* under, and not antagonistic and paramount to, that of the bailor, principal, or landlord. An interpleader is allowed wherever the adverse claim originates from some act of the bailor, principal, or landlord, done or suffered after the commencement of the bailment, agency, or tenancy, and causing a

should be remembered that in all such cases if the bailee or agent has recognized the title of the assignee or other holder of a derivative title, and has stipulated to hold the property at his disposal, the independent liability thus assumed will prevent the bailee or agent from compelling the assignee to interplead with the bailor or principal who repudiates the transaction: See *ante*, § 1326; Tyus v. Rust, 37 Ga. 574, 95 Am. Dec. 365; Hatfield v. McWhorter, 40 Ga. 269.

*Tenant and landlord.*—The general doctrine is familiar, that a tenant cannot deny his landlord's title; he cannot therefore maintain a suit for interpleader against his landlord and a stranger who claims under a title antagonistic and paramount to that of the lessor: Dungey v. Angove, 2 Ves. 304, 310; Woolaston v. Wright, 3 Anstr. 801; Smith v. Target, 2 Anstr. 529; Johnson v. Atkinson, 3 Anstr. 798; Cook v. Earl of Rosslyn, 1 Giff. 137; Crawshay v. Thornton, *supra*; Seaman v. Wright, 12 Abb. Pr. 304; Crane v. Burntrager, 1 Ind. 165; Snodgrass v. Butler, 54 Miss. 45. But the tenant is entitled to interplead his landlord and an opposing claimant whenever there is some privity between the two,—when the title of the other claimant is derivative from that of the lessor,—as, for example, when the relation of mortgagor and mortgagee, trustee and *cestui que trust*, assignor and assignee, etc., has been created between the two. In such a case the tenant does not dispute his landlord's title: Dungey v. Angove, 2 Ves. 304, 310, 312; Metcalf v. Hervey, 1 Ves. Sr. 248; Cowtan v. Williams, 9 Ves. 107; Clarke v. Byne, 13 Ves. 383; Johnson v. Atkinson, 3 Anstr. 798; Seaman v. Wright, 12 Abb. Pr. 304; Snodgrass v. Butler, 54 Miss. 45; Oil Run Petro. Co. v. Gale, 6 W. Va. 525. Or where both contestants claim under the lessor by different titles; for example, one as heir and the other as devisee: Jew v. Wood, 3 Beav. 579; Badeau v. Tylee, 1 Sand. Ch. 270.

*Parties to contracts.*—As a general rule, where A and B are bound by express contract, A cannot maintain an interpleader suit against B or a person holding or claiming under him, and a stranger who asserts and claims under an antagonistic and paramount title. A is under an independent liability to B: *Ante*, § 1326. For example, a vendee of real or personal property, with respect to his liability to pay the purchase price, cannot interplead his vendor and a third person

dispute as to which of the parties is entitled to the thing, fund, or duty. The claim of the third person, instead of being under an independent, antagonistic, paramount title, must be made under a title *derived* from that of the bailor, principal, or landlord; it must acknowledge, and not deny, such original title.

claiming to own the property by an independent antagonistic title: James v. Pritchard, 7 Mees. & W. 216; Trigg v. Hitz, 17 Abb. Pr. 436; Shehan's Heirs v. Barnett's Heirs, 6 T. B. Mon. 592. On the other hand, as in cases of bailees, agents, and tenants, a party to a contract may interplead his co-contractor and other persons in privity with him, or distinct claimants all of whom are in privity with his co-contractor,—that is, may interplead his co-contractor and persons who derive their title under him, or several claimants all of whom thus hold by derivative title. As example: A vendee may interplead his vendor and an attaching creditor of A, alleged to be the real owner, the sale being alleged to have been really made by the vendor as A's agent: Richards v. Salter, 6 Johns. Ch. 445; Johnston v. Lewis, 4 Abb. Pr., N. S., 150. A vendor of land may interplead the husband of the deceased vendee and her heirs, where both claimed to be entitled to a conveyance: Farley v. Blood, 30 N. H. 354. Insurance companies may compel opposing claimants of the insurance money to interplead when they claim by assignment from the assured, or by mortgage, or by attachment, etc.,—that is, when they claim *derivatively*: Nelson v. Barter, 2 Hem. & M. 334; Hamilton v. Marks, 5 De Gex & S. 638; Spring v. S. C. Ins. Co., 8 Wheat. 268. On like ground, corporations may interplead opposing claimants of stock or dividends, whose titles are derivative from a stockholder, by assignment, execution, attachment, trust, etc.: Salisbury Mills v. Townsend, 109 Mass. 115; Providence Bank v. Wilkinson, 4 R. I. 507, 70 Am. Dec. 160; Cady v. Potter, 55 Barb. 463. See Cheever v. Hodgson, 9 Mo. App. 565. A maker of a note may compel claimants holding under the payee by derivative title to interplead; for example, an attaching creditor of payee and an assignee: Briant v. Reed, 14 N. J. Eq. 271; Bryan v. Saltentall, 3 J. J. Marsh. 672; Fahie v. Lindsay, 8 Or. 474. The administrator of a deceased guardian to whom the note was made payable, and a new guardian appointed in place of the one deceased: Van Buskirk v. Roy, 8 How. Pr. 425. A receiver has been held entitled to interplead opposing claimants of the fund in his hands: Winfield v. Bacon, 24 Barb. 154. (*Quere*, would not the court direct the proper distribution of the fund by the receiver?) Where suits by persons claiming to be owners of the

§ 1328. **Pleadings and Other Procedure.**<sup>a</sup>—The bill of complaint must contain allegations which show that all of the requisites entitling the plaintiff to the remedy exist in the case. It must allege positively that conflicting claims to substantially the same thing, fund, debt, or duty are set up by the defendants; that plaintiff claims no interest in the subject-matter; that he is indifferent between the claimants, and is ready and willing to deliver the thing or fund, or pay the debt, or render the duty to the rightful claimant, but that he is ignorant or in doubt which is the rightful one, and is in a real danger or hazard by means of such doubt, from their conflicting demands.<sup>1</sup> The bill need not show an apparent

cargo are instituted in admiralty against a ship, causing her arrest, the master cannot maintain interpleader against these claimants, because,— 1. The claims are not against him, but against the ship; and 2. The court of admiralty has full jurisdiction to settle all the questions: *Sablicieh v. Russell*, L. R. 2 Eq. 441. Independently of statute, it has generally been held that a sheriff levying on goods by execution against A, which are claimed by B to be his property, cannot compel the execution creditor and B to interplead: *Slingsby v. Boulton*, 1 Ves. & B. 334; *Shaw v. Coster*, 8 Paige, 339, 35 **Am. Dec.** 690; *Quinn v. Green*, 1 Ired. Eq. 229, 36 **Am. Dec.** 46; *Quinn v. Patton*, 2 Ired. Eq. 48; *Dewey v. White*, 65 N. C. 225. Nor can the sheriff compel the opposing claimants of a surplus in his hands after satisfying an execution to interplead; such claims can be adjusted by the court: *Parker v. Barker*, 42 N. H. 78, 77 **Am. Dec.** 789; *McDonald v. Allen*, 37 Wis. 108, 19 **Am. Rep.** 754. But see *Kring v. Green's Ex'rs*, 10 Mo. 195; *Lawson v. Jordan*, 19 Ark. 297, 70 **Am. Dec.** 596. Statutes in England and in many of the states have authorized the sheriff to interplead the claimants of property seized by him under process.

§ 1328, 1 *Farley v. Blood*, 30 N. H. 354; *Parker v. Barker*, 42 N. H. 78, 77 **Am. Dec.** 789; *Atkinson v. Manks*, 1 Cow. 691; *Wilson v. Duncan*, 11 Abb. Pr. 3; *Lozier's Ex'rs v. Van Saun's Adm'rs*, 3 N. J. Eq. 325; *Briant v. Reed*, 14 N. J. Eq. 271; *Snodgrass v. Butler*, 54 Miss. 45; *Starling v. Brown*, 7 Bush, 164; *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 82; *Pfister v. Wade*, 56 Cal. 43.

§ 1328, (a) For annotations to this paragraph, see *Pom. Equitable Remedies*, §§ 58, 59.



title in either of the defendants.<sup>2</sup> On the contrary, if the bill should show that plaintiff was fully informed of the defendants' rights and of his own liability, or if it should show that one of the defendants was certainly entitled, on the facts alleged, to the thing, debt, or duty, in either case it would be demurrable; there would be no ground for an interpleader.<sup>3</sup> It is the settled practice that the bill of complaint must be accompanied by an affidavit of the plaintiff, stating that the suit is not brought in collusion with either of the defendants; and the omission of such affidavit may generally be taken advantage of by demurrer.<sup>4</sup> The plaintiff must also

§ 1328, 2 East & W. Ind. Dock Co. v. Littledale, 7 Hare, 57; Pfister v. Wade, *supra*.

§ 1328, 3 Parker v. Barker, 42 N. H. 78, 77 Am. Dec. 789; Mohawk etc. R. R. v. Clute, 4 Paige, 384; Morgan v. Fillmore, 18 Abb. Pr. 217; Wilson v. Duncan, 11 Abb. Pr. 3; Briant v. Reed, 14 N. J. Eq. 271; Barker v. Swain, 4 Jones Eq. 220. And if the plaintiff denies his liability to either of the defendants, he is not entitled to the remedy; he destroys the very foundation on which it rests: McHenry v. Hazard, 45 Barb. 657, 45 N. Y. 580. If the bill is taken as confessed by one of the conflicting defendants, the fund indisputably belongs to the other. And where in such a case a stranger was afterwards admitted by the lower court, on petition, to contest the interest of the remaining defendant, it was held on appeal that there was no practice allowing a third person thus to come into the cause by petition; that the bill could not be amended to reach him, as it was filed to guard against *known* claims; the order that the remaining defendant and the third person should interplead was irregular: Michigan etc. Co. v. White, 44 Mich. 25. (*Quære*, would such a proceeding be allowed under the provision of the Iowa and California codes permitting *Intervention*?)

§ 1328, 4 Hamilton v. Marks, 5 De Gex & S. 638; Farley v. Blood, 30 N. H. 354; Atkinson v. Manks, 1 Cow. 691; Beck v. Stephani, 9 How. Pr. 193; Mount Holly etc. Co. v. Ferree, 17 N. J. Eq. 117; Tyus v. Rust, 37 Ga. 574, 95 Am. Dec. 365; Snodgrass v. Butler, 54 Miss. 45; Starling v. Brown, 7 Bush. 164; Biggs v. Kouns, 7 Dana, 405, 411; but a contrary practice seems to prevail in Connecticut: Consociated Pres. Soc. v. Staples, 23 Conn. 544, 555; Nash v. Smith, 6 Conn. 421. The plaintiff's affidavit is conclusive; defendants cannot contradict it,



bring or pay, or offer to bring or pay, the entire thing, fund, or money in controversy into court; an omission to do so renders the bill demurrable.<sup>5</sup> If the bill was properly filed, and if the plaintiff has acted in good faith, he is generally entitled to his costs out of the fund in controversy, which costs, as between the defendants, must ultimately be paid by the unsuccessful party.<sup>6</sup>

**§ 1329. Interpleader in Legal Actions.**<sup>a</sup>—In England and in many of the American states a summary mode of interpleader by motion and order in certain legal actions is authorized.<sup>1</sup> These statutes substantially pro-

even though the plaintiff has filed supplemental affidavits: *Manby v. Robinson*, L. R. 4 Ch. 347; *Langston v. Boylston*, 2 Ves. 101; *Stevenson v. Anderson*, 2 Ves. & B. 407; and see *Fahie v. Lindsay*, 8 Or. 474. If collusion appears on the face of the bill, relief will, of course, be denied: *Marvin v. Ellwood*, 11 Paige, 365; *Kerr v. Union Bank*, 18 Md. 396; *Williams v. Halbert*, 7 B. Mon. 184.

§ 1328, <sup>5</sup> The whole fund must be put at the disposal of the court; an offer to bring in what may be found due is not sufficient: *Mohawk etc. R. R. v. Clute*, 4 Paige, 384; *Atkinson v. Manks*, 1 Cow. 691; *Williams v. Walker*, 2 Rich. Eq. 291, 46 Am. Dec. 53; *Snodgrass v. Butler*, 54 Miss. 45; *McGarrah v. Prather*, 1 Blackf. 299; *Starling v. Brown*, 7 Bush, 164. It was held in *Farley v. Blood*, 30 N. H. 354, that in a suit concerning the defendants' rights to a conveyance under a land contract, the plaintiff must offer to convey, and must have the deeds executed ready for delivery.

§ 1328, <sup>6</sup> See *Laing v. Zeden*, L. R. 9 Ch. 736; *Aldridge v. Thompson*, 2 Brown Ch. 149; *Farley v. Blood*, 30 N. H. 354; *Manchester Print Works v. Stimson*, 2 R. I. 415; *Atkinson v. Manks*, 1 Cow. 691; *Canfield v. Morgan*, Hopk. Ch. 224; *Aymer v. Gault*, 2 Paige, 284; *Badeau v. Rogers*, 2 Paige, 209; *Spring v. S. C. Ins. Co.*, 8 Wheat. 268. As in all equity suits, costs are within the discretion of the court, and depend somewhat upon the circumstances of each case.

§ 1329, <sup>1</sup> The English statute of 1 & 2 Wm. IV, c. 58, sec. 1, allowed this proceeding in actions of assumpsit, debt, trover, and detinue. For the amendment made by the common-law procedure act of 1860, see *ante*, note under § 1324. The American statutes mainly differ with

§ 1329, (a) For annotations to this paragraph see *Pom. Equitable Remedies*, § 61.

vide that in actions specified the defendant may show by affidavit that the same thing or money is claimed by another person besides the plaintiff; that he has sued or threatens to sue; that defendant is not in collusion with him; and that defendant is ready and willing to bring the thing or money into court. The court on motion may order such claimant to be substituted as defendant in the action in place of the original defendant. It is universally held that these statutes do not at all limit nor affect the equitable jurisdiction by suit; they merely furnish another special, cumulative, and concurrent remedy. The ordinary type of these statutes does not alter the settled doctrines concerning interpleader. The statutory remedy is a mere substitute for the equitable remedy by suit, in the kinds of actions to which it applies, and is governed by the same rules.<sup>2</sup> Of course,

respect to the kinds of actions in which the proceeding is allowed. In a few states it is confined to actions on contract for money: *Alabama*: Code 1876, secs. 2906, 2907; or to actions for the recovery of personal property: *Arkansas*: Code 1874, secs. 4483, 4484; *Iowa*: 2 McClain's Stats. 1880, sec. 2572; *Oregon*: Gen. Laws 1872, p. 111, sec. 39. In several states the proceeding is allowed in actions on contract, and in those for the recovery of specific personal property: *California*: Code Civ. Proc., sec. 386 (for recent amendment, see *ante*, note under § 1324); *Idaho*: Gen. Laws 1880-81, sec. 201; *Kansas*: Dassler's Comp. Laws 1881, secs. 3564, 3565; *Nebraska*: Brown's Comp. Stats. 1881, pp. 535, 536, sec. 48; *Ohio*: 2 Rev. Stats. 1880, secs. 5016, 5017; *Mississippi*: Rev. Code 1880, sec. 1578. In others it embraces actions on contract, and actions for the recovery of real or of personal property: *Dakota*: Rev. Codes 1877, p. 491, sec. 91; *Minnesota*: Stats. 1878, p. 725, sec. 131; *New York*: Code Civ. Proc. (new code), sec. 820; *North Carolina*: Battle's Rev. 1873, p. 156, sec. 65; *South Carolina*: Rev. Stats. 1873, p. 597, sec. 145. In two states it is authorized "in any action": *Virginia*: Code 1873, c. 149, p. 1019; *West Virginia*: 1 Kelly's Rev. Stats. 1879, c. 7, p. 238. In some other states a similar proceeding is authorized by statute in certain special cases; *Colorado*: King's Code Civ. Proc. 1880, p. 151, sec. 404.

§ 1329, <sup>2</sup> *Oriental Bank v. Nicholson*, 3 Jur., N. S., 857; *Slaney v. Sidney*, 14 Mees. & W. 800; *Tauton v. Groh*, 4 Abb. App. 358; *Vos-*

the statutes may change the equitable doctrines; may enlarge their scope of operation; and a few of them have doubtless produced this effect, as in the clauses introduced by amendment into the statutes of England and California, already noticed.<sup>3</sup>

burgh v. Huntington, 15 Abb. Pr. 254; Johnson v. Maxey, 43 Ala. 521; Nelson v. Goree's Adm'r, 34 Ala. 565; Starling v. Brown, 7 Bush, 164; Board of Education v. Scoville, 13 Kan. 17; Pfister v. Wade, 56 Cal. 43.

§ 1329, <sup>3</sup> See *ante*, note under § 1324; Tanner v. European Bank, L. R. 1 Ex. 261. As to actions under codes of procedure adopting the reformed procedure, see Cady v. Potter, 55 Barb. 463; Washington etc. Ins. Co. v. Lawrence, 28 How. Pr. 435; St. Louis Life Ins. Co. v. Alliance Mut. L. Ins. Co., 23 Minn. 7; Board of Education v. Scoville, 13 Kan. 17; Pfister v. Wade, 56 Cal. 43. In volume 35 of the American Decisions, pp. 695-712, the reader will find a very able, exhaustive, and instructive note to the case of Shaw v. Coster, which discusses many points of practice, and questions arising under the statutes, which I have not touched upon. I have availed myself of the assistance furnished by this note in preparing the foregoing chapter, especially in its exhaustive collection of cases.

## CHAPTER SECOND.

## RECEIVERS.

## ANALYSIS.

- § 1330. Definition, general nature, and objects.
- § 1331. The appointment discretionary.
- §§ 1332-1335. Cases in which a receiver may be appointed.
- § 1332. First class.
- § 1333. Second class.
- § 1334. Third class.
- § 1335. Fourth class.
- § 1336. Their powers, rights, duties, and liabilities.

§ 1330. **General Nature and Objects.**<sup>a</sup>—I purpose in this chapter to give a mere sketch of the general doctrines concerning this peculiar subject.<sup>1</sup> A receiver is a person standing indifferent between the parties, appointed by the court as a *quasi* officer or representative of the court, to hold, manage, control, and deal with the property which is the subject-matter of or involved in the controversy, under the direction of the court, during the continuance of the litigation, either where there is no person entitled competent to thus hold it,—as, for

§ 1330, 1 The subject of receivers has come to be one of great importance, owing especially to its vastly increased application of late in the winding up of corporations both in England and in this country. The remedy is so peculiar, and the rules regulating it in all its phases and applications are so special, that my limits of time and space will only permit a meager statement of its most general doctrines. The reader must be referred, for practical assistance in his professional work, to those treatises which deal with the subject in an exhaustive manner, of which Mr. Kerr's work is certainly one of the best.

§ 1330, (a) The subject of this chapter is treated in detail in Pom. Equitable Remedies, chaps. III-XI, §§ 62-261. For annotations and additions to the present paragraph, see *Id.*, § 62.



example, in the case of an infant, or in the interval before an executor or administrator of a deceased owner is appointed; or where two or more litigants are equally entitled, but it is not just and proper that either of them should retain it under his control,—as, for example, in some suits between partners; or where a person is legally entitled, but there is danger of his misapplying or misusing it,—as, for example, in some suits against an executor or administrator, or, under some particular circumstances, in suits for the enforcement of a mortgage; or he is appointed in like manner and under like circumstances for the purpose of carrying into effect a decree of the court concerning the property,—as, for example, a decree for the winding up and settlement of a corporation, or the decree in a creditor's suit.<sup>2</sup>

**§ 1331. The Appointment Discretionary.**<sup>a</sup>—The appointment of a receiver is, as a general rule, discretion-

§ 1330, 2 Kerr on Receivers, 1, 2; Owen v. Homan, 3 Macn. & G. 378, 412; Bainbrigge v. Baddeley, 3 Macn. & G. 413, 419; Sturch v. Young, 5 Beav. 557; Ladd v. Harvey, 21 N. H. 514; Cheever v. Rutland etc. R. R., 39 Vt. 653; Bank of Miss. v. Duncan, 52 Miss. 740; Battle v. Davis, 66 N. C. 252; Twitty v. Logan, 80 N. C. 69; Crowder v. Moone, 52 Ala. 220 (not until the bill is filed); Delaware etc. R. R. v. Erie R. R., 21 N. J. Eq. 298; Blondheim v. Moore, 11 Md. 365; Haight v. Burr, 19 Md. 130; Voshell v. Hynson, 26 Md. 83; Beverley v. Brooke, 4 Gratt. 187, 208; Hand v. Dexter, 41 Ga. 454; Reid v. Reid, 38 Ga. 24; Dougherty v. McDougald, 10 Ga. 121; Mapes v. Scott, 4 Ill. App. 268; Richards v. Barrett, 5 Ill. App. 510; Baker v. Backus's Adm'r, 32 Ill. 79; Mays v. Wherry, 3 Tenn. Ch. 34; Cassetty v. Capps, 3 Tenn. Ch. 524; French v. Gifford, 30 Iowa, 148; Brown v. Home Sav. Bank, 5 Mo. App. 1; La Société Francaise v. District Court, 53 Cal. 495; Libby v. Rosekrans, 55 Barb. 202; Booth v. Clark, 17 How. 322, 331; Crane v. McCoy, 1 Bond, 422; Whelpley v. Erie R'y, 6 Blatchf. 271; Wilmer v. Atlanta etc. R'y, 2 Woods, 409.

§ 1331, (a) On appointment of receivers, in general, see Pom. Equitable Remedies, chap. III, §§ 63-73. For abstract of the statutes of the several states, see Id., § 73, and note.

ary.<sup>1</sup> The discretion is not arbitrary or absolute; it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of promoting the ends of justice, and of protecting the rights of *all* the parties interested in the controversy and the subject-matter, and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding. One of the most material circumstances, without which the court would hardly make the appointment, is the reasonable probability that the plaintiff asking for a receiver will ultimately succeed in obtaining the general relief sought for by his suit.<sup>2</sup>

§ 1331, <sup>1</sup> The discretion is not so absolute that it may not be reviewed, and its exercise, if improper, reversed; *La Société Française v. Dist. Court*, 53 Cal. 495; *Milwaukee etc. R. R. v. Soutter*, 2 Wall. 521.

§ 1331, <sup>2</sup> In *Owen v. Homan*, 3 Macn. & G. 378, 412, affirmed 4 H. L. Cas. 997, the court said: "It is unnecessary to do more than to state that the granting a receiver is a matter of discretion to be governed by a view of the whole circumstances of the case; one most material of which circumstances is the probability of the plaintiff being ultimately entitled to a decree." In *Bainbrigge v. Baddeley*, 3 Macn. & G. 413, 419, the court, speaking of the general grounds for the appointment of a receiver, said: "There are, I apprehend, two grounds, and two only: 1. That there is a reasonable probability of success on the part of the plaintiff; and 2. That the property, the subject of the suit, is in danger." In *Blondheim v. Moore*, 11 Md. 365, the following rules controlling the exercise of the discretion were laid down, which have been frequently quoted as a correct generalization: "1. That the power of appointment is a delicate one, and is to be exercised with great circumspection; 2. That it must appear the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve the property; 3. That there is no case in which the court appoints a receiver merely because the measure can do no harm; 4. That fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved; and 5. That unless the necessity be of the most stringent character, the court will not appoint a receiver until the defendant is first heard in response to the application." These rules, however, must be taken with some reservations; they are certainly too strong to be of universal applica-

**§ 1332. Cases in Which a Receiver may be Appointed.**—As stated in a previous paragraph, the cases in which a receiver may be appointed, subject to the general rules regulating the exercise of the judicial discretion, may be reduced to four general classes. The first class contains those cases where there is no person entitled to the property who is at the same time competent to hold and manage it during the judicial proceeding. In instances of this class a receiver is appointed more readily and without proof of imminent danger, perhaps, than in any other. It includes,—1. Infants' estates.<sup>1a</sup> A court of equity exercises control over the property of its infant ward, where there is no trustee, by means of a receiver, even though there is a guardian. 2. Lunatics' estates. The control of the court over the property of a lunatic is ordinarily exercised by means of a committee; but instead of a committee, and especially where no person will act as a committee, the court may appoint a receiver.<sup>2b</sup> 3. Estates of decedents. During the litigation,

especially the fourth. There are classes of cases in which a receiver is appointed almost as a matter of course, although no fraud nor *imminent* danger is proved. See, on the general matter of discretion, *Earl Talbot v. Hope Scott*, 4 Kay & J. 96; *Whitworth v. Whyddon*, 2 Macn. & G. 52, 55; *Evans v. Coventry*, 5 De Gex, M. & G. 911, 916, 917; *Skip v. Harwood*, 3 Atk. 564; *Battle v. Davis*, 66 N. C. 252; *Hand v. Dexter*, 41 Ga. 454; *Crawford v. Ross*, 39 Ga. 44; *Crane v. McCoy*, 1 Bond, 422; *Nichols v. Perry Pat. Arm Co.*, 11 N. J. Eq. 126; *Ladd v. Harvey*, 21 N. H. 514; *Orphan Asylum v. McCartee*, Hopk. Ch. 429; *Maynard v. Railey*, 2 Nev. 313; *Bank of Miss. v. Duncan*, 52 Miss. 740.

§ 1332, 1 *Gardner v. Blane*, 1 Hare, 381; *Butler v. Freeman*, Amb. 301, 303; *Duke of Beaufort v. Berty*, 1 P. Wms. 703. The main reason for appointing a receiver, in the absence of a trustee, was that the guardian at common law had not full power of control and management. The necessity of a receiver in such cases may have been obviated in many states by statutes enlarging the powers of guardians.

§ 1332, 2 See *ante*, § 1312, cases as to appointment of committees. A receiver will not be appointed after the death of a lunatic, during a

§ 1332, (a) See, further, Pom. Equitable Remedies, § 74.

§ 1332, (b) See, further, Pom. Equitable Remedies, § 75.

tion concerning the admission of a will to probate, and during the interval before an executor or administrator is appointed, a court of equity has power to appoint a receiver of the personal property and of the rents and profits of the real estate, where there is any danger of their loss, misuse, or misapplication. The necessity of such a receiver has been greatly lessened by modern statutes authorizing the probate court to appoint an administrator *ad litem*, and enlarging his powers.<sup>3c</sup>

**§ 1333. The Same. Second Class.**—The second class of cases is based upon the fact that all of the parties are equally entitled to the possession of the property which is the subject-matter of the controversy, but it is not just and proper, from the nature of the dispute and of their

controversy between persons claiming to be his heirs: *In re Ferrior*, L. R. 3 Ch. 175, 719. Where a suit was brought by the committee of a lunatic to set aside a conveyance of land alleged to have been obtained by defendant from the lunatic by fraud, undue influence, and defendant was in possession receiving the rents and profits, and was alleged to be insolvent, the appointment of a receiver of the property during the litigation was held proper: *Mitchell v. Barnes*, 22 Hun, 194.

§ 1332, 3 While this jurisdiction is well settled, the recent English decisions hold that it will not be exercised if the probate court has already appointed an administrator *ad litem*; but if no such temporary administrator has been appointed, the court of equity will still appoint a receiver: *Whitworth v. Whyddon*, 2 Maen. & G. 52, 55; *King v. King*, 6 Ves. 172; *Richards v. Chave*, 12 Ves. 462; *Edmunds v. Bird*, 1 Ves. & B. 542; *Atkinson v. Henshaw*, 2 Ves. & B. 85; *Ball v. Oliver*, 2 Ves. & B. 96; *Rutherford v. Douglas*, 1 Sim. & St. 111, note; *Watkins v. Brent*, 1 Mylne & C. 97, 102; *Devey v. Thornton*, 9 Hare, 222, 229; *Anderson v. Guichard*, 9 Hare, 275; *Rendall v. Rendall*, 1 Hare, 152; *Jones v. Goodrich*, 10 Sim. 327; *Reed v. Harris*, 7 Sim. 639; *Wood v. Hitchings*, 2 Beav. 289; *Veret v. Duprez*, L. R. 6 Eq. 329; *Hitchen v. Birks*, L. R. 10 Eq. 471; *Parkin v. Seddons*, L. R. 16 Eq. 34; *Tewart v. Lawson*, L. R. 18 Eq. 490; *Flagler v. Blunt*, 32 N. J. Eq. 518; *Osborn v. United States Bank*, 9 Wheat. 738; *Schlecht's Appeal*, 60 Pa. St. 172; *Rachel Colvin's Case*, 3 Md. Ch. 278.

§ 1332, (c) See, further, *Pom. Equitable Remedies*, § 76.



relations with each other, that either one of them should be allowed to retain possession and control during the litigation. While the foundation of the remedy is, of course, the danger, yet it is not always essential that there should be any element of actual fraud or breach of trust. The most important instances which do or may belong to this class are: 1. Suits between partners.<sup>1a</sup> In suits for a dissolution or winding up of a partnership, and even in some very special cases without a dissolution, the court may appoint a receiver of the firm assets, when there is any misconduct on the part of the defendants, and even, perhaps, where the partners themselves are wholly unable to agree as to the manage-

§ 1333, 1 My limits do not permit a discussion of the particular circumstances under which a receiver will or will not be appointed; the cases cited furnish many illustrations. In general, a dissolution must have occurred, or must be asked; although in extreme cases of misconduct and danger therefrom, an *ad interim* receiver may be appointed without a dissolution. A disagreement among the partners themselves is essential: *Hall v. Hall*, 3 Macn. & G. 79; *Fairburn v. Pearson*, 2 Macn. & G. 144; *Clegg v. Fishwick*, 1 Macn. & G. 294 (after death of a partner); *Roberts v. Eberhardt*, Kay, 148; *Sheppard v. Oxenford*, 1 Kay & J. 491; *Evans v. Coventry*, 5 De Gex, M. & G. 911; *Butchart v. Dresser*, 4 De Gex, M. & G. 542; *Smith v. Jeyes*, 4 Beav. 503; *Blake-ney v. Dufaur*, 15 Beav. 40; *Hale v. Hale*, 4 Beav. 369; *Waters v. Taylor*, 15 Ves. 10; *Goodman v. Whitecomb*, 1 Jacob & W. 589; *Const. v. Harris*, Turn. & R. 496; *Bard v. Bingham*, 54 Ala. 463; *Anderson v. Powell*, 44 Iowa, 20; *Law v. Ford*, 2 Paige, 310; *Marten v. Van Schaick*, 4 Paige, 479; *Garretson v. Weaver*, 3 Edw. Ch. 385; *Smith v. Lowe*, 1 Edw. Ch. 33; *Gregory v. Gregory*, 1 Sweeny, 613; *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172; *Randall v. Morrell*, 17 N. J. Eq. 343, 346; *Renton v. Chaplain*, 9 N. J. Eq. 62; *Birdsall v. Colie*, 10 N. J. Eq. 63; *Cox v. Peters*, 13 N. J. Eq. 39; *Wolbert v. Harris*, 7 N. J. Eq. 605; *Sloan v. Moore*, 37 Pa. St. 217; *Holden's Adm'rs v. McMakin*, 1 Pars. Cas. 270; *Whitman v. Robinson*, 21 Md. 30; *Walker v. House*, 4 Md. Ch. 39; *Drury v. Roberts*, 2 Md. Ch. 157; *Williamson v. Wilson*, 1 Bland, 418; *Speights v. Peters*, 9 Gill, 472; *Roys v. Vilas*, 18 Wis. 169; *Allen v. Hill*, 16 Cal. 113; *Todd v. Rich*, 2 Tenn. Ch. 107.

§ 1333, (a) For a detailed treatment of this subject, see Pom. *Equitable Remedies*, §§ 78-85.

ment of the property and the settlement of the partnership affairs. The jurisdiction is, however, always exercised with great carefulness and caution. 2. In suits for partition between co-owners.<sup>2b</sup> In suits between co-owners of mines and collieries the English courts grant a receiver upon the same grounds and under the same circumstances as in those between partners; but in all ordinary cases of partition between legal co-owners of land, a receiver is not generally appointed unless some of the parties are in sole possession, to the exclusion of the others. 3. In suits between conflicting claimants of land, especially between parties claiming under legal titles, a receiver will not ordinarily be appointed. The remedy, however, may be granted under special circumstances, in cases of gross fraud, or great danger, or where possession is maintained by violence, and the like. In such cases the court acts with great caution, only where the plaintiff's rights are reasonably certain, and the danger is apparent.<sup>3c</sup>

§ 1333, 2 Mines and collieries. The working of a mine or colliery by co-owners is necessarily a business analogous to a partnership; *Adams's Equity*, 247, 354; *Roberts v. Eberhardt*, *Kay*, 148; *Crawshay v. Maule*, 1 *Swanst.* 405, 518, 523; *Jefferys v. Smith*, 1 *Jacob & W.* 298; *Fereday v. Wightwick*, 1 *Russ. & M.* 45; *Bentley v. Bates*, 4 *Younge & C.* 182; *Vice v. Thomas*, 4 *Younge & C.* 538. Partition between ordinary co-owners: *Tyson v. Fairclough*, 2 *Sim. & St.* 142; *Evelyn v. Evelyn*, 2 *Dick.* 800; *Street v. Anderton*, 4 *Brown Ch.* 414; *Milbank v. Revett*, 2 *Mer.* 405; *Porter v. Lopes*, *L. R.* 7 *Ch. Div.* 358 (Sir George Jessel spoke of the jurisdiction as enlarged by statute); *Darcin v. Wells*, 61 *How. Pr.* 259; *Cassetty v. Capps*, 3 *Tenn. Ch.* 524; *Williams v. Jenkins*, 11 *Ga.* 595; *Brenan v. Preston*, 2 *De Gex, M. & G.* 813 (a receiver appointed in a suit concerning title to machinery between part owners of a ship).

§ 1333, 3 *Huguenin v. Baseley*, 13 *Ves.* 105; *Stilwell v. Wilkins*,

§ 1333, (b) For a detailed treatment of this subject, see *Pom. Equitable Remedies*, § 86.

§ 1333, (c) For a detailed treatment of this subject, see *Pom. Equitable Remedies*, § 87, and notes.

**§ 1334. The Same. Third Class.**—The third class embraces those cases in which the person holding title to the property is in a position of trust or of *quasi* trust, and is violating his fiduciary duties by misusing, misapplying, or wasting the property, and is thereby endangering the rights of other persons beneficially interested. In many, but not in all, the instances falling within this class, the plaintiff has, and is seeking to enforce, some equitable estate or interest; but whatever be the nature of his right, the ground of the remedy is always the misconduct of the party holding the title, and the consequent danger of loss. Among the more important instances of this class in which a receiver may be appointed are the following: 1. Suits against trustees who have been guilty of a breach of trust;<sup>1a</sup> 2. Suits under like circumstances against executors or administrators;<sup>2b</sup> 3. Suits

Jacob, 280; Clark v. Dew, 1 Russ. & M. 103; Jones v. Goodrich, 10 Sim. 327; Toldervy v. Colt, 1 Younge & Co. 621; Earl Talbot v. Hope Scott, 4 Kay & J. 96; Hlawacek v. Bohman, 51 Wis. 92; Davis v. Reaves, 2 Lea, 649; Johnson v. Tucker, 2 Tenn. Ch. 398; Mays v. Wherry, 3 Tenn. Ch. 34; Mapes v. Scott, 4 Ill. App. 268; Rollins v. Henry, 77 N. C. 467; Battle v. Davis, 66 N. C. 252; Twitty v. Logan, 80 N. C. 69; Chappell v. Boyd, 56 Ga. 578; Williams v. Jenkins, 11 Ga. 595; Jones v. Dougherty, 10 Ga. 273; Guernsey v. Powers, 9 Hun, 78.

**§ 1334, 1** Courts will not interfere with trustees' possession by a receiver unless there is real danger from their misconduct: Evans v. Coventry, 5 De Gex, M. & G. 911, 916; Middleton v. Dodswell, 13 Ves. 266, 268; Browell v. Reed, 1 Hare, 434; Bainbrigge v. Blair, 3 Beav. 421; Skinners' Co. v. Irish Soc., 1 Mylne & C. 162; Richards v. Barrett, 5 Ill. App. 510; Bowling v. Scales, 2 Tenn. Ch. 63; Vose v. Reed, 1 Woods, 647.

**§ 1334, 2** In administration suits a receiver will not be appointed unless the executor or administrator has been guilty of misconduct, waste, misuse of assets, and the like, and there is real danger of loss: Ibid.;

**§ 1334, (a)** For details of this subject, see Pom. Equitable Remedies, §§ 89, 90.

**§ 1334, (b)** For details of this subject, see Pom. Equitable Remedies, § 91.

to enforce a mortgage when the security is inadequate, the mortgagor is insolvent, or is committing acts of waste, and the like, depreciating the value of the property;<sup>3c</sup> 4. Suits, under like circumstances, to enforce equitable liens, including those by judgment creditors

Anonymous, 12 Ves. 4; In re Hopkins, L. R. 19 Ch. Div. 61; Nothard v. Proctor, L. R. 1 Ch. Div. 4; Randle v. Carter, 62 Ala. 95; Briarfield Iron Works Co. v. Foster, 54 Ala. 622; Du Val v. Marshall, 30 Ark. 230; Powell v. Quinn, 49 Ga. 523; Hoge v. Hollister, 8 Baxt. 533; Haines v. Carpenter, 1 Woods, 262; Beverley v. Brooke, 4 Gratt. 187; Leddel's Ex'r v. Starr, 19 N. J. Eq. 163.

§ 1334, 3 In England an equitable mortgagee alone is entitled to a receiver, because a legal mortgagee can at any time gain possession, and thus secure the rents and profits: Berney v. Sewell, 1 Jacob & W. 647; Brooks v. Greathed, 1 Jacob & W. 176; Reid v. Middleton, Turn. & R. 455; Truman v. Redgrave, L. R. 18 Ch. Div. 547; Peek v. Trinsmaran Iron Co., L. R. 2 Ch. Div. 115; Pease v. Fletcher, L. R. 1 Ch. Div. 273; Lord Crewe v. Edleston, 1 De Gex & J. 93 (mortgage of tolls). A receiver may also be appointed in suits to determine the priorities among several equitable mortgages or liens: Davis v. Duke of Marlborough, 2 Swanst. 108; Angel v. Smith, 9 Ves. 335; Pritchard v. Fleetwood, 1 Mer. 54; Smith v. Earl of Effingham, 2 Beav. 232; Brooks v. Greathed, *supra*; Cortleyeu v. Hathaway, 11 N. J. Eq. 39, 64 Am. Dec. 478. In this country no distinction is made between legal and equitable mortgages. The ground of appointing a receiver is the smallness of the security, and the danger lest it should be rendered more inadequate by the conduct of the mortgagor: Price v. Dowdy, 34 Ark. 285; Haas v. Chicago Build. Soc., 89 Ill. 498; Des Moines Gas Co. v. West, 44 Iowa, 23; Worrill v. Coker, 56 Ga. 666; Phillips v. Eiland, 52 Miss. 721; Brasted v. Sutton, 30 N. J. Eq. 462; Mahon v. Crothers, 28 N. J. Eq. 567; Johnson v. Tucker, 2 Tenn. Ch. 398; Williams v. Noland, 2 Tenn. Ch. 151 (of personal property); Moran v. Johnston, 26 Gratt. 108; Phoenix Mut. L. Ins. Co. v. Grant, 3 McAr. 220; Pullan v. Cincinnati etc. R. R., 4 Biss. 35; for cases of receivers over corporations in suits for the enforcement of a deed of trust in the nature of a mortgage, see Allen v. Dallas etc. R. R., 3 Woods, 316; Warner v. Rising etc. Iron Co., 3 Woods, 514; Wilmer v. Atlanta etc. R'y, 2 Woods, 409.

§ 1334, (c) This subject is treated at length in Pom. Equitable Remedies, §§ 92-104.



in the nature of an equitable execution;<sup>4d</sup> 5. Suits, under like circumstances, and for a like reason, by a vendor to enforce the specific performance of a contract for the sale of land against a vendee who is in possession;<sup>5e</sup> 6. In suits by creditors, although not strictly creditors' actions by judgment creditors, brought to enforce their demands from the debtors' property, under some very special circumstances involving great danger of loss, such as the debtors' non-residence, insolvency, and the like;<sup>6f</sup> 7. Suits for the rescission of a contract for the sale of land under special circumstances;<sup>7g</sup> 8. Suits to

§ 1334, <sup>4</sup> Lien by deposit of title deeds: See Adams's Equity, 125. Suit by a holder of debentures secured by lien on assets of the corporation: *Hopkins v. Worcester etc. Canal Prop'rs*, L. R. 6 Eq. 437. Creditors' suits: *Gage v. Smith*, 79 Ill. 219; *Kuhl v. Martin*, 26 N. J. Eq. 60; *Osborn v. Heyer*, 2 Paige, 342; *Anglo-Italian Bank v. Davies*, L. R. 9 Ch. Div. 275, and cases cited.

§ 1334, <sup>5</sup> A receiver pending the suit is appointed only when the land is a doubtful or inadequate security, and the vendee is insolvent, or committing waste, etc.: *Hall v. Jenkinson*, 2 Ves. & B. 125; *Boehm v. Wood*, 2 Jacob & W. 236; *Shakel v. Duke of Marlborough*, 4 Madd. 463; *Taylor v. Eckersley*, L. R. 2 Ch. Div. 302 (contract concerning chattels); *Phillips v. Eiland*, 52 Miss. 721; *Hughes v. Hatchett*, 55 Ala. 631; *Tufts v. Little*, 56 Ga. 139; *Gunby v. Thompson*, 56 Ga. 316. In a suit to enforce a grantor's or vendor's lien, a receiver will not generally be appointed before a decree, but may be after the decree: *Latimer v. Aylesbury etc. R'y*, L. R. 9 Ch. Div. 385; *Munns v. Isle of Wight R'y*, L. R. 5 Ch. 414; *Pell v. Northampton etc. R'y*, L. R. 2 Ch. 100.

§ 1334, <sup>6</sup> The case must undoubtedly be very special, to warrant the appointment of a receiver in a suit by a simple creditor: *Johnson v. Farnum*, 56 Ga. 144; *Ballin v. Ferst*, 55 Ga. 546; *Gregory v. Gregory*, 1 Jones & S. 1.

§ 1334, <sup>7</sup> *Gibbs v. David*, L. R. 20 Eq. 373.

§ 1334, (d) See Pom. Equitable Remedies, § 105. For receivers in judgment creditors' suits, see *Id.*, §§ 106-109; in proceedings supplementary to execution, *Id.*, § 110.

§ 1334, (e) For details of this subject, see Pom. Equitable Remedies, § 111.

§ 1334, (f) For details of this subject, see Pom. Equitable Remedies, § 112.

§ 1334, (g) See, further, Pom. Equitable Remedies, § 113.

enforce payment of the arrears of annuities;<sup>8h</sup> 9. Suits for the protection of remaindermen against the life tenant or other holder of the particular estate;<sup>9i</sup> 10. Suits, under many circumstances, against corporations;<sup>10j</sup> 11. Suits and proceedings in bankruptcy.<sup>11k</sup>

§ 1334, 8 In England only when the payment cannot be enforced by distress: *Sollory v. Leaver*, L. R. 9 Eq. 22; *Buxton v. Monkhouse*, Coop. 41; *Probasco v. Probasco*, 30 N. J. Eq. 108.

§ 1334, 9 In re *Fowler*, L. R. 16 Ch. Div. 723.

§ 1334, 10 The following cases will illustrate many of the circumstances under which a receiver may be appointed over corporations or corporate property: *Featherstone v. Cooke*, L. R. 16 Eq. 298; *Hopkins v. Worcester etc. Canal Prop'rs*, L. R. 6 Eq. 437; *Allen v. Dallas etc. R. R.*, 3 Woods, 316; *Warner v. Rising etc. Iron Co.*, 3 Woods, 514; *Wilmer v. Atlanta etc. R'y*, 2 Woods, 409; *North Car. etc. R. R. v. Drew*, 3 Woods, 691; *Union Tr. Co. v. St. Louis etc. R. R.*, 4 Dill. 114; *Kennedy v. St. Paul etc. R. R.*, 2 Dill. 448; *Whelpley v. Erie R'y*, 6 Blatchf. 271; *Bank of Bethel v. Palquique Bank*, 14 Wall. 383; *National Tr. Co. v. Miller*, 33 N. J. Eq. 155; *Freeholders of Middlesex v. State Bank*, 28 N. J. Eq. 166; *McCullough v. Merch. Loan etc. Co.*, 29 N. J. Eq. 217; *In re Long Branch etc. R. R.*, 24 N. J. Eq. 398; *Delaware etc. R. R. v. Erie R. R.*, 21 N. J. Eq. 298; *La Société Francaise v. District Court*, 53 Cal. 495; *Kelly v. Alabama etc. R. R.*, 58 Ala. 489; *Wilson v. Barney*, 5 Hun, 257; *Redmond v. Enfield Mfg. Co.*, 13 Abb. Pr., N. S., 332; *Rochester v. Bronson*, 41 How. Pr. 78; *Brown v. Home Sav. Bank*, 5 Mo. App. 1; *Vermont etc. R. R. v. Vt. etc. R. R.*, 50 Vt. 500; *Port Huron etc. R'y v. Judge of St. Clair Circuit*, 31 Mich. 456; *French v. Gifford*, 30 Iowa, 148; *Hand v. Dexter*, 41 Ga. 454; *People v. Security Ins. Co.*, 78 N. Y. 114, 34 Am. Rep. 522, 79 N. Y. 267.

§ 1334, 11 *Salt v. Cooper*, L. R. 16 Ch. Div. 544; *Ex parte Browne*, L. R. 16 Ch. Div. 497; *In re Manchester etc. R'y*, L. R. 14 Ch. Div. 645; *Ex parte Rylands*, L. R. 6 Ch. Div. 57; *Taylor v. Eckersley*, L. R. 5 Ch. Div. 740; *Boyle v. Bettws etc. Co.*, L. R. 2 Ch. Div. 726; *In re H.'s Es-*

§ 1334, (h) See, further, *Pom. Equitable Remedies*, § 114.

§ 1334, (i) See, further, *Pom. Equitable Remedies*, § 115.

§ 1334, (j) The appointment of receivers of corporations is fully treated in *Pom. Equitable Remedies*, §§ 116-131. For statutes, see *Id.*, §§ 123, 127, notes. For railroad receiver, see *Id.*, §§ 128-131.

§ 1334, (k) See *Pom. Equitable Remedies*, § 132. For receivers in suits for divorce or maintenance, and in miscellaneous cases, see *Id.*, § 133.

§ 1335. **The Same. Fourth Class.**—This class contains those cases in which a receiver is appointed after judgment for the purpose of carrying the decree into effect. In some instances the receiver appointed on motion pending the action is continued in his office after the decree; in others, he is appointed after the decree, when no appointment would be made before the final hearing. In all instances the object of a receiver is to carry into effect a special decree, which could not otherwise be efficiently executed by ordinary process. Among the most important cases in which a receiver may thus be appointed are creditors' suits and suits to enforce other equitable liens, suits to enforce the contracts of married women against their separate estates, and suits or proceedings generally statutory for the winding up of corporations.<sup>1a</sup> In the states adopting the reformed procedure, the codes of procedure generally contain provisions regulating the appointment of receivers.<sup>2</sup>

tate, L. R. 1 Ch. Div. 276; *Munns v. Isle of Wight R'y*, L. R. 5 Ch. 414; *Riches v. Owen*, L. R. 3 Ch. 820; *In re Johnson*, L. R. 1 Ch. 325.

§ 1335, <sup>1</sup> Creditors' suits: See *post*, section on creditors' suits: *Anglo-Italian Bank v. Davies*, L. R. 9 Ch. Div. 275. On contracts of married women, see *ante*, section on married women's contracts: *Bryant v. Bull*, L. R. 10 Ch. Div. 153.

§ 1335, <sup>2</sup> These provisions are substantially alike in most of the codes; that of California may be taken as the type: *California*: Code Civ. Proc., sec. 564; *Arkansas*: Gantt's Dig. of Stats. 1874, secs. 4809, 4810; *Colorado*: King's Code Civ. Proc. 1880, sec. 138; *Dakota*: Hand's Code Civ. Proc. 1877, sec. 219; *Florida*: Code Civ. Proc. 1870, sec. 192; *Indiana*: 2 Davis's Rev. 1876, p. 114, sec. 199; *Iowa*: 2 Miller's Rev. Code 1880, sec. 2903; *Kansas*: Dassler's Comp. Laws 1881, p. 634, sec. 254; *Kentucky*: Bullitt's Code 1876, secs. 298, 299; *Minnesota*: Young's Stats. 1878, p. 739, sec. 207; *Missouri*: 1 Rev. Stats. 1879, secs. 3116, 3660; *Nebraska*: Brown's Comp. Stats. 1881, p. 565, sec. 266;

§ 1335, (a) For annotations, see Pom. Equitable Remedies, § 134, *Notice to the defendant a prerequisite to appointment of receiver*. This rule and its exceptions are discussed in Pom. Equitable Remedies, §§ 135-147.

§ 1336. **Powers, Rights, Duties, and Liabilities.**—The appointment of a receiver during the pendency of a suit does not determine any rights or title of the litigant parties; it is made for the benefit of all. His possession, though impartial while the controversy is undecided, is regarded as on behalf of the one who is ultimately found to be entitled to the property.<sup>1</sup> He is in reality an

*Nevada*: Comp. Laws 1873, p. 323, sec. 1207; *New York*: Code Civ. Proc., sec. 713; *North Carolina*: 1 Battle's Rev. 1873, p. 190, sec. 215; *Ohio*: 2 Rev. Stats. 1880, p. 1359, sec. 5587; *Oregon*: Gen. Laws 1872, p. 312, sec. 1029; *South Carolina*: Rev. Stats. 1873, p. 628, sec. 267; *Wisconsin*: Rev. Stats. 1878, p. 749, c. 126, sec. 2787. See, also, *Georgia*: Code 1882, p. 778, sec. 3098 (3043); p. 778, sec. 3149 (3092); *Texas*: Rev. Stats. 1879, p. 222, art. 1461.

§ 1336, 1 While my limits do not permit any discussion in detail of the receiver's powers, rights, and liabilities, the following cases, which are generally classified, will furnish many illustrations: *Who may be appointed*:<sup>a</sup> *In re Lloyd*, L. R. 12 Ch. Div. 447; *Perry v. Oriental Hotels Co.*, L. R. 5 Ch. 420; *Benneson v. Bill*, 62 Ill. 408. *When the appointment takes effect*: *Edwards v. Edwards*, L. R. 2 Ch. Div. 291 (not until security is given); *Crowder v. Moore*, 52 Ala. 220 (appointment before bill filed); *Clark v. Brockway*, 1 Abb. App. 351; *Crane v. McCoy*, 1 Bond, 422. *Effect of appointment*: *Ex parte Evans*, L. R. 13 Ch. Div. 252; *Bolles v. Duff*, 54 Barb. 215 (of consent to be a receiver). *Nature of receiver's office*: *Jefferys v. Dickson*, L. R. 1 Ch. 183; *State v. Gambs*, 68 Mo. 289 (is not a trustee of an express trust). *Interference with him, protection by the court*:<sup>b</sup> *Ex parte Cochrane*, L. R. 20 Eq. 282; *Russell v. East Anglian R'y*, 3 Macn. & G. 104; *Jordan v. Wells*, 3 Woods, 527; *Vermont etc. R. R. v. Vt. Cent. R. R.*, 46 Vt. 792. *Powers, rights, and authority in general*:<sup>c</sup> *In re Birmingham etc. R'y*, L. R. 18 Ch. Div. 155; *Campbell v. Compagnie Générale*, L. R. 2 Ch. Div. 181; *Ex parte Warren*, L. R. 10 Ch. 222; *Ex parte*

§ 1336, (a) *Selection and eligibility of receivers*: See Pom. Equitable Remedies, §§ 148–153.

§ 1336, (b) *The receiver's possession, and interference therewith; and conflicting appointments*: See Pom. Equitable Remedies, chap. IV, §§ 154–170.

§ 1336, (c) *Receiver's management and disposition of property*: See Pom. Equitable Remedies, chap. VIII, §§ 197–216. *Receivers' sales*, §§ 209–213. *Receivers' certificates*, §§ 214–216.



officer of the court, and will be protected by it from interference by third persons in the discharge of his duties; indeed, such interference without permission of the court would be a contempt. The receiver, in all important matters, acts under special direction of the

Jay, L. R. 9 Ch. 133; *Armstrong v. Armstrong*, L. R. 12 Eq. 614; *Kennedy v. St. Paul etc. R. R.*, 5 Dill. 519; *Stanton v. Ala. etc. R. R.*, 2 Woods, 506; *Cowdery v. Railroad Co.*, 1 Woods, 331; *Davis v. Gray*, 16 Wall. 203; *Heermans v. Clarkson*, 64 N. Y. 171; *Porter v. Williams*, 9 N. Y. 142, 59 *Am. Dec.* 519; *People v. Security Ins. Co.*, 78 N. Y. 114, 34 *Am. Rep.* 522, 79 N. Y. 267; *Scott v. Elmore*, 10 Hun, 68; *Olcott v. Heermans*, 3 Hun, 431; *Simmons v. Wood*, 45 How. Pr. 262; *Elmira etc. Co. v. Erie R'y*, 26 N. J. Eq. 284; *Receivers v. Paterson Gas Light Co.*, 23 N. J. L. 283; *Robinson v. Atlantic etc. R'y*, 66 Pa. St. 160; *Gibert v. Washington City etc. R. R.*, 33 Gratt. 586; *Spinning v. Ohio etc. Tr. Co.*, 2 Disn. 336; *Johnson v. Gunter*, 6 Bush, 534; *MeCombs v. Merryhew*, 40 Mich. 721; *Newbold v. Peoria etc. R. R.*, 5 Ill. App. 367; *Safford v. People*, 85 Ill. 558; *Tripp v. Boardman*, 49 Iowa, 410; *Bank of Montreal v. Chicago etc. R. R.*, 48 Iowa, 518; *McIlrath v. Snure*, 22 Minn. 391; *Barron v. Mullin*, 21 Minn. 374; *Meredith Sav. Bank v. Simpson*, 22 Kan. 414; *Moseby v. Burrow*, 52 Tex. 396; *Weems v. Lathrop*, 42 Tex. 207. *Powers to bring, maintain, or continue suits:*<sup>a</sup> *Campbell v. Fish*, 8 Daly, 162; *Donnelly v. West*, 17 Hun, 564 (limited divorce); *Albany etc. Ins. Co. v. Van Vranken*, 42 How. Pr. 281; *Calkins v. Atkinson*, 2 Lans. 12; *Rockwell v. Merwin*, 8 Abb. Pr., N. S., 330; *Garver v. Kent*, 70 Ind. 428; *Manlove v. Burger*, 38 Ind. 211; *Alexander v. Relfe*, 9 Mo. App. 133; *Lathrop v. Knapp*, 37 Wis. 307; *Miller v. Mackenzie*, 29 N. J. Eq. 291; *Battle v. Davis*, 66 N. C. 252; *Gadsden v. Whaley*, 14 S. C. 210; *Searles v. Jacksonville etc. R. R.*, 2 Woods, 621. *Particular powers.*—In the enforcement of payment of debts: *Ex parte Harris*, L. R. 2 Ch. Div. 423; *Ex parte Hare*, L. R. 10 Ch. 218; *Jolly v. Arbuthnot*, 4 De Gex & J. 224; *Screven v. Clark*, 48 Ga. 41; *Seagram v. Tuck*, L. R. 18 Ch. Div. 296 (right to set up statute of limitations); *Ex parte Browne*, L. R. 16 Ch. Div. 497, (lien on assets); *Porter v. Kingman*, 126 Mass. 141 (cancellation of mortgage); *Pond v. Cooke*, 45 Conn. 126, 29 *Am. Rep.* 668 (over property taken into another state); *Hoover v. Montclair etc.*

§ 1336, (a) *Suits by the receiver:* See Pom. *Equitable Remedies*, chap. VI, §§ 180–191. *Set-off against the receiver*, §§ 187–189.

*Receiver's relation to pending suits:* See Pom. *Equitable Remedies*, chap. VII, §§ 192–195. When he is a necessary party, § 196.

court. He must, in general, obtain its permission to bring suits, and suits cannot be properly brought against him without permission. Although not strictly a trustee, because the legal title to the property is not vested in him, he occupies a fiduciary position, and must

R'y, 29 N. J. Eq. 4 (to make repairs); Mann v. Fairechild, 3 Abb. App. 152 (assignment of his right); Koontz v. Northern Bank, 16 Wall. 196 (of purchaser under receiver's deed). *His duties and liabilities in general:*<sup>e</sup> Ex parte Gordon, L. R. 20 Eq. 291; Kain v. Smith, 80 N. Y. 458; Clark v. Bininger, 11 Jones & S. 126, 344; Corey v. Long, 12 Abb. Pr., N. S., 427; Coe v. N. J. etc. R. R., 27 N. J. Eq. 37; Klein v. Jewett, 26 N. J. Eq. 474; Commonwealth v. Young, 11 Phila. 606; Stewart v. Lay, 45 Iowa, 604; Demain v. Cassidy, 55 Miss. 320; Stanton v. Ala. etc. R. R., 2 Woods, 506; Davenport v. Receivers, 2 Woods, 519; Davis v. Gray, 16 Wall. 203. *Suits against them:*<sup>f</sup> Killmer v. Hobart, 8 Abb. N. C. 426, 58 How. Pr. 452 (foreign receivers); Barton v. Barbour, 3 MeAr. 212, 36 Am. Rep. 104 (ditto); Express Co. v. Railroad Co., 99 U. S. 191 (for a specific performance); Palys v. Jewett, 32 N. J. Eq. 302 (at law for a tort); Hackley v. Draper, 60 N. Y. 88; 4 Thomp. & C. 614 (to set aside a fraudulent sale); De Graffenried v. Brunswick etc. R. R., 57 Ga. 22. *His liability for negligence, trespasses, etc.:*<sup>g</sup> Newell v. Smith, 49 Vt. 255; Kain v. Smith, 11 Hun, 552; Henderson v. Walker, 55 Ga. 481; Meara's Adm'r v. Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633; Potter v. Bunnell, 20 Ohio St. 150; Hills v. Parker, 111 Mass. 508, 15 Am. Rep. 63 (trespasses). *Particular liabilities, default in payments of balance:* In re Bell's Estate, L. R. 9 Eq. 172; Hobson v. Jones, L. R. 9 Eq. 456; Clark v. Bininger, 75 N. Y. 344. *For wrongful use of funds:* Cartwright's Case, 114 Mass. 230; Drake v. Goodridge, 6 Blatchf. 531; Wall v. Pulliam, 5 Heisk. 365 (for property lost); Hinekley v. Railroad Co., 100 U. S. 153 (for interest); Stretch v. Gowdey, 3 Tenn. Ch. 565 (failure to report); Cowdrey v. Galveston etc. R. R., 93 U. S. 352 (expenditure disallowed). *His compensation:*<sup>h</sup> Hopfensack v. Hopfensack, 61 How. Pr. 498;

§ 1336, (e) *Priority of claims:* See Pom. Equitable Remedies, chap. IX, §§ 219-237.

§ 1336, (f) *Actions against the receiver:* See Pom. Equitable Remedies, chap. V, §§ 171-179.

§ 1336, (g) *Liability for fraud, negligence, etc.:* See Pom. Equitable Remedies, § 217.

§ 1336, (h) *Compensation and payment of costs:* See Pom. Equitable Remedies, §§ 238-245.

act with perfect good faith, and is liable to account. The exact nature of his duties depends upon the particular case.

Crook v. Findley, 60 How. Pr. 375; Gardiner v. Tyler, 2 Abb. App. 247; McArthur v. Montclair R. R., 27 N. J. Eq. 77; Jones v. Keen, 115 Mass. 170; Special Bank Comm'rs v. Cranston Sav. Bank, 12 R. I. 497; Special Bank Comm'rs v. Franklin Sav. Inst., 11 R. I. 557; Mabry v. Brown, 12 Heisk. 597; Brien v. Harriman, 1 Tenn. Ch. 467; Hutchinson v. Hampton, 1 Mont. Ter. 39.<sup>1</sup>

§ 1336, (1) *Removal and discharge of receivers*: See Pom. Equitable Remedies, chap. X, §§ 246, 247. *Foreign and ancillary receivers*: Pom. Equitable Remedies, chap. XI, §§ 248-261.

## SECOND GROUP.

### REMEDIES PURELY PREVENTIVE.

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#### CHAPTER FIRST.

#### INJUNCTIONS.

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#### SECTION I.

TO PROTECT OR RESTRAIN THE VIOLATION OF OBLIGATIONS AND RIGHTS OF PROPERTY OR OF CONTRACT, EITHER LEGAL OR EQUITABLE.

##### ANALYSIS.

- § 1337. General nature and objects: Interdicts.
- § 1338. Fundamental principle.
- § 1339. To protect purely equitable estates or interests, and in aid of purely equitable remedies.
- § 1340. The same: Particular instances.
- §§ 1341-1344. To prevent the violation of contracts.
  - § 1341. General doctrine.
  - § 1342. 1. Restrictive covenants creating equitable easements.
  - § 1343. 2. Contracts for personal services or acts.
  - § 1344. 3. Other agreements generally negative in their nature.
  - § 1345. Miscellaneous cases: Corporations and their officers; between mortgagor and mortgagee; public officers; cloud on title; married women's property; partners, etc.

**§ 1337. General Nature and Object.**—The remedy of injunction was undoubtedly borrowed by the chancellors from the “interdicts” of the Roman law.<sup>1</sup> An

§ 1337, <sup>1</sup> As to “interdicts,” see Gaius’s Inst., lib. 4, secs. 138-170; Poste’s ed., 492-520; Just. Inst., lib. 4, tit. 15 secs. 1-8; Sandars’s ed.,



injunction may be either a final remedy obtained by a suit, or a preliminary and interlocutory relief granted while the suit is pending. In the first case it is a decree, in the second, an order or writ. Whatever be its form, decree or order, the remedy by ordinary injunction is wholly preventive, prohibitory, or protective. The same is true in theory and in form of a mandatory injunction, which always by its language prohibits the continuance of an act or of a structure, although in effect and in its essential nature it is wholly restorative, and compels the defendant to restore the thing to its original situation. While injunctions may thus be final, or preliminary and ancillary to other final relief, they all depend upon the

1st Am. ed., 58, 570-580. The general definition as given by Gaius (*Ibid.*, sec. 139) is as follows: "Under certain circumstances, chiefly when possession or *quasi* possession [i. e., possession of a servitude] is in dispute, the first step in the legal proceedings is the interposition of the prætor or pro-consul, who commands some performance or forbearance; which commands, formulated in solemn terms, are called interdicts." The most general formula was "*vim fieri veto, exhibeas, restituas*," "I forbid you to use violence, you must produce, you must restore." There were thus three distinct species of interdicts: 1. The prohibitory, where the defendant was commanded to refrain or desist from some act, answering to our ordinary injunction; 2. The exhibitory, where the defendant was commanded to produce and exhibit something in his possession,—*exhibeas*, which does not answer to any kind of injunction, but has some analogies with certain common-law writs; 3. The restorative, where the defendant was commanded to restore something to its original position, clearly resembling in its effect our mandatory injunction. Interdicts were granted where some danger was apprehended, or some injury was being done, to something of a *quasi* public character, as the stopping up of a highway, or to some private interest or right. One of the most common occasions of the interdict was to protect the plaintiff in his possession of a thing, in which case the interdict *uti possidetis* was used to protect possession of land and buildings, and the interdict *utrubi* for movables. In the interdict *uti possidetis*, the defendant was forbidden to interfere with the possession "*nec vi, nec clam, nec precario*." The granting of interdicts belonged wholly to the "extraordinary" or equitable jurisdiction of the magistrate: See *ante*, vol. 1, § 6.

same *general* principles, doctrines, and rules which determine and regulate the exercise of the jurisdiction to award them. In the states adopting the reformed procedure, the codes contain general provisions describing the cases in which an injunction may be issued, but these provisions do not materially alter the settled equitable jurisdiction, except in reference to injunctions against actions or judgments at law.<sup>2a</sup>

**§ 1338. Fundamental Principle.**—In determining whether an injunction will be issued to protect any right of property, to enforce any obligation, or to prevent any wrong, there is one fundamental principle of the utmost importance, which furnishes the answer to any questions, the solution to any difficulties which may arise. This principle is both affirmative and negative, and the affirmative aspect of it should never be lost sight of, any more than the negative side.<sup>1</sup> The general principle

**§ 1337, 2** *California*: Code Civ. Proc., sec. 526; Civ. Code, secs. 3420, 3422, 3423; *Arkansas*: Dig. of Stats. 1874, sec. 3450; *Colorado*: Code Civ. Proc. 1880, sec. 119; *Dakota*: Code Civ. Proc. 1877, p. 509, sec. 189; *Florida*: Code Civ. Proc. 1870, sec. 168; *Indiana*: 2 Davis's Stats. 1876, p. 93, sec. 137; *Iowa*: 2 Miller's Rev. Code 1880, secs. 3386, 3388; *Kansas*: Dassel's Comp. Laws 1881, p. 632, sec. 238; *Kentucky*: Bullitt's Codes 1876, p. 59, sec. 272; *Minnesota*: Young's Stats. 1878, p. 738, sec. 200; *Missouri*: 1 Rev. Stats. 1879, p. 454, sec. 2703; *Nebraska*: Brown's Comp. Laws 1881, p. 563, sec. 251; *Nevada*: 1 Comp. Laws 1873, p. 314, sec. 1173; *New York*: Code Civ. Proc., secs. 603, 604; *North Carolina*: Battle's Rev. 1873, p. 183, sec. 189; *Ohio*: 2 Rev. Stats. 1880, p. 1353, sec. 5572; *Oregon*: Gen. Laws 1872, p. 194, sec. 407; *South Carolina*: Rev. Stats. 1873, p. 621, sec. 242; *Wisconsin*: Rev. Stats. 1878, sec. 2774. See also *Georgia*: Code 1882, p. 803, secs. 3210 (3149); *Texas*: Rev. Stats. 1879, p. 415, art. 2873.

**§ 1338, 1** A comparison of the English and American reports will show that our courts have dwelt too much on the negative side of this principle, and have almost ignored its affirmative aspect. While the English judges have gradually but steadily enlarged the scope of the

**§ 1337, (a)** For a fuller abstract of statutes, see Pom. Equitable Remedies, § 262, note.

may be stated as follows: Wherever a right exists or is created, by contract, by the ownership of property or otherwise, cognizable by law, *a violation of that right will be prohibited*, unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy. *The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognized by the law, and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limit its exercise.* This jurisdiction of equity to prevent the commission of wrong is, however, modified and restricted by considerations of expediency and of convenience which confine its application to those cases in which the legal remedy is not full and adequate. Equity will not interfere to restrain the breach of a contract, or the commission of a tort, or the violation of any right, when the legal remedy of compensatory damages would be complete and adequate. The incompleteness and inadequacy of the legal remedy is the criterion which, under the settled doctrine, determines the right to the equitable remedy of injunction.<sup>2</sup> In the

injunction, the tendency of the American decisions has been to narrow it even within the well-established limits of the jurisdiction. If "an ounce of prevention is worth a pound of cure," this tendency is clearly opposed to the best interests of society.

§ 1338, <sup>2</sup> *Jersey City v. Gardner*, 33 N. J. Eq. 622; *Powell v. Foster*, 59 Ga. 790; *Johnson v. Conn. Bank*, 21 Conn. 148, 157; *Watson v. Sutherland*, 5 Wall. 74. An injunction will not be granted to restrain arrests: *Davis v. Am. Soc. etc.*, 6 Daly, 81, 75 N. Y. 362; *Cohen v. Goldsboro*, 77 N. C. 2; nor to restrain other mere criminal acts; *Phillips v. Stone Mountain*, 61 Ga. 386; *Life Ass'n of Am. v. Boogher*, 3 Mo. App. 173. As to injunction against threatened acts in another state, see *Atlantic etc. Tel. Co. v. Baltimore & O. R. R.*, 14 Jones & S. 377; *Western U. Tel. Co. v. Western etc. R. R.*, 8 Baxt. 54. As to the grounds and requisites for the granting of a preliminary injunction,<sup>a</sup> see *McHenry v. Jewett*, 90

§ 1338, (a) *Preliminary or interlocutory injunctions*: See Pom. *Equitable Remedies*, § 264.

treatment of this twofold principle, I shall state the general rules which have been derived from it, and which regulate the exercise of the jurisdiction, and shall illustrate these rules by enumerating the more important instances to which they have been applied. The general object of the discussion will be to show when an injunction may be granted.<sup>3</sup>

**§ 1339. To Protect Purely Equitable Estates or Interests, and in Aid of Purely Equitable Remedies.**—The jurisdiction to grant injunctions restraining acts in violation of trusts and fiduciary obligations, or in violation of any other purely equitable estates, interests, or claims in and to specific property, is really commensurate with the equitable remedies given to enforce trusts and fiduciary duties, or to establish and enforce any other equitable estates, interests, or claims, with respect to specific things, whether lands, chattels, securities, or funds of money, or to relieve against mistake, or fraud done or contemplated with respect to such things. In all such cases the question whether the remedy at law is adequate cannot arise; much less can it be the criterion by which to determine whether an injunction can be granted; for there is no remedy at law. Since the es-

N. Y. 58; *Sheridan v. Jackson*, 72 N. Y. 170; *Scotfield v. Whitelegge*, 49 N. Y. 259; N. Y. *Printing etc. Estab. v. Fitch*, 1 Paige, 98; *Corporation of N. Y. v. Mapes*, 6 Johns. Ch. 46; *Ogden v. Kip*, 6 Johns. Ch. 160; *Babcock v. New Jersey etc. Co.*, 20 N. J. Eq. 296; *Richard's Appeal*, 57 Pa. St. 105, 98 Am. Dec. 202.

§ 1338, <sup>3</sup> The general effect produced by some text-books and judicial opinions might lead the reader to suppose that the main object of the writers or the judges was to show when injunctions could *not* be granted. The full force and effect of this most beneficial remedy, and the freedom with which it is granted by courts of the highest authority, can only be ascertained by an actual examination of the decided cases. It is for this reason that I have cited so many decisions under several of the subsequent heads. An exhaustive treatment of injunctions would require a whole volume, and would, in fact, be a review of the entire remedial department of equity.



tate, interest, or claim of the complainant is purely equitable, it is exclusively cognizable by equity; and if its existence is shown, a court of equity not only has the jurisdiction, but is bound to grant every kind of remedy necessary to its complete establishment, protection, and enforcement according to its essential nature. Many breaches of trust are of such a nature that, if accomplished, they would completely defeat the right of the beneficiary to the specific trust property. The equitable reliefs against mistake or fraud with respect to specific equitable property, and the equitable remedies of all kinds to enforce trusts, express or by operation of law, and fiduciary duties concerning specific property, and to enforce any other equitable estate, interest, lien, or right in or over specific property, would be of comparatively little practical value, unless the court could by injunction restrain the alienation, transfer, or encumbrance of such property, and all other modes of dealing with it which would prejudice the rights of the complainant, and prevent him from acquiring the title, or from enjoying his estate, or from enforcing his claim, or from receiving the full benefits of his final relief.<sup>1</sup> It may therefore be stated as a general proposition, that whenever the equitable relief against mistake or fraud with respect to specific property, or the equitable remedy of enforcing trusts or fiduciary duties concerning specific property, or of enforcing any other equitable estates, interests, or claims in or to specific property, *requires the*

§ 1339, 1 It is true that in suits concerning land, the statute authorizing a notice of *lis pendens* to be filed affords some security to the complainant against transfers and encumbrances pending the suit. But this statute does not affect the truth nor generality of the proposition contained in the text. *At the utmost*, it only shows that in such cases "*the aid of an injunction is not required.*" But the notice of *lis pendens* is, at best, only a partial relief; it does not prevent a transfer; it does not even obviate the necessity of an injunction in many suits concerning land; and it does not generally extend to other suits at all.

*aid of an injunction*, a court of equity has jurisdiction; and will exercise that jurisdiction, to grant an injunction, either pending the suit or as a part of the final decree, to restrain a breach of trust or of fiduciary duty, or to restrain an alienation, transfer, assignment, encumbrance, or other kind of dealing with the property, which would be in violation of the trust or fiduciary duty, or in fraud of the complainant's rights, and which would therefore interfere with and prejudice the ultimate remedies to which he may be entitled with respect to such property. The particular instances to which this doctrine is applied are almost numberless, and extend through the entire range of equitable remedies against mistake and fraud, or to enforce trusts and fiduciary duties, or to establish and enforce other equitable estates, interests, liens, and primary rights in and to specific property of any kind or form.

**§ 1340. The Same. Particular Instances.**<sup>a</sup>—Among the instances in which equity will grant an injunction, preliminary or final, in pursuance of the general doctrine as stated in the foregoing paragraph, the following are some of the most important, and they fully illustrate and establish the doctrine itself, in all its generality, and the grounds upon which it rests: To prevent the transfer of negotiable instruments, at the suit of the defrauded maker or acceptor, or of the party claiming to be the true owner, or to have an interest in them;<sup>1</sup> or

§ 1340, <sup>1</sup> Lord Chedworth v. Edwards, 8 Ves. 46; Stead v. Clay, 1 Sim. 294, 4 Russ. 550; Smith v. Haytwell, Amb. 66, 3 Atk. 566; King v. Hamlet, 4 Sim. 223; Hood v. Aston, 1 Russ. 412; Thompson v. Smith, 1 Madd. 395; Lloyd v. Gurdon, 2 Swanst. 180; Patrick v. Harrison, 3 Brown Ch. 476; Thiedemann v. Goldschmidt, 1 De Gex, F. & J. 4, 10 (an injunction refused against a defendant who was a *bona fide* holder for value); Ferguson v. Fisk, 28 Conn. 501; Hile v. Davison,

§ 1340, (a) For annotations and additions to this section, see Pom. Equitable Remedies, §§ 266-269.

the transfer, under like circumstances, of stocks or other securities not strictly negotiable;<sup>2</sup> or even the transfer of chattels, when of a special nature and value, such as diamonds, and the like articles;<sup>3</sup> to prevent a payment of money in violation of a trust;<sup>4</sup> to restrain a breach of trust;<sup>5b</sup> to prevent a defendant from affecting or encum-

20 N. J. Eq. 228; *Metler's Adm'rs v. Metler*, 18 N. J. Eq. 270, 19 N. J. Eq. 457; *Zeigler v. Beasley*, 44 Ga. 56; *Hinkle v. Margerum*, 50 Ind. 240; *Osborn v. U. S. Bank*, 9 Wheat. 738, 845; *Deaderick v. Mitchell*, 6 Baxt. 35; *Bridges v. Robinson*, 2 Tenn. Ch. 720; *Belohradsky v. Kuhn*, 69 Ill. 547.

This remedy is often used in connection with suits for cancellation: See *post*, chapter on cancellation.

§ 1340, <sup>2</sup> *King v. King*, 6 Ves. 172; *Lord Chedworth v. Edwards*, 8 Ves. 46; *Stead v. Clay*, 1 Sim. 294, 4 Russ. 550; *Athenæum Life Ass. Co. v. Pooley*, 3 De Gex & J. 294; *Osborn v. U. S. Bank*, 9 Wheat. 738, 844, 845; *Hile v. Davison*, 20 N. J. Eq. 228; *Elder v. First Nat. Bank*, 12 Kan. 238.

§ 1340, <sup>3</sup> The jurisdiction in such case depends upon the same reasons as the analogous jurisdiction to compel the delivery up of such unique chattels, or the specific performance of contracts for their sale: *Post*, § 1402; *Ximenes v. Franco*, 1 Dick. 149; *Tonnins v. Prout*, 1 Dick. 387.

§ 1340, <sup>4</sup> *Reeve v. Parkins*, 2 Jacob & W. 390; *Green v. Lowes*, 3 Brown Ch. 217; *Whittingham v. Burgoyne*, 3 Anstr. 900; *Mathews v. Jones*, 2 Anstr. 506; *Hawkshaw v. Parkins*, 2 Swanst. 539; *Hine v. Handy*, 1 Johns. Ch. 6. In *Bank of Turkey v. Ottoman Co.*, L. R. 2 Eq. 366, an injunction was refused because the money was not shown to be impressed with a trust; if this fact had appeared, the opinion clearly indicates that an injunction would have been granted. See, also, *Ernest v. Croysdill*, 2 De Gex, F. & J. 175.

§ 1340, <sup>5</sup> *Dance v. Goldingham*, L. R. 8 Ch. 902; *Brenan v. Preston*, 2 De Gex, M. & G. 813; *North Car. R. R. v. Drew*, 3 Woods, 674. In suits by a beneficiary against his trustee, an injunction, if needed, would be granted as a matter of course. To restrain violations of confidence: See *Little v. Kingswood Coll. Co.*, L. R. 20 Ch. Div. 733 (to prevent an attorney from acting against a former client); *Lewis v.*

§ 1340, (b) *To restrain breaches of trust*: See Pom. *Equitable Remedies*, § 266.

§ 1340, (c) *To restrain violations of confidence*: See Pom. *Equitable Remedies*, § 267.

bering the property in litigation by contract, conveyance, mortgage, or any other act;<sup>6</sup> and, in general, in all suits to enforce an equitable right against specific property,—as to enforce an equitable estate and compel the conveyance of the legal title, to enforce a trust, or an equitable lien, to compel the specific performance of a contract, and the like,—the court will grant an injunction to restrain a threatened transfer of the property, whether land, chattels, or securities, during the pendency of the action.<sup>7</sup>

Smith, 1 Macn. & G. 417 (to prevent disclosure of confidential communications by an attorney); *Brenan v. Preston*, 2 De Gex, M. & G. 813 (against a ship's husband); *Phelan v. Boylan*, 25 Wis. 679 (by reversioner against life tenant to prevent his use of a tax title). To restrain the disclosure of confidential communications, trade secrets, private papers, etc.:<sup>a</sup> See *Yovatt v. Winyard*, 1 Jacob & W. 394; *Newbery v. James*, 2 Mer. 446, 451; *Williams v. Williams*, 3 Mer. 157; *Morison v. Moat*, 9 Hare, 241; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664.

§ 1340, 6 *Great West. R'y v. Birmingham etc. R'y*, 2 Phill. Ch. 597, 602, 603, per Lord Cottenham; *Echliiff v. Baldwin*, 16 Ves. 267; *Curtis v. Marquis of Buckingham*, 3 Ves. & B. 168; *Spiller v. Spiller*, 3 Swanst. 556; and see cases in next following note.

§ 1340, 7 *Fells v. Read*, 3 Ves. 70; *Lloyd v. Loaring*, 6 Ves. 773; *Nutbrown v. Thornton*, 10 Ves. 159, 163; *Echliiff v. Baldwin*, 16 Ves. 267; *Daly v. Kelly*, 4 Dow, 417, 440; *Wood v. Rowcliffe*, 3 Hare, 304, 308; *Robinson v. Pickering*, L. R. 16 Ch. Div. 371, 660 (in suit to enforce married woman's contract against her separate estate, an injunction restraining her from aliening her property will not be granted, because her contract creates no lien or charge on her estate); *Lemprière v. Lange*, L. R. 12 Ch. Div. 675 (injunction in suit for cancellation on account of fraud); *Hart v. Herwig*, L. R. 8 Ch. 860 (in specific performance of contract for sale of a ship); *Beyfus v. Bullock*, L. R. 7 Eq. 391 (in suit to set aside a deed for fraud); *Hadley v. London Bank of Scotland*, 3 De Gex, J. & S. 63 (in specific performance); *De Mattos v. Gibson*, 4 De Gex & J. 276 (ditto); *Brenan v. Preston*, 2 De Gex, M. & G. 813 (suit against trustee); *Lemprière v. Lange*, L. R. 12 Ch. Div. 675; *Vavasseur v. Krupp*, L. R. 9 Ch. Div. 351; *Building Ass'n v.*

§ 1340, (a) *Disclosure of trade secrets*: See *Pom. Equitable Remedies*, § 268.



§ 1341. **To Prevent the Violation of Contracts.**<sup>a</sup>—An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrines and rules; and it may be stated as a general proposition that wherever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit. Where the agreement stipulates that certain acts shall not be done, an injunction preventing the commission of those acts is evidently the only mode of enforcement; but the remedy of injunction is not confined to contracts whose stipulations are negative; it often extends to those which are affirmative in their provisions, where the affirmative stipulation implies or includes a negative. The universal test of the jurisdiction, admitted alike by the courts of England and of the United States, is the inadequacy of the legal remedy of damages in the class of contracts to which the particular instance belongs.<sup>1</sup>

Ashmead, 7 Phila. 272; Joseph v. McGill, 52 Iowa, 127 (against fraudulent grantee); French v. Snell, 29 N. J. Eq. 95 (against assignee of a mortgage; the assignment void); Venable v. Everett, 63 Ga. 633; Sierra Nev. Min. Co. v. Sears, 10 Nev. 346; Vogler v. Montgomery, 54 Mo. 577.

§ 1341, 1 The modern English decisions have been much more liberal than the American cases in applying this test, and the English courts have more freely used the injunction to prevent the violation of contracts than the majority of the American judges have been willing to go. The *tendency* of the American courts has been to limit, rather than to enlarge, the jurisdiction in cases of contracts. English courts will enjoin the violation of some contracts, even though they cannot be specifically enforced. The American decisions, with few exceptions, refuse to adopt this doctrine.

§ 1341, (a) See Pom. Equitable Remedies, chap. XIII, §§ 270–300.

This general doctrine is fully sustained by the cases cited in the succeeding paragraphs as illustrations of its application. A clearer notion of the doctrine will perhaps be obtained by considering the contracts to which it applies in three main classes: 1. Those restrictive covenants which create equitable easements; 2. Agreements stipulating for personal services or acts; 3. Other agreements, generally negative in their nature.

**§ 1342. 1. Restrictive Covenants Creating Equitable Easements.**<sup>a</sup>—This doctrine has already been examined, and it has been shown that restrictive covenants in deeds, leases, and agreements limiting the use of land in a specified manner, or prescribing a particular use, which create equitable servitudes on the land, will be specifically enforced in equity by means of an injunction, not only between the immediate parties, but also against subsequent purchasers with notice, even when the covenants are not of the kind which technically run with the land.<sup>1</sup> The injunction in this class of cases is granted almost as a matter of course upon a breach of the covenant. The amount of damages, and even the fact that the plaintiff has sustained *any* pecuniary damages, are wholly immaterial. In the words of one of the ablest of modern equity judges: "It is clearly established by authority that there is sufficient to justify the court interfering, if there has been a breach of the covenant. It is not for the court, but the plaintiffs, to estimate the amount of damages that arises from the injury inflicted upon them. The moment the court finds that there has been a breach of the covenant, that is an injury, and the court has no right to measure it, and no right to refuse to the plaintiff the specific performance of his contract, although his

§ 1342, <sup>1</sup> See *ante*, vol. 2, § 689; vol. 3, § 1295.

§ 1342, (a) For a detailed treatment of the subject of this section, see Pom. Equitable Remedies, §§ 272-284.

remedy is that which I have described," namely, an injunction.<sup>2</sup>

**§ 1343. 2. Contracts for Personal Services or Acts.<sup>a</sup>—**

Where a contract stipulates for special, unique, or extraordinary personal services or acts, or for such services or acts to be rendered or done by a party having special, unique, and extraordinary qualifications,—as, for example, by an eminent actor, singer, artist, and the like,—it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same or the same kind of services or acts elsewhere, or by employing any other person. It is, however, a familiar doctrine that a court of equity will not exercise

§ 1342, 2 Per Sir George Jessel, M. R., in *Leech v. Schweder*, L. R. 9 Ch. 463, 465, note, 468, note; *Tipping v. Eckersley*, 2 Kay & J. 264, 270, 273; *Dickenson v. Grand Junc. C. Co.*, 15 Beav. 260, 270; *Western v. MacDermot*, L. R. 1 Eq. 499, 505; 2 Ch. 72, 75; *Evans v. Davis*, L. R. 10 Ch. Div. 747; *Kemp v. Sober*, 1 Sim., N. S., 517, 520. For illustrations of such restrictive covenants and of the general doctrine, see cases cited *ante*, under §§ 689, 1295; *Lord Grey de Wilton v. Saxon*, 6 Ves. 106; *Fleming v. Snook*, 5 Beav. 250; *Hodson v. Coppard*, 29 Beav. 4; *Bramwell v. Lacy*, L. R. 10 Ch. Div. 691; *Evans v. Davis*, L. R. 10 Ch. Div. 747; *Master v. Hansard*, L. R. 4 Ch. Div. 718 (injunction refused; no breach); *Lord Manners v. Johnson*, L. R. 1 Ch. Div. 673; *Aspden v. Seddon*, L. R. 10 Ch. 394 (no breach); *Gearns v. Baker*, 10 Ch. 355 (ditto); *Booth v. Alcock*, L. R. 8 Ch. 663 (ditto); *Catt v. Tourle*, L. R. 4 Ch. 654; *Leader v. Moody*, L. R. 20 Eq. 145 (injunction refused under very special facts); *Telford v. Metrop. Board of Works*, L. R. 13 Eq. 574; *Feilden v. Slater*, L. R. 7 Eq. 523; *Peek v. Matthews*, L. R. 3 Eq. 515 (injunction refused; plaintiff's acquiescence); *Lloyd v. London etc. R'y*, 2 De Gex, J. & S. 568; *Piggott v. Stratton*, 1 De Gex, F. & J. 33; *Nicholson v. Rose*, 4 De Gex & J. 10; *Coles v. Sims*, 5 De Gex, M. & G. 1; *Hall v. Wesster*, 7 Mo. App. 56; *Steward v. Winters*, 4 Sand. Ch. 587; *Trustees etc. v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; and see cases cited in note under § 1344.

§ 1343, (a) For a further treatment of this subject, see Pom. *Equitable Remedies*, §§ 288–291.

its jurisdiction to grant the remedy of an *affirmative* specific performance, however inadequate may be the remedy of damages, whenever the contract is of such a nature that the decree for its specific performance cannot be enforced and its obedience compelled by the ordinary processes of the court. A specific performance in such cases is said to be impossible; and contracts stipulating for personal acts have been regarded as the most familiar illustrations of this doctrine, since the court cannot in any direct manner compel an actor to act, a singer to sing, or an artist to paint. Applying the same course of reasoning, the English courts formerly held that they could not *negatively* enforce the specific performance of such contracts by means of an injunction restraining their violation.<sup>1</sup> Those courts have, however, entirely receded from this latter conclusion. The rule is now firmly established in England that the violation of such contracts may be restrained by injunction, whenever the legal remedy of damages would be inadequate, and the contract is of such a nature that its negative specific enforcement is possible. This rule was first applied to stipulations which were in form expressly negative, but was soon extended to affirmative contracts which implied or involved negative stipulations.<sup>2</sup>

§ 1343, 1 *Kemble v. Kean*, 6 Sim. 333; *Kimberley v. Jennings*, 6 Sim. 340; for American decisions to the same effect, see next following notes.

§ 1343, 2 The leading case is *Lumley v. Wagner*, 1 De Gex, M. & G. 604, in which the defendant, a "prima donna," had agreed to sing for a certain specified period in the plaintiff's opera-house, and also that she would not sing elsewhere during that time. The opinion by Lord Chancellor St. Leonards contains a full review of the previous authorities, and a most able and convincing discussion of the principle. In *Montague v. Flockton*, L. R. 16 Eq. 189, the rule was extended to a contract by an actor which contained no negative stipulation. See, also, *Wolverhampton etc. R'y v. London etc. R'y*, L. R. 16 Eq. 433; *Ward v. Beeton*, L. R. 19 Eq. 207; *Donnell v. Bennett*, L. R. 22 Ch. Div. 835; *Fothergill*



§ 1344. 3. **Other Agreements Generally Negative in Their Nature.**<sup>a</sup>—In all these agreements, where the stipulations are expressly negative in form, and where they belong to the class of which the specific performance would be enforced if they were affirmative in form, an injunction to restrain their violation will be granted as a general rule, and almost as a matter of course. The inadequacy of the legal remedy is the criterion; but the fact that the agreements belong to a class which would be specifically enforced necessarily shows that the legal remedy is inadequate. The particular instances of this class are very numerous, and some of the most important examples are placed in the foot-note.<sup>1</sup>

v. Rowland, L. R. 17 Eq. 132, 141; *Garrett v. Banstead etc.* R'y, 4 De Gex, J. & S. 462; *Munro v. Wivenhoe etc.* R'y, 4 De Gex, J. & S. 723; *Jennings v. Brighton etc. Board*, 4 De Gex, J. & S. 735; *De Mattos v. Gibson*, 4 De Gex & J. 276 (a charter-party); *Johnson v. Shrewsbury etc.* R'y, 3 De Gex, M. & G. 914; *Stocker v. Brockelbank*, 3 Maen. & G. 250; *Sainter v. Ferguson*, 1 Maen. & G. 286. The most recent English decisions interfere to restrain the violation of such contracts even while conceding that their specific performance could not be enforced. This doctrine has been adopted and acted upon to its full extent by a few modern American cases: *Western U. Tel. Co. v. Union Pac.* R'y, 1 McCrary, 558; *Western U. Tel. Co. v. St. Jo. etc.* R'y, 1 McCrary, 565; *Singer etc. Co. v. Union etc. Co.*, 1 Holmes, 253. The American courts generally have either rejected the doctrine of *Lumley v. Wagner* entirely, or have accepted it only to a partial extent: See *Sanquirico v. Benedetti*, 1 Barb. 315; *Bank of Cal. v. Fresno etc. Co.*, 53 Cal. 201; *Western U. Tel. Co. v. Western etc. R. R.*, 8 Baxt. 54; *Crutchfield v. Wason Car Works*, 8 Baxt. 242; *Smith v. McElwain*, 57 Ga. 247; *Hahn v. Concordia Soc.*, 42 Md. 460; *Manhattan Mfg. etc. Co. v. N. J. Stock Yard etc. Co.*, 23 N. J. Eq. 161; *Gallagher v. Fayette Co. R. R.*, 38 Pa. St. 102. In all cases, English and American, the inadequacy of the legal remedy is the sole criterion for interference by injunction to prevent the violation of any contract.

§ 1344, 1 Agreements not to carry on a trade: *Barret v. Blagrave*, 5 Ves. 555, 6 Ves. 104; *Williams v. Williams*, 2 Swanst. 253; *Shackle v.*

§ 1344. (a) For a further treatment of this subject, see Pom. *Equitable Remedies*, §§ 292-299.

**§ 1345. Miscellaneous Cases.**—As has already been stated, an injunction will always be granted, if necessary, to protect, aid, or enforce any equitable estate, interest, or primary right, or to secure and render efficient any purely equitable remedy. Among the most important in-

Baker, 14 Ves. 468; Crutwell v. Lye, 17 Ves. 335; Harrison v. Gardner, 2 Madd. 198; Ginesi v. Cooper, L. R. 14 Ch. Div. 596; Jones v. Heavens, L. R. 4 Ch. Div. 636; Altman v. Royal Aqua Soc., L. R. 3 Ch. Div. 228; Clements v. Welles, L. R. 1 Eq. 200; Turner v. Evans, 2 De Gex, M. & G. 740; Cobbs v. Niblo, 6 Ill. App. 60; Ropes v. Upton, 125 Mass. 258; McNutt v. McEwen, 10 Phila. 112; Carroll v. Hiekes, 10 Phila. 308; McClurg's Appeal, 58 Pa. St. 51; Harkinson's Appeal, 78 Pa. St. 196, 21 **Am. Rep.** 9; Richardson v. Peacock, 28 N. J. Eq. 151, 26 N. J. Eq. 40; Baumgarten v. Broadaway, 77 N. C. 8; Berger v. Armstrong, 41 Iowa, 447; Caswell v. Gibbs, 33 Mich. 331; Doty v. Martin, 32 Mich. 462; Butler v. Burleson, 16 Vt. 176; Guerand v. Dandeleit, 32 Md. 561, 3 **Am. Rep.** 164. Not to build, etc.: Rankin v. Huskisson, 4 Sim. 13; Lloyd v. London etc. R'y, 2 De Gex, J. & S. 568; Bowes v. Law, L. R. 9 Eq. 636; St. Andrew's Church's Appeal, 67 Pa. St. 512. Not to run trains past a certain station without stopping: Hood v. North East R'y, L. R. 8 Eq. 666; 5 Ch. 525; Phillips v. Great West. R'y, L. R. 7 Ch. 409; Rigby v. Great West. R'y, 2 Phill. Ch. 44. Not to ring a certain bell; Martin v. Nulkin, 2 P. Wms. 266. By an author, not to write or publish a rival work: Barfield v. Nicholson, 2 Sim. & St. 1; Morris v. Colman, 18 Ves. 437. See, also, as further illustrations, Wolfe v. Matthews, L. R. 21 Ch. Div. 194; Aspden v. Seddon, L. R. 10 Ch. 394; Gearns v. Baker, L. R. 10 Ch. 355; Catt v. Tourle, L. R. 4 Ch. 654; Leader v. Moody, L. R. 20 Eq. 145; Jones v. North, L. R. 19 Eq. 426; Pattisson v. Gilford, L. R. 18 Eq. 259, 262, 263; Warne v. Routledge, L. R. 18 Eq. 497; Fothergill v. Rowland, L. R. 17 Eq. 132; Telford v. Metrop. Bd. of Works, L. R. 13 Eq. 574; Feilden v. Slater, L. R. 7 Eq. 523; Peek v. Matthews, L. R. 3 Eq. 515; Dyke v. Taylor, 3 De Gex, F. & J. 467; Nicholson v. Rose, 4 De Gex & J. 10; Shrewsbury etc. R'y v. London etc. R'y, 3 Macn. & G. 70; Wagner v. Meety, 69 Mo. 150; Hall v. Wesster, 7 Mo. App. 56; Gold etc. Tel. Co. v. Todd, 17 Hun, 548; Gillis v. Hall, 2 Brewst. 342; Beckwith v. Howard, 6 R. I. 1; Manhattan etc. Co. v. Van Keuren, 23 N. J. Eq. 251; Haskell v. Wright, 23 N. J. Eq. 389; Parker v. Garrison, 61 Ill. 250; Frank v. Brunne-mann, 8 W. Va. 462.

Contracts which are entirely affirmative in form and language may imply and include a negative, so that their violation may be restrained

stances in which this general doctrine is applied, in addition to those already mentioned, are the following: Against *Corporations* and their directors and officers, to restrain acts which are illegal, *ultra vires*, or in violation of their fiduciary duties.<sup>1a</sup> While the right to member-

by injunction. In *Hamilton v. Hector*, L. R. 6 Ch. 701, a husband and wife had stipulated in a separation deed that the children should attend such schools as their father should choose, and should spend their holidays where the trustees should direct; the trustees directed that they should spend one half their holidays with their father, and the rest with their mother; the father was restrained by injunction from interfering with the children during the time they were to spend with their mother, in violation of his agreement. See, also, *Drury v. Molins*, 6 Ves. 328; *Pratt v. Brett*, 2 Madd. 62; *Briggs v. Law*, 4 Johns. Ch. 22; *Marvine v. Drexel's Ex'rs*, 68 Pa. St. 362.

§ 1345, 1 The general subject of suits against corporations, and their managing officers, based upon their trust relations, and their acts in violation thereof, has already been considered: *Ante*, §§ 1091-1096. In all such suits an injunction may be granted either as the sole remedy, or in connection with the remedies of rescission, cancellation, accounting, etc. In connection with the cases there cited, see, also, the following as illustrations: To restrain *ultra vires* acts: *Lord Auckland v. Westminster Board*, L. R. 7 Ch. 597; *Metts v. Northern R'y*, L. R. 5 Ch. 621; *Pudsey Gas Co. v. Corporation of Bradford*, L. R. 15 Eq. 167; *Pickering v. Stephenson*, L. R. 14 Eq. 322; *Kernaghan v. Williams*, L. R. 6 Eq. 228; *London etc. R'y v. London etc. R'y*, 4 De Gex & J. 362; *Ware v. Regent's Canal Co.*, 3 De Gex & J. 212; *Rogers v. Oxford etc. R'y*, 2 De Gex & J. 662; *Hodgson v. Earl of Powis*, 1 De Gex, M. & G. 6; *Cohen v. Wilkinson*, 1 Maen. & G. 481; *Platteville v. Galena etc. R. R.*, 43 Wis. 493. To restrain unlawful acts of directors or managing officers in violation of their fiduciary duties: *Cannon v. Trask*, L. R. 20 Eq. 669; *Dowling v. Pontypool etc. R'y*, L. R. 18 Eq. 714; *Featherstone v. Cooke*, L. R. 16 Eq. 298; *Mair v. Himalaya Tea Co.*, L. R. 1 Eq. 411; *Carlisle v. South East. R'y*, 1 Maen. & G. 689 (to restrain payment of dividends); *Pond v. Vt. Valley R. R.*, 12 Blatchf. 280; *Webb v. Ridgely*, 38 Md. 364 (to restrain a fraudulent transferee of stock from voting). To restrain the minority of a religious corporation from interfering with the control of the majority: *Cooper v. Gordon*, L. R. 8 Eq. 249; *Perry v. Shipway*, 4 De Gex & J. 353. To restrain a corporation from com-

§ 1345, (a) *Injunctions against corporations and their officers*: See *Pom. Equitable Remedies*, chap. XIV, §§ 301-308.

ship in a corporation, or to be a corporation officer, cannot, in general, be tested by means of an injunction, the improper or unlawful expulsion of a member from a voluntary association without good cause, or in violation of its by-laws, may be restrained by injunction. Between *Mortgagors and Mortgagees*.<sup>2c</sup> Against *Public Officers*. An injunction will not be granted, in general, to restrain persons from acting as public officers;<sup>3</sup> but the illegal, unlawful, or improper acts of public officers may be re-

mitting a trespass: *Eversfield v. Mid-Sussex R'y*, 3 De Gex & J. 286; and see cases *post*, under head of Trespass. To restrain the expulsion of a member from a club or society:<sup>b</sup> *Labouchere v. Earl of Wharncliffe*, L. R. 13 Ch. Div. 346; *Fisher v. Keane*, L. R. 11 Ch. Div. 353; *Fisher v. Board of Trade*, 80 Ill. 85; *Gregg v. Mass. Med. Soc.*, 111 Mass. 185, 15 Am. Rep. 24; *Lowry v. Read*, 3 Brewst. 452. As to the use of an injunction to restrain a person from being, or from acting as, an officer of a corporation, see *Aslatt v. Corporation of Southampton*, L. R. 16 Ch. Div. 143; *Hussey v. Gallagher*, 61 Ga. 86. See, also, in general, *Cromford etc. R'y v. Stockport etc. R'y*, 1 De Gex & J. 326; *Aurora etc. R. R. v. Lawrenceburgh*, 56 Ind. 80.

§ 1345, <sup>2</sup> To restrain mortgagee from improper sale under a power of sale, by advertisement, etc.: *Capehart v. Biggs*, 77 N. C. 261; *Purnell v. Vaughan*, 77 N. C. 268; *Haggerson v. Phillips*, 37 Wis. 364; *Collins v. Lamport*, 4 De Gex, J. & S. 500. To restrain mortgagor from committing waste, under certain circumstances, or doing other acts to the property whereby the security would be imperiled: *Bagnall v. Villar*, L. R. 12 Ch. Div. 812 (cutting crops); *Warner v. Jacob*, L. R. 20 Ch. Div. 220; *Truman v. Redgrave*, L. R. 18 Ch. Div. 547; *Mut. Life Ins. Co. v. Bigler*, 79 N. Y. 568 (removing property); *Taylor v. Collins*, 51 Wis. 123 (same remedy on foreclosure of a land contract). See, also, cases cited *post*, under head of Waste.

§ 1345, <sup>3</sup> The legal remedy is, in general, adequate to test the right to a public office: *Campbell v. Taggart*, 10 Phila. 443; *Jones v. Comm'rs of Granville*, 77 N. C. 280; *Sneed v. Bullock*, 77 N. C. 282; *Stone v. Wetmore*, 42 Ga. 601; *Sanders v. Metcalf*, 1 Tenn. Ch. 419 (no injunction to restrain a judge from acting).

§ 1345, (b) *Injunctions relating to voluntary associations and non-stock companies*: See Pom. Equitable Remedies, chap. XV, §§ 309-315.

§ 1345, (c) *Injunctions between mortgagor and mortgagee*: See Pom. Equitable Remedies, § 316.



strained when they would produce irreparable injury, or create a cloud upon title, or when such remedy is necessary to prevent a multiplicity of suits.<sup>4d</sup> To prevent a

§ 1345, 4 To restrain the imposition or enforcement of illegal taxes and other public burdens, at the suit of taxpayers: See *ante*, vol. 1, §§ 259, 260, 265, 266, where this subject is fully discussed, and the conflicting results of decisions in different states are formulated. In addition to the cases there cited, see *Wagner v. Meety*, 69 Mo. 150; *Curtenius v. Grand Rapids etc. R. R.*, 37 Mich. 583; *Cattell v. Lowry*, 45 Iowa, 478; *Albany etc. Min. Co. v. Auditor-General*, 37 Mich. 391; *Sinclair v. Comm'rs of Winona Co.*, 23 Minn. 404, 23 *Am. Rep.* 694; *South Platte Land Co. v. Comm'rs of Buffalo County*, 7 Neb. 253; *Burlington etc. R. R. v. Comm'rs of York County*, 7 Neb. 487; *George v. Dean*, 47 Tex. 73; *Douglass v. Harrisville*, 9 W. Va. 162, 27 *Am. Rep.* 548; *Marsh v. Supervisors of Clark County*, 42 Wis. 502; *Schettler v. Fort Howard*, 43 Wis. 48; *Hagaman v. Comm'rs of Cloud County*, 19 Kan. 394; *Worthen v. Badgett*, 32 Ark. 496; *New Orleans etc. R. R. v. Dunn*, 51 Ala. 128; *Wells v. Dayton*, 11 Nev. 161; *Union Pacific R. R. v. Lincoln Co.*, 3 Dill. 300; *Brown v. Concord*, 56 N. H. 375; *Savings Bank v. Portsmouth*, 52 N. H. 17. To restrain the sale of land under an illegal tax or assessment: *Kean v. Asch*, 27 N. J. Eq. 57; *Oliver v. Memphis etc. R. R.*, 30 Ark. 128 (a sale of a railroad); *Deming v. James*, 72 Ill. 78 (a sale of personal property not subject to tax); *Abbott v. Edgerton*, 53 Ind. 196 (same); *Trowbridge v. Horan*, 78 N. Y. 439. Instances of injunction refused: Against election officers: *Roudanez v. New Orleans*, 29 La. Ann. 271; *Harris v. Schryock*, 82 Ill. 119; *Hardesty v. Taft*, 23 Md. 512, 87 *Am. Dec.* 584. Against a city exercising legislative powers: *Chicago v. Wright*, 69 Ill. 318; and see *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, 24 *Am. Rep.* 756; *Hugg v. Camden*, 29 N. J. Eq. 6; *Brown v. Catlettsburg*, 11 Bush, 435; *People v. Canal Board*, 55 N. Y. 390; *Kelly v. Baltimore*, 53 Md. 134. Miscellaneous instances in which an injunction has been granted: To prevent the removal of a public schoolhouse: *District etc. of Lodomillo v. District etc. of Cass*, 54 Iowa, 115; or the removal of a county seat: *Stuart v. Bair*, 8 Baxt. 141.<sup>e</sup> To prevent taking of private property

§ 1345, (d) *Injunctions against public officers*: See *Pom. Equitable Remedies*, chap. XVII, §§ 321-338. *Against municipal corporations and their officers*; *Id.*, chap. XVIII, §§ 339-355. *Against taxation and special assessments*; *Id.*, chap. XIX, §§ 356-464.

§ 1345, (e) *Injunction against exercise of the power of eminent domain*: See *Pom. Equitable Remedies*, chap. XX, §§ 465-473.

*Cloud upon Title.* The use of the injunction to prevent acts which would create a cloud upon title is governed by the same rules which control the remedy of removing a cloud from title.<sup>5</sup> To protect *Married Women's* property.<sup>6</sup> In controversies between *Partners*, and in other special cases.<sup>7</sup>

for public use without compensation: *Folley v. Passaic*, 26 N. J. Eq. 216; and see *Tribune Ass'n v. Sun etc. Ass'n*, 7 Hun, 175; *Dairiese v. Cooke*, 91 U. S. 580; *Lewis v. Providence*, 10 R. I. 97; *People v. Chicago*, 53 Ill. 424.

§ 1345, <sup>5</sup> See *post*, *Removing Cloud*, and cases there cited; *Lehman v. Roberts*, 86 N. Y. 232; *Strusburgh v. New York*, 87 N. Y. 452; *Dederer v. Voorhies*, 81 N. Y. 154; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

§ 1345, <sup>6</sup> An injunction may be needed for this purpose; as, for example, to restrain the sale of her property for her husband's debts when her title is clear, but not unless it *is* clear: *Allen v. Benners*, 10 Phila. 10; *Simson v. Bates*, 10 Phila. 66; to prevent the collection of a mortgage assigned by a wife, when the assignment was void; *French v. Snell*, 29 N. J. Eq. 95.

§ 1345, <sup>7</sup> In settlement of partnership affairs after a dissolution: *Large v. Ditmars*, 27 N. J. Eq. 283. Special cases: When to restrain arbitration: *Pickering v. Cape Town R'y*, L. R. 1 Eq. 84; to prevent injury to the property of a foreign monarch, restraining the publication of spurious securities of the foreign government: *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217; to prevent a person from taking letters from the post-office for fraudulent purposes; *Zellenkoff v. Collins*, 23 Hun, 156; and see *Guion v. Trask*, 1 De Gex, F. & J. 373.

## SECTION II.

### TO PREVENT OR RESTRAIN THE COMMISSION OF TORTS.

#### ANALYSIS.

- § 1346. The estates and interests generally legal.
- § 1347. Kinds and classes of torts restrained.
- § 1348. Waste.
- § 1349. Nuisance: Public.
- § 1350. Nuisance: Private; when restrained.
- § 1351. Same: Instances; violations of easements.
- § 1352. Patent rights and copyrights.
- § 1353. Literary property as distinct from copyright.
- § 1354. Trade-marks.
- § 1355. Good-will.
- § 1356. Trespasses.
- § 1357. General doctrine; cases in which trespass may be enjoined.
- § 1358. Slander of title; libels; wrongful use of name.

**§ 1346. The Estates and Interests Generally Legal.**—The estates, interests, and primary rights to be secured by injunctions of this kind are in most instances legal; and the injunctions themselves, as a class, are frequently described as those for the protection of legal rights and interests. So far as they do thus sustain and enforce legal rights, they are, of course, supplementary to or in lieu of the legal remedies which courts of common law originally gave, and perhaps now give, by action, under the same circumstances. For this reason, the general test as stated in a former paragraph applies with special force. The inadequacy of the legal remedies is the criterion which determines the exercise of this preventive jurisdiction; and the criterion is enforced, especially by the American courts, with great strictness.

**§ 1347. Kinds and Classes of Torts Restrained.**—The legal remedy is ordinarily considered as adequate in

cases of torts to the person, and to property held by a legal title, and equity does not interfere.<sup>1</sup> There are, however, certain species of torts, in respect to each of which, as a class, it is settled that the legal remedy is generally inadequate, so that equity will generally interfere to prevent the wrong by injunction. There are other species of torts, in respect to each of which, as a class, the legal remedy is adequate, but may become inadequate, in individual instances, from their particular circumstances, so that in those instances an injunction will be granted. In the kind of torts for which the legal remedy is generally inadequate, so that an injunction is a proper remedy, the title of the injured party must be clear, the injury real, and not merely temporary or transient. They are waste, nuisance, including interference with easements, servitudes, and similar rights, infringements of patent rights, of copyrights, of trade-marks, and of other intangible property rights, the pecuniary value of which cannot be certainly estimated, such as literary property in manuscript writings and good-will. In ordinary trespasses the injured party is left to his remedy of damages, but the circumstances of a trespass to property—especially to real property—may be such that the compensatory remedy is inadequate, and a court of equity will prevent the wrong by injunction.

§ 1347, <sup>1</sup> Injunction never granted to restrain criminal acts:<sup>a</sup> Phillips v. Stone Mountain, 61 Ga. 386; Life Ass'n v. Boogher, 3 Mo. App. 173; nor arrests: Davis v. Am. Soc., 6 Daly, 81; 75 N. Y. 362; Cohen v. Comm'rs of Goldsboro, 77 N. C. 2. No preliminary injunction will be granted while the plaintiff's legal right is really doubtful and unsettled: Nat. Docks R. R. v. Central R. R., 32 N. J. Eq. 755; overruling Cent. R. R. v. Pa. R. R., 31 N. J. Eq. 475.

§ 1347, (a) *Injunctions to restrain criminal acts: See Pom. Equitable Remedies, chap. XXI, §§ 476-481.*



§ 1348. **Waste.**<sup>a</sup>—Waste is the destruction or improper deterioration or material alteration of things forming an essential part of the inheritance, done or suffered by a person rightfully in possession by virtue of a temporary or partial estate,—as, for example, a tenant for life or for years. The rightful possession of the wrong-doer is essential, and constitutes a material distinction between waste and trespass.<sup>1</sup> The remedy by injunction is fully established, and has not only virtually superseded the old common-law “action of waste,” but has to a great extent taken the place of the “action on the case” for damages. An injunction will be granted in all cases where a legal action would lie to recover possession of the land wasted, or to recover damages.<sup>2</sup> It will also be granted in many instances where no legal action can be maintained, although the interest of the injured

§ 1348, <sup>1</sup> Many acts are not waste in this country which would be waste in England, such as cutting timber, and modes of using the soil, when done in accordance with the usual methods of good husbandry in the neighborhood: See *Drown v. Smith*, 52 Me. 141; *Keeler v. Eastman*, 11 Vt. 293; *Gardiner v. Dering*, 1 Paige, 573; *Livingston v. Reynolds*, 26 Wend. 115; *Morehouse v. Cotheal*, 22 N. J. Eq. 521; *Lynn’s Appeal*, 31 Pa. St. 44, 72 Am. Dec. 721; *McCullough v. Irvine*, 13 Pa. St. 438; *Crawley v. Timberlake*, 2 Ired. Eq. 460; *Alexander v. Fisher*, 7 Ala. 514.

§ 1348, <sup>2</sup> *Pulteney v. Shelton*, 5 Ves. 260, note; *Twort v. Twort*, 16 Ves. 128; *Hole v. Thomas*, 7 Ves. 589; *Smallman v. Onions*, 3 Brown Ch. 621; *Powys v. Blgrave*, 4 De Gex, M. & G. 448; *Kekewich v. Marker*, 3 Maen. & G. 311; *Hawley v. Clowes*, 2 Johns. Ch. 122; *Kane v. Vanderburgh*, 1 Johns. Ch. 11; *Watson v. Hunter*, 5 Johns. Ch. 169; 9 Am. Dec. 295; *Duvall v. Waters*, 1 Bland, 569, 576, 18 Am. Dec. 350; *Hill v. Bowie*, 1 Bland, 593; *Markham v. Howell*, 33 Ga. 508; *Peak v. Hayden*, 3 Bush, 125; *Northrup v. Trask*, 39 Wis. 515; *Mut. L. Ins. Co. v. Bigler*, 79 N. Y. 568; *Vandemark v. Schoonmaker*, 9 Hun, 16; *Williams v. Peabody*, 8 Hun, 271; *Le Roy v. Wright*, 4 Saw. 530 (plaintiff’s legal title disputed).

§ 1348, (a) *Injunction against waste.*—For a detailed treatment of this subject, see Pom. *Equitable Remedies*, chap. XXII, §§ 482–492.

party is legal;<sup>3</sup> and where the estate of the injured party is wholly equitable;<sup>4</sup> and where the waste itself is entirely "equitable,"—that is, where, by the terms of the will, deed, settlement, or lease, the tenant holds the land "without impeachment of waste."<sup>5</sup> An injunction will

§ 1348, <sup>3</sup> Garth v. Cotton, 1 Ves. Sr. 524, 556; 1 Dick. 183; 1 Lead. Cas. Eq., 4th Am. ed., 955; Perrot v. Perrot, 3 Atk. 94; Robinson v. Litton, 3 Atk. 209; Farrant v. Lovel, 3 Atk. 723; Davis v. Leo, 6 Ves. 784, 787; Onslow v. —, 16 Ves. 173; Pratt v. Brett, 2 Madd. 62; Clement v. Wheeler, 25 N. H. 361; Attaquin v. Fish, 5 Met. 140, 147; Kane v. Vanderburgh, 1 Johns. Ch. 11, 12; Douglass v. Wiggins, 1 Johns. Ch. 435; Kidd v. Dennison, 6 Barb. 10, 15; Sarles v. Sarles, 3 Sand. Ch. 601; Ware v. Ware, 6 N. J. Eq. 117; Duvall v. Waters, 1 Bland, 569, 576; 18 Am. Dec. 350; Lewis v. Christian, 40 Ga. 187; Smith v. Rome, 19 Ga. 89; Lyon v. Hunt, 11 Ala. 295, 305, 46 Am. Dec. 216.

§ 1348, <sup>4</sup> Garth v. Cotton, 1 Ves. Sr. 524, 556; 1 Dick. 183; 1 Lead. Cas. Eq. 955; Robinson v. Litton, 3 Atk. 209; Farrant v. Lovel, 3 Atk. 723; Stansfield v. Habbergham, 10 Ves. 273, 277; Humphreys v. Harrison, 1 Jacob & W. 581; Wallington v. Taylor, 1 N. J. Eq. 314, 318; Brashear v. Macey, 3 J. J. Marsh. 89. At the suit of the vendee against the vendor under a land contract: Smith and Fleek's Appeal, 69 Pa. St. 474. Between mortgagee and mortgagor, to restrain waste of the mortgaged premises: Brady v. Waldron, 2 Johns. Ch. 148; Robinson v. Preswick, 3 Edw. Ch. 246; Ensign v. Colburn, 11 Paige, 503; Phoenix v. Clark, 6 N. J. Eq. 447; Nelson v. Pinegar, 30 Ill. 473; Bunker v. Locke, 15 Wis. 635; Robinson v. Russell, 24 Cal. 467; Cooper v. Davis, 15 Conn. 556; State v. North etc. R'y, 18 Md. 193; Parsons v. Hughes, 12 Md. 1; and in other cases of injuries analogous to waste: Litka v. Wilcox, 39 Mich. 94; Patton v. Moore, 16 W. Va. 428, 37 Am. Rep. 789; Frank v. Brunnemann, 8 W. Va. 462.

§ 1348, <sup>5</sup> Garth v. Cotton, *supra*; Vane v. Lord Barnard, 2 Vern. 738; Prec. Ch. 454; Rolt v. Lord Somerville, 2 Eq. Cas. Abr. 759; Aston v. Aston, 1 Ves. Sr. 264; Burges v. Lamb, 16 Ves. 174, 185; Day v. Merry, 16 Ves. 375; Abrahall v. Bubb, 2 Swanst. 172; Morris v. Morris, 15 Sim. 505; Wellesley v. Wellesley, 6 Sim. 497; Micklethwait v. Micklethwait, 1 De Gex & J. 504, 519; Kekewich v. Marker, 3 Maen. & G. 311; Att'y-Gen. v. Duke of Marlborough, 3 Madd. 498, 538; Sowerby v. Fryer, L. R. 8 Eq. 417; Birch-Wolfe v. Birch, L. R. 9 Eq. 683; Bubb v. Yelverton, L. R. 10 Eq. 465; Clement v. Wheeler, 25 N. H. 361.

also be granted to restrain threatened waste, although none has actually been committed.<sup>6</sup>

§ 1349. **Nuisance — Public.**<sup>a</sup>—A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the attorney-general in England, and at the suit of the state, or the people, or municipality, or some proper officer representing the commonwealth, in this country. A public nuisance must be established by clear evidence, before the preventive remedy will be granted.<sup>1</sup> A public nuisance will also be restrained at the suit of a private person who suffers therefrom a special and particular injury distinct from that suffered by him in common with the public at large; but this injury must be real, and such that the legal remedy of damages would not be adequate.<sup>2</sup>

§ 1348, <sup>6</sup> *Rodgers v. Rodgers*, 11 Barb. 595; *Duvall v. Waters*, 1 Bland, 569, 576; 18 **Am. Dec.** 350; *Loudon v. Warfield*, 5 J. J. Marsh, 196; *White Water etc. Co. v. Comegys*, 2 Ind. 469.

§ 1349, <sup>1</sup> *Att'y-Gen. v. Cleaver*, 18 Ves. 211, 217; *Att'y-Gen. v. Forbes*, 2 Mylne & C. 123; *Earl of Ripon v. Hobart*, 3 Mylne & K. 169, 179; *Att'y-Gen. v. Great East. R'y*, L. R. 6 Ch. 572; *Att'y-Gen. v. Eau Claire*, 37 Wis. 400; *State v. Eau Claire*, 40 Wis. 533; *Rochester v. Erickson*, 46 Barb. 92; *Coast Line R. R. v. Cohen*, 50 Ga. 451; *Pennsylvania v. Wheeling etc Bridge Co.*, 13 How. 518; *Miss. & Mo. R. R. v. Ward*, 2 Black, 485; *Att'y-Gen. v. Cohoes Co.*, 6 Paige, 133, 29 **Am. Dec.** 755; *Mohawk Bridge Co. v. Utica etc. R. R.*, 6 Paige, 554; *People v. Third Ave. R. R.*, 45 Barb. 63; *Hinchman v. Paterson etc. R. R.*, 17 N. J. Eq. 75, 86 **Am. Dec.** 252; *Craig v. People*, 47 Ill. 487.

§ 1349, <sup>2</sup> *Soltau v. De Held*, 2 Sim., N. S., 133; *Att'y-Gen. v. Sheffield Gas Co.*, 3 De Gex, M. & G. 304; *Att'y-Gen. v. Cambridge Gas Co.*, L. R. 4 Ch. 71, 80; *Att'y-Gen. v. Gee*, L. R. 10 Eq. 131; *Original Hartlepool etc. Co. v. Gibb*, L. R. 5 Ch. Div. 713; *Pettibone v. Hamilton*, 40 Wis. 402; *Coast Line R. R. v. Cohen*, 50 Ga. 451; *Thayer v. New Bedford R. R.*, 125 Mass. 253; *Osborne v. Brooklyn etc. R. R.*, 5 Blatchf. 366; *Hartshorn v. South Reading*, 3 Allen, 501; *Central Bridge Corp. v. Lowell*, 4 Gray, 474; *Rowe v. Granite Bridge Corp.*, 21 Pick. 344;

§ 1349, (a) *Injunction against public nuisance*: See **Pom. Equitable Remedies**, § 542.

§ 1350. **Private Nuisance — When Restrained.**<sup>a</sup>—It is a well-settled doctrine that equity will restrain a private nuisance at the suit of the injured party. This remedy will not, however, be granted in every instance of alleged nuisance. The present or threatened injury must be real, not trifling, transient, or temporary; it must be one for which, either on account of its essentially irreparable nature, or its repetition or continuance, the legal remedy of damages is inadequate. The title of the plaintiff must also be clear, or at least not subject to any substantial doubt or question. The equitable jurisdiction is therefore based upon the notion of restraining irreparable mischief, or of preventing vexatious litigation, or a multiplicity of suits.<sup>1</sup>

*Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 36 **Am. Dec.** 502; *Frink v. Lawrence*, 20 Conn. 117, 50 **Am. Dec.** 274; *Milhau v. Sharp*, 27 N. Y. 611, 84 **Am. Dec.** 314; *Knox v. New York*, 55 Barb. 404; *Smith v. Lockwood*, 13 Barb. 209; *Mayor etc. v. Baumberger*, 7 Rob. (N. Y.) 219; *Hudson River R. R. v. Loeb*, 7 Rob. (N. Y.) 418; *Manhattan etc. Co. v. Barker*, 7 Rob. (N. Y.) 523; *Peck v. Elder*, 3 Sand. 126; *Corning v. Lowerre*, 6 Johns. Ch. 439; *Sparhawk v. Union Pass. R'y*, 54 Pa. St. 401; *Black v. Phila. etc. R. R.*, 58 Pa. St. 249; *Philadelphia v. Collins*, 68 Pa. St. 106; *Buck Mt. etc. Co. v. Lehigh etc. Co.*, 50 Pa. St. 91, 99, 88 **Am. Dec.** 534; *Higbee v. Camden etc. R. R.*, 19 N. J. Eq. 276; *Allen v. Board of Freeholders*, 13 N. J. Eq. 68, 74; *Zabriskie v. Jersey City etc. R. R.*, 13 N. J. Eq. 314; *Delaware etc. R. R. v. Stump*, 8 Gill. & J. 479, 29 **Am. Dec.** 561; *Hamilton v. Whitridge*, 11 Md. 128, 69 **Am. Dec.** 184; *Savannah etc. R. R. v. Shiels*, 33 Ga. 601; *Columbus v. Jaques*, 30 Ga. 506; *Green v. Oakes*, 17 Ill. 249; *Smith v. Bangs*, 15 Ill. 399; *Ewell v. Greenwood*, 26 Iowa, 377; *Sheboygan v. Sheboygan etc. R. R.*, 21 Wis. 667.

§ 1350, <sup>1</sup> According to the modern decisions, a mere denial of the plaintiff's title in defendant's pleading will not prevent an injunction; but if the plaintiff's title is really disputed, or is in any real doubt, it must first be established by a verdict, before equity will interfere with its preventive relief: *Att'y-Gen. v. Nichol*, 16 Ves. 338, 342; *Wynstanley v. Lee*, 2 Swanst. 333, 335; *Fishmongers' Co. v. East India Co.*, 1

§ 1350, (a) *Injunction against nuisance.*—For a detailed treatment of this subject, see *Pom. Equitable Remedies*, chap. XXIV, §§ 512-541.



**§ 1351. Same. Instances—Violations of Easements.<sup>a</sup>**

Among the nuisances, or wrongs in the nature of nuisances, which equity readily prevents by injunction are those which consist in the interference with, disturbance, or destruction, actual or threatened, of easements and servitudes, whether created by grant or by covenant, or resulting from user. Some of the most common forms of such injuries which equity enjoins are the obstruction of ancient lights in England, and rights of air or of prospect, by erections of any kind; the removal of the lateral support of land by excavations; the interference with water rights by diverting or polluting streams. In fact, every disturbance of an easement or servitude, existing or threatened, will be thus restrained, whenever from the essential nature of the injury, or from its continuous

Dick. 163; *Blakemore v. Glamorganshire Canal Navigation*, 1 Mylne & K. 154; *Squire v. Campbell*, 1 Mylne & C. 459, 465, 467; *Taylor v. Davis*, 3 Beav. 388, note; *Whittaker v. Howe*, 3 Beav. 383, 387, 395, note; *Spencer v. London etc. R'y*, 8 Sims. 193; *Soltau v. De Held*, 2 Sim., N. S., 133; *Wood v. Sutcliffe*, 2 Sim., N. S., 163; *Walter v. Selfe*, 4 De Gex & S. 315; *Bostock v. North Staffordshire R'y*, 5 De Gex & S. 584; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Broadbent v. Imperial Gas Co.*, 7 De Gex, M. & G. 436, 461, 462; 7 H. L. Cas. 600; *Att'y-Gen. v. Sheffield Gas etc. Co.*, 3 De Gex, M. & G. 304; *Crossley v. Lightowler*, L. R. 2 Ch. 478; *Robson v. Whittingham*, L. R. 1 Ch. 442; *Att'y-Gen. v. Cambridge etc. Gas. Co.*, L. R. 4 Ch. 71; *Goodson v. Richardson*, L. R. 9 Ch. 221, 223, 226; *Stanford v. Hurlstone*, L. R. 9 Ch. 116, 118, 119; *Inchbald v. Robinson*, L. R. 4 Ch. 388, 395, 397; *London etc. R'y v. Lancashire etc. R'y*, L. R. 4 Eq. 174, 178; *Mayor v. Cardiff Water Co.*, 4 De Gex & J. 596, 597-599; *Elmhirst v. Spencer*, 2 Maen. & G. 45, 50; *Parker v. Winnipiseogee etc. Co.*, 2 Black, 545; *Barnes v. Hathorn*, 54 Me. 124; *Coe v. Winnepiseogee etc. Co.*, 37 N. H. 254, 264; *Eastman v. Amoskeag etc. Co.*, 47 N. H. 71; *Burnham v. Kempton*, 44 N. H. 78, 90; *Bassett v. Salisbury etc. Co.*, 47 N. H. 426; *Wilcox v. Wheeler*, 47 N. H. 488; *Wesson v. Washburn Iron Co.*, 13 Allen, 95, 90 Am. Dec. 181; *Rhode Island etc. Bank v. Hawkins*, 6 R. I. 198; *Falls Village etc. Co. v. Tibbetts*, 31 Conn. 165; *Fish v.*

§ 1351, (a) *Injunctions to protect easements.*—For a full discussion of this subject, see Pom. *Equitable Remedies*, chap. XXV, §§ 543-560.

character, the legal remedy is inadequate.<sup>1</sup> No sufficient notion can be obtained of the scope and efficiency of this injunctive jurisdiction, except from an actual examination of the numerous and varying instances in which it has been exercised by the modern decisions.

Dodge, 4 Denio, 311, 47 *Am. Dec.* 254; Catlin v. Valentine, 9 Paige, 575, 38 *Am. Dec.* 567; Brady v. Weeks, 3 Barb. 157; Auburn etc. Co. v. Douglass, 12 Barb. 553; Niagara Falls etc. Co. v. Great Western R'y, 39 Barb. 212; Gilbert v. Mickle, 4 Sand. Ch. 357; Peck v. Elder, 3 Sand. 126; Cleveland v. City Gas Light Co., 20 N. J. Eq. 201; Ross v. Butler, 19 N. J. Eq. 294, 97 *Am. Dec.* 654; Davidson v. Isham, 9 N. J. Eq. 186; Wolcott v. Melick, 11 N. J. Eq. 204, 66 *Am. Dec.* 790; Smith v. Cummings, 2 Pars. Cas. 92; Cunningham v. Rome R. R., 27 Ga. 499; Cotton v. Miss. etc. Co., 19 Minn. 497; Carlisle v. Cooper, 21 N. J. Eq. 576, 579, 580, 583-585, 587; Att'y-Gen. v. Steward, 21 N. J. Eq. 340, 20 N. J. Eq. 415; Holsman v. Boiling Spring etc. Co., 14 N. J. Eq. 335, 342-345; Shimer v. Morris C. Co., 27 N. J. Eq. 363; Nat. Docks R'y v. Central R. R., 32 N. J. Eq. 755; Central R. R. v. Pa. R. R., 31 N. J. Eq. 475; Le Roy v. Wright, 4 Saw. 530; Perry v. Parker, 1 Wood. & M. 280, 282; Hart v. Mayor etc. of Albany, 3 Paige, 213; Tuolumne Water Co. v. Chapman, 8 Cal. 392; Hicks v. Michael, 15 Cal. 107, 116; Levaroni v. Miller, 34 Cal. 231, 91 *Am. Dec.* 692; Olmsted v. Loomis, 9 N. Y. 423; Hacker v. Barton, 84 Ill. 313; Robinson v. Baugh, 31 Mich. 290.

§ 1351, 1 The jurisdiction, where equitable servitudes have been impressed upon land by covenants in deeds of conveyance, etc., has already been examined: See *ante*, § 1342.

*Interfering with easement of light and air:* Att'y-Gen. v. Nichol, 16 Ves. 338; Wynstanley v. Lee, 2 Swanst. 333; Back v. Stacy, 2 Russ. 121; Tapling v. Jones, 11 H. L. Cas. 290; Aynsley v. Glover, L. R. 10 Ch. 283; Hackett v. Baiss, L. R. 20 Eq. 494; Smith v. Smith, L. R. 20 Eq. 500; Ecclesiastical Comm'rs v. Kino, L. R. 14 Ch. Div. 213; Thruston v. Minke, 32 Md. 487; Robeson v. Pittenger, 2 N. J. Eq. 57, 32 *Am. Dec.* 412; Irwin v. Dixon, 9 How. 10.

*Removal of lateral support of land:* Hunt v. Peake, Johns. 705; 6 Jur., N. S., 1071.

*Interfering with water rights by diverting streams, polluting streams, etc.:*<sup>b</sup> The cases on this subject are very numerous. The jurisdiction

§ 1351, (b) *Injunctions for the protection of water rights:* See Pom. Equitable Remedies, chap. XXVI, §§ 561-564.

§ 1352. **Patent Rights and Copyrights.**<sup>a</sup>—When the existence of a patent right or of a copyright is conceded, or has been established by an action at law, the jurisdiction of equity to restrain an infringement is too well settled and familiar to require the citation of authorities in

is exercised alike against private persons and against public bodies, municipalities, boards, commissioners, etc.; *Lane v. Newdigate*, 10 Ves. 192; *Chalk v. Wyatt*, 3 Mer. 688; *Att'y-Gen. v. Birmingham*, 4 Kay & J. 528; *Wood v. Sutcliffe*, 2 Sim., N. S., 163; *Lingwood v. Stowmarket Co.*, L. R. 1 Eq. 77, 336; *Att'y-Gen. v. Richmond*, L. R. 2 Eq. 306; *Goldsmid v. Tunbridge etc. Comm'rs*, L. R. 1 Ch. 349; 1 Eq. 161; *Clowes v. Staffordshire etc. Co.*, L. R. 8 Ch. 125; *Att'y-Gen. v. Guardians*, L. R. 20 Ch. Div. 595, 604–610; *Metropolitan Board v. London etc. R'y*, L. R. 17 Ch. Div. 246; *Att'y-Gen. v. Birmingham Board*, L. R. 17 Ch. Div. 685, 691; *Pugh v. Golden V. R'y*, L. R. 15 Ch. Div. 330; *Glassop v. Heston etc. Board*, L. R. 12 Ch. Div. 102, 109; *Newington etc. Board v. Cottingham etc. Board*, 12 Ch. Div. 725, 734; *West Cumberland etc. Co. v. Kenyon*, L. R. 11 Ch. Div. 782; 6 Ch. Div. 773; *Taylor v. Corporation of St. Helens*, L. R. 6 Ch. Div. 264; *Flower v. Local Board etc.*, L. R. 5 Ch. Div. 347, 352; *Pennington v. Brinsopp etc. Co.*, L. R. 5 Ch. Div. 769; *Att'y-Gen. v. Great East. R'y*, L. R. 6 Ch. 572; *Att'y-Gen. v. Leeds Corporation*, L. R. 5 Ch. 583; *Att'y-Gen. v. Colney Hatch etc. Asylum*, L. R. 4 Ch. 146; *Baxendale v. McMurray*, L. R. 2 Ch. 790; *Crossley v. Lightowler*, L. R. 2 Ch. 478; *Nuneaton L. Board v. General Sewage Co.*, L. R. 20 Eq. 127; *Compton v. Lea*, L. R. 19 Eq. 115, 121; *Holt v. Corporation of Rochdale*, L. R. 10 Eq. 354, 361; *Carlisle v. Cooper*, 21 N. J. Eq. 568, 579, 583, 585; *Att'y-Gen. v. Steward*, 21 N. J. Eq. 340, 20 N. J. Eq. 415; *Shimer v. Morris Canal Co.*, 27 N. J. Eq. 363; *Holsman v. Boiling Spring etc. Co.*, 14 N. J. Eq. 335; *Jacobs v. Allard*, 42 Vt. 303, 1 *Am. Rep.* 331; *Bull v. Valley Falls Co.*, 8 R. I. 42; *Frink v. Lawrence*, 20 Conn. 117, 50 *Am. Dec.* 274; *Fisk v. Wilber*, 7 Barb. 395; *Pollitt v. Long*, 58 Barb. 20; *Olmsted v. Loomis*, 6 Barb. 152; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 165, 7 *Am. Dec.* 526; *Van Bergen v. Van Bergen*, 2 Johns. Ch. 272; 3 Johns. Ch. 282, 8 *Am. Dec.* 511; *Reid v. Gifford*, Hopk. Ch. 416; *Hammond v. Fuller*, 1 Paige, 197; *Arthur v. Case*, 1 Paige, 447; *Belknap v. Trimble*, 3 Paige, 577, 600; *Babcock v. New Jersey etc. Co.*, 20 N. J. Eq. 296; *Spangler's Appeal*, 64 Pa. St. 387; *Sanderson v. Pennsylvania Coal Co.*, 86 Pa. St. 401, 27 *Am. Rep.* 711; *Lewis v.*

§ 1352, (a) *Injunctions to protect patents and copyrights.*—For a full treatment, see *Pom. Equitable Remedies*, chap. XXVII, §§ 565–575.

its support. From the nature of the right and of the wrong,—the violation being a continuous act,—the legal remedy is necessarily inadequate. The ordinary form of relief is an accounting of profits and an injunction in equity; indeed, the action at law is seldom resorted to,

Stein, 16 Ala. 214, 50 **Am. Dec.** 177; Burden v. Stein, 27 Ala. 104, 62 **Am. Dec.** 758.

The California reports are so rich in most instructive cases that I may properly cite freely from them: Fitzgerald v. Urton, 5 Cal. 308; Burdge v. Underwood, 6 Cal. 45; Tenney v. Miners' D. Co., 7 Cal. 335; Tuolumne W. Co. v. Chapman, 8 Cal. 392; Weimer v. Lowery, 11 Cal. 104; Boggs v. Merced M. Co., 14 Cal. 279, 379; Henshaw v. Clark, 14 Cal. 460; Hicks v. Michael, 15 Cal. 107; Weaver v. Eureka Lake Co., 15 Cal. 271; Hicks v. Compton, 18 Cal. 206; Bensley v. Mt. Lake W. Co., 13 Cal. 306, 73 **Am. Dec.** 575; Logan v. Driscoll, 19 Cal. 623, 81 **Am. Dec.** 90; McLaughlin v. Kelly, 22 Cal. 212; Kittle v. Pfeiffer, 22 Cal. 484; Rupley v. Welch, 23 Cal. 452; Robinson v. Russell, 24 Cal. 467; Wixon v. Bear River etc. Co., 24 Cal. 367, 85 **Am. Dec.** 69; Leach v. Day, 27 Cal. 643; Ferrea v. Knipe, 28 Cal. 340, 87 **Am. Dec.** 128; Grigsby v. Burtnett, 31 Cal. 406; More v. Massini, 32 Cal. 590; Hill v. Smith, 32 Cal. 166; Levaroni v. Miller, 34 Cal. 231, 91 **Am. Dec.** 692; Yolo Co. v. Sacramento, 36 Cal. 193; Grigsby v. Clear Lake W. Co., 40 Cal. 396; Gregory v. Nelson, 41 Cal. 278; Cowell v. Martin, 43 Cal. 605; Cave v. Crafts, 53 Cal. 135; Robinson v. Black Diamond Coal Co., 50 Cal. 460; 57 Cal. 412, 40 **Am. Rep.** 118; and see the very important case of Woodruff v. North Bloomfield etc. M. Co., 8 Saw. 628, to enjoin several hydraulic mining companies from discharging their mining *débris* into a river, by which the lands of the adjoining proprietors below were destroyed, and the navigation of the river was impeded. Several of these California cases are very instructive with respect to injunctions against trespass.

*Miscellaneous examples—Encroachments upon public parks, squares, and the like:* Corning v. Lowerre, 6 Johns. Ch. 439; Hills v. Miller, 3 Paige, 254, 24 **Am. Dec.** 218; Trustees of Watertown v. Cowen, 4 Paige, 510.

*Corporations encroaching upon the rights of adjoining proprietors:* Coats v. Clarence R'y, 1 Russ. & M. 181; Bonaparte v. Camden etc. R. R., Bald. 205, 231; Mohawk etc. R. R. v. Artcher, 6 Paige, 83; Drake v. Hudson River R. R., 7 Barb. 508; Att'y-Gen. v. Tudor Ice Co., 104 Mass. 239; 6 **Am. Rep.** 227; Morris etc. R. R. v. Prudden, 20 N. J. Eq. 530.



except for the purpose of establishing the validity of the patent or copyright by the verdict of a jury when it is

*Disturbance of a burying-ground:* Beatty v. Kurtz, 2 Pet. 566, 584.

*Ringling of church bells:* Soltau v. De Held, 2 Sim., N. S., 133.

*Illustrations of various other nuisances:* Vernon v. Vestry of St. James, L. R. 16 Ch. Div. 449; Hedley v. Bates, L. R. 13 Ch. Div. 498; Sturges v. Bridgman, L. R. 11 Ch. Div. 852; Theed v. Debenham, L. R. 2 Ch. Div. 165; Broder v. Saillard, L. R. 2 Ch. Div. 692; Umfreville v. Johnson, L. R. 10 Ch. 580; Goodson v. Richardson, L. R. 9 Ch. 221; Att'y-Gen. v. Terry, L. R. 9 Ch. 423; Ball v. Ray, L. R. 8 Ch. 467; Thorpe v. Brumfitt, L. R. 8 Ch. 650; Gaunt v. Fynney, L. R. 8 Ch. 8; Hext v. Gill, L. R. 7 Ch. 699; Staight v. Burn, L. R. 5 Ch. 163; Inchbald v. Robinson, L. R. 4 Ch. 388; Att'y-Gen. v. Mid-Kent R'y, L. R. 3 Ch. 100; Clarke v. Clark, L. R. 1 Ch. 16; Tipping v. St. Helen's etc. Co., L. R. 1 Ch. 66; Ivimey v. Stocker, L. R. 1 Ch. 396; Smith v. Smith, L. R. 20 Eq. 500; Fenwick v. East London R'y, L. R. 20 Eq. 544; Allen v. Martin, L. R. 20 Eq. 462; Mott v. Shoolbred, L. R. 20 Eq. 22; Dyers's Co. v. King, L. R. 9 Eq. 438; Walker v. Brewster, L. R. 5 Eq. 25; Beadel v. Perry, L. R. 3 Eq. 465; Crump v. Lambert, L. R. 3 Eq. 409; Martin v. Headon, L. R. 2 Eq. 425, 434; Dent v. Auction Mart Co., L. R. 2 Eq. 238, 244, 246, 247; Broadbent v. Imperial Gas Co., 7 De Gex, M. & G. 436, 460, 462; 7 H. L. Cas. 600; St. Helen's etc. Co. v. Tipping, 11 H. L. Cas. 642; Watson v. Sutherland, 5 Wall. 74; Parker v. Winnipiseogee etc. Co., 2 Black, 545; Cadigan v. Brown, 120 Mass. 493; Richmond Mfg. Co. v. Atlantic etc. Co., 10 R. I. 106, 14 Am. Rep. 658; Duncan v. Hayes, 22 N. J. Eq. 25; Meigs v. Lister, 23 N. J. Eq. 199; O'Riley v. McChesney, 3 Lans. 278; Snow v. Williams, 16 Hun, 468; Rothery v. N. Y. Rubber Co., 24 Hun, 172; Seaman v. Lee, 10 Hun, 607; Beach v. Elmira, 22 Hun, 158; Henderson v. N. Y. Cent. R. R., 78 N. Y. 423; Lynch v. Mayor etc., 76 N. Y. 60, 32 Am. Rep. 271; Adams v. Popham, 76 N. Y. 410; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Olmsted v. Loomis, 9 N. Y. 423; Davis v. Lambertson, 56 Barb. 480; Owen v. Phillips, 73 Ind. 284; Wahle v. Reinbach, 76 Ill. 322; Greene v. Nunemacher, 36 Wis. 50; Pettibone v. Hamilton, 40 Wis. 402; Lewis v. Stein, 16 Ala. 214, 50 Am. Dec. 177; Ex parte Martin, 13 Ark. 198, 58 Am. Dec. 321; Lamborn v. Covington Co., 2 Md. Ch. 409.

It is only by examining a large number of decisions that any adequate notion can be obtained of the wide extent of this jurisdiction, as well as of its limitations. These cases show that the jurisdiction is not exercised merely in exceptional cases, as might be inferred from some judicial language.

really contested. Under the constitution of the United States, the cognizance of suits for the infringement of these rights belongs exclusively to the federal courts.<sup>1</sup>

**§ 1353. Literary Property as Distinct from Copyright.**<sup>a</sup>—In analogy to the protection of copyrights, a jurisdiction has become well established by modern decisions to restrain the invasion or piracy of literary property in the product of intellectual labor, which still remains in the form of manuscript, or which, if printed, has not been published, and over which, as a consequence, no statutory copyright has been obtained; and to restrain an invasion of the similar right which an artist has in his pictures, and other original works of his creative art. This jurisdiction belongs to the state courts. It will be exercised to restrain the unauthorized publication of *unpublished* manuscript or printed matter in violation of the rights of the person entitled thereto;<sup>1</sup> the unauthorized publication, performance, representation on the stage, or other similar uses of dramatic compositions which have not been “published” by the author or proprietor;<sup>2</sup> the unauthorized publication, delivery, or other like use of lectures which have been delivered by the

§ 1352, 1 Hogg v. Kirby, 8 Ves. 215, 223; Nicol v. Stockdale, 3 Swanst. 687; Bacon v. Jones, 4 Mylne & C. 433, 436; Saunders v. Smith, 3 Mylne & C. 711, 728; Martin v. Wright, 6 Sim. 297. See Curtis on Patent and Copyrights, and Webster’s Patent Cases.

§ 1353, 1 Duke of Queensbury v. Shebbeare, 2 Eden, 329; Pope v. Curl, 2 Atk. 342; Southey v. Sherwood, 2 Mer. 435, 437; Keene v. Wheatley, 9 Am. Law Reg. 33; Folsom v. Marsh, 2 Story, 100; Grigsby v. Breckenridge, 3 Bush, 480, 92 Am. Dec. 509.

§ 1353, 2 Keene v. Kimball, 16 Gray, 545, 77 Am. Dec. 426; Keene v. Clarke, 5 Rob. (N. Y.) 38; Palmer v. De Witt, 47 N. Y. 532, 7 Am. Rep. 480; 2 Sweeny, 530, 5 Abb. Pr., N. S., 130; Boucicault v. Fox, 5 Blatchf. 87; Keene v. Wheatley, 9 Am. Law Reg. 33; Crowe v. Aiken, 4 Am. Law Rev. 450.

§ 1353, (a) For annotations to this section, see Pom. Equitable Remedies, § 576.

author, but not otherwise published;<sup>3</sup> the unauthorized making, sale, or exhibition of copies of paintings, engravings, and other works of art, even though the originals may have been publicly exhibited;<sup>4</sup> and the unauthorized publication of private letters, whether on literary topics, or on matters of private business, friendship, or family.<sup>5</sup>

§ 1354. **Trade-marks.**<sup>a</sup>—Somewhat akin to the protection of patent and copy rights is that which courts of equity give, by means of the injunction, to the peculiar species of right arising from the adoption and use of “trade-marks.” Although some judicial opinions and some recent statutes speak of “property” in trade-marks, or call the right to their exclusive use a kind of property, yet in strictness the remedy does not depend upon any true *property* acquired in these symbols and names, but upon the broad principle that a court of equity will not permit fraud to be practiced upon the public nor upon private individuals.<sup>1</sup> It is well settled by modern deci-

§ 1353, <sup>3</sup> *Abernethy v. Hutchinson*, 1 Hall & T. 28, 40; 3 L. J. Ch. 209; *Keene v. Kimball*, 16 Gray, 545, 77 Am. Dec. 426, per Hoar, J.; *Bartlett v. Crittenden*, 4 McLean, 300.

§ 1353, <sup>4</sup> *Prince Albert v. Strange*, 1 Maen. & G. 25; 1 Hall & T. 1; 2 De Gex & S. 652; *Turner v. Robinson*, 10 Ir. Ch. 121, 510.

§ 1353, <sup>5</sup> The restraint may be at the suit of the writer against the person written to, or his assigns, or a stranger, or at the suit of the person written to, or his personal representatives against a stranger: *Pope v. Curl*, 2 Atk. 342; *Gee v. Pritchard*, 2 Swanst. 402; *Thompson v. Stanhope*, Amb. 737; *Lord Perceval v. Phipps*, 2 Ves. & B. 19, 24; *Earl of Granard v. Dunkin*, 1 Ball & B. 207; *Folsom v. Marsh*, 2 Story, 100, 113; *Hoyt v. Mackenzie*, 3 Barb. Ch. 320; *Wetmore v. Scovell*, 3 Edw. Ch. 515, 529; *Woolsey v. Judd*, 4 Duer, 379.

§ 1354, <sup>1</sup> The ground of the remedy was stated in *Farina v. Silverlock*, 6 De Gex, M. & G. 214, 217: “This right cannot properly be described as a copyright; it is, in fact, a right which can be said to exist only, and can be tested only, by its violation; it is the right which any person designating his wares or commodities by a particular

§ 1354, (a) *Trade-marks, trade names, unfair competition, etc.*: See Pom. *Equitable Remedies*, §§ 577-582.

sions, that when a trade-mark has been duly acquired by a manufacturer or dealer, an injunction will be granted at his suit to restrain other persons from using it upon their goods, or from using such limitations of it as will tend to mislead and deceive the public.<sup>2</sup> For a discussion of the numerous questions concerning the nature and validity of trade-marks, who may acquire them, how they may be acquired, what imitations are wrongful, and the like, the reader must be referred to the special treatises upon the subject.

trade-mark, as it is called, has to prevent others from selling wares which are not his, marked with that trade-mark, in order to mislead the public, and so incidentally to injure the person who is owner of the trade-mark."

§ 1354, 2 *Burgess v. Burgess*, 3 De Gex, M. & G. 896; *Rogers v. Nowill*, 3 De Gex, M. & G. 614; *Farina v. Silverlock*, 6 De Gex, M. & G. 214; *Edelsten v. Edelsten*, 1 De Gex, J. & S. 185; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523; 4 De Gex, J. & S. 137; *Flavel v. Harrison*, 10 Hare, 467; *Holloway v. Holloway*, 13 Beav. 209; *Cocks v. Chandler*, L. R. 11 Eq. 446; *Marshall v. Ross*, L. R. 8 Eq. 651; *Leather Cloth Co. v. Lorscheid*, L. R. 9 Eq. 345; *Radde v. Norman*, L. R. 14 Eq. 348; *Hirst v. Denham*, L. R. 14 Eq. 542; *Seixo v. Provezende*, L. R. 1 Ch. 192; *Lee v. Haley*, L. R. 5 Ch. 155; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Perry v. Truefitt*, 6 Beav. 66; *Collins Co. v. Brown*, 3 Kay & J. 423; *Collins Co. v. Cowen*, 3 Kay & J. 428; *Singer Mfg. Co. v. Loog*, L. R. 18 Ch. Div. 395; *Hendriks v. Montagu*, L. R. 17 Ch. Div. 638 (using a name); *Orr Ewing v. Johnston*, L. R. 13 Ch. Div. 434; *Civil Service etc. Ass'n v. Dean*, L. R. 13 Ch. Div. 512; *Boulnois v. Peake*, L. R. 13 Ch. Div. 513, note; *Day v. Brownrigg*, L. R. 10 Ch. Div. 294; *Merch. Bank Co. v. Merch. Bank*, L. R. 9 Ch. Div. 560 (using name); *Seigert v. Findlater*, L. R. 7 Ch. Div. 801; *Linoleum Mfg. Co. v. Nairn*, L. R. 7 Ch. Div. 834; *Braham v. Beachim*, L. R. 7 Ch. Div. 848; *Moet v. Pickering*, L. R. 6 Ch. Div. 770; *Cheavin v. Walker*, L. R. 5 Ch. Div. 850; *Hirsch v. Jonas*, L. R. 3 Ch. Div. 584; *Singer Mfg. Co. v. Wilson*, L. R. 2 Ch. Div. 434; *Estcourt v. Estcourt etc. Co.*, L. R. 10 Ch. 276; *Upmann v. Elkan*, L. R. 7 Ch. 130; 12 Eq. 140; *Ford v. Foster*, L. R. 7 Ch. 611; *Cope v. Evans*, L. R. 18 Eq. 138; *Raggett v. Findlater*, L. R. 17 Eq. 29; *James v. James*, L. R. 13 Eq. 421; *Hall v. Barrows*, 4 De Gex, J. & S. 150; *Coffeen v. Brunton*, 5 McLean, 256; *Canal Co. v. Clark*, 13 Wall. 311;



§ 1355. **Good-will.**—Another intangible kind of property which will be protected from invasion by injunction is “good-will.” The peculiar right, or rather expectancy, called “good-will,” assumes that a certain business has been established and carried on at some specific place. It consists in the probability, based upon the habits of men, that the persons who have been accustomed to deal with that business at that specific place, as well as others, will continue to come to such place and deal in the future. When such a business is transferred, the good-will may be assigned with it.<sup>1</sup> If a good-will is

Ames v. King, 2 Gray, 379; Boardman v. Meriden Britannia Co., 35 Conn. 402, 95 **Am. Dec.** 270; Bradley v. Norton, 33 Conn. 157, 87 **Am. Dec.** 200; Congress etc. Spring Co. v. High Rock etc. Co., 45 N. Y. 291, 6 **Am. Rep.** 82; Smith v. Woodruff, 48 Barb. 438; Samuel v. Berger, 24 Barb. 163; Howard v. Henriques, 3 Sand. 725; Palmer v. Harris, 60 Pa. St. 156, 100 **Am. Dec.** 557; Rowley v. Houghton, 2 Brewst. 303; Dixon Crucible Co. v. Guggenheim, 2 Brewst. 321; McCartney v. Garnhart, 45 Mo. 593, 100 **Am. Dec.** 397; Filley v. Fassett, 44 Mo. 168, 100 **Am. Dec.** 275; Gillott v. Esterbrook, 48 N. Y. 374, 8 **Am. Rep.** 553; 47 Barb. 455; Godillot v. Harris, 81 N. Y. 263; Burnett v. Phalon, 3 Keyes, 594; Gillott v. Kettle, 3 Duer, 624; Amoskeag Mfg. Co. v. Spear, 2 Sand. 599; Lockwood v. Bostwick, 2 Daly, 521; Curtis v. Bryan, 2 Daly, 312; Pettridge v. Wells, 4 Abb. Pr. 144; Coats v. Holbrook, 2 Sand. Ch. 586; Taylor v. Carpenter, 2 Sand. Ch. 603; 11 Paige, 292, 42 **Am. Dec.** 114; Woodward v. Lazar, 21 Cal. 448, 82 **Am. Dec.** 751; Derringer v. Plate, 29 Cal. 292, 87 **Am. Dec.** 170; Falkinburg v. Lucy, 35 Cal. 52, 95 **Am. Dec.** 76; Choynski v. Cohen, 39 Cal. 501, 2 **Am. Rep.** 476; Burke v. Cassin, 45 Cal. 467, 13 **Am. Rep.** 204; Coffeen v. Brunton, 4 McLean, 516; Walton v. Crowley, 3 Blatchf. 440; Hostetter v. Vowinkle, 1 Dill. 329; Heath v. Wright, 3 Wall. Jr. 141; Taylor v. Carpenter, 3 Story, 458; 2 Wood. & M. 1; Moorman v. Hoge, 2 Saw. 78; Taylor v. Gillies, 59 N. Y. 331, 17 **Am. Rep.** 333; Gouraud v. Trust, 6 Thomp. & C. 133; 3 Hun, 627; Meneely v. Meneely, 3 Thomp. & C. 540; 1 Hun, 367.

§ 1355, <sup>1</sup> Independently of statute, a good-will by itself, without the business on which it depends, cannot be assigned: See Cal. Civ. Code, secs. 992, 993.

thus assigned with a business, interference with it by the assignor will generally be restrained by injunction.<sup>2</sup>

§ 1356. **Trespasses.**<sup>a</sup>—At an early day the court of chancery refused to interfere and restrain any trespasses. Lord Thurlow broke through this rule, and began to use the preventive relief against such wrongs. He was followed by Lord Eldon;<sup>1</sup> and the jurisdiction is now firmly established in its principles, although there is no little disagreement among the courts—and especially the American courts—in applying these principles.

§ 1357. **General Doctrine — Cases in Which Trespass may be Enjoined.**—If a trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere. The *principle* determining the jurisdiction embraces two classes of cases, and may be correctly formulated as follows: 1. If the trespass, although a single act, is or would be destructive, if the injury is or would be irreparable,—that is, if the injury done or threatened is of such a nature that, when accomplished, the property cannot be restored to its original condition, or cannot be replaced, by means of

§ 1355, <sup>2</sup> When a person who had carried on a business at a certain locality transfers the business with its good-will, if he should set up the same business again so near the locality as to draw off the customers from the old place, this would be an infringement of the good-will. The legal remedy would be inadequate, for it would always be very difficult, if not impossible, to estimate the pecuniary damages upon any certain basis. The gist of the injury is undoubtedly the breach of an implied contract arising from the transfer; and often there is an express stipulation: See *ante*, under § 1344, cases concerning contracts in restraint of trade.

§ 1356, <sup>1</sup> See opinion of Lord Eldon in *Thomas v. Oakley*, 18 Ves. 184; *Hanson v. Gardiner*, 7 Ves. 305.

§ 1356, (a) *Injunctions against trespasses.*—For a detailed treatment of this subject, see *Pom. Equitable Remedies*, chap. XXI, §§ 493–511.

compensation in money,—then the wrong will be prevented or stopped by injunction. 2. If the trespass is *continuous* in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act *if it stood alone*, then also the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions. In both cases the ultimate criterion is the inadequacy of the legal remedy.<sup>1</sup> All the cases, English and American, have professed to adopt the in-

§ 1357, 1 The legal remedy is not adequate simply because a recovery of pecuniary damages is possible. It is only adequate when the injured party can, *by one action at law*, recover damages which constitute a complete and certain relief for the whole wrong,—a relief virtually as efficient as that given by a court of equity. This conclusion is sustained by the consensus of modern decisions of the highest authority; although it cannot be claimed that the cases are unanimous in its acceptance. The principle, so far as it applies to the first class of trespasses—those *essentially* destructive—was stated by Chancellor Kent in two leading cases, which may be regarded as the counterparts of each other: *Livingston v. Livingston*, 6 Johns. Ch. 497, 499, 10 *Am. Dec.* 353; and *Jerome v. Ross*, 7 Johns. Ch. 315, 333, 11 *Am. Dec.* 484. In *Livingston v. Livingston*, he granted an injunction, citing and relying upon the following English cases, among others: *Mitchell v. Dors*, 6 Ves. 147; *Hamilton v. Worsefold*, cited in 10 Ves. 290; *Crockford v. Alexander*, 15 Ves. 138; *Twort v. Twort*, 16 Ves. 128; *Kinder v. Jones*, 17 Ves. 110; *Earl Cowper v. Baker*, 17 Ves. 128; *Gray v. Duke of Northumberland*, 17 Ves. 281, and *Thomas v. Oakley*, 18 Ves. 184. In *Jerome v. Ross*, *supra*, he refused to enjoin canal commissioners, acting under color of a state statute, from quarrying a ledge of rocks on complainant's land, it not appearing that the stone had any market value, or that its removal would injure the freehold. He cited *Stevens v. Beekman*, 1 Johns. Ch. 318, and distinguished *Gardner v. Newburgh*, 2 Johns. Ch. 162, and *Belknap v. Belknap*, 2 Johns. Ch. 463. Whatever may be thought of the actual decision in *Jerome v. Ross*, it cannot be denied that the tendency of Chancellor Kent's opinion in narrowing the jurisdiction to the comparatively few trespasses of an extraordinary and specially aggravated nature is opposed to the modern decisions of the highest ability and authority.

adequacy of legal remedies as the test and limit of the injunctive jurisdiction; but in applying this criterion, the modern decisions, with some exceptions among the American authorities, have certainly held the injury to be irreparable and the legal remedy inadequate in many instances and under many circumstances where Chancellor Kent would probably have refused to interfere. It is certain that many trespasses are now enjoined which, if committed, would fall far short of *destroying* the property, or of rendering its restoration to its original condition impossible. The injunction is granted, not merely because the injury is *essentially* destructive, but because, being continuous or repeated, the full compensation for the entire wrong cannot be obtained in one action at law for damages.<sup>2</sup> While the same formula is employed by

§ 1357, <sup>2</sup> Illustrations: Injury to houses, fixtures, land, etc.: De Veney v. Gallagher, 20 N. J. Eq. 33; Witmer's Appeal, 45 Pa. St. 455, 84 **Am. Dec.** 505; Frederick v. Groshon, 30 Md. 436, 96 **Am. Dec.** 591; Ryan v. Brown, 18 Mich. 196, 100 **Am. Dec.** 154; Echelkamp v. Schrader, 45 Mo. 505. Injuring a party-wall: Phillips v. Bordman, 4 Allen, 147. Cutting off an aqueduct or water supply: Wilcox v. Wheeler, 47 N. H. 488; Wright v. Moore, 38 Ala. 593, 82 **Am. Dec.** 731; Pettigrew v. Evansville, 25 Wis. 223, 3 **Am. Rep.** 50. Obstructing a railroad, or access to it: London etc. R'y v. Lancashire etc. R'y, L. R. 4 Eq. 174; Clark v. Jeffersonville etc. R. R., 44 Ind. 248. Destroying trees, ornamental or timber: Sarles v. Sarles, 3 Sand. Ch. 601; Daubenspeck v. Gear, 18 Cal. 443. Excavating ore, coal, stones, etc.: West Point Iron Co. v. Reymert, 45 N. Y. 703; Anderson v. Harvey's Heirs, 10 Gratt. 386; Merced etc. Co. v. Fremont, 7 Cal. 317, 68 **Am. Dec.** 262; Real Del Monte etc. Co. v. Pond etc. Co., 23 Cal. 82; More v. Massini, 32 Cal. 590. Diverting a stream from a mill: Corning v. Troy etc. Factory, 40 N. Y. 191. Continuous or repeated trespasses: Martyr v. Lawrence, 2 De Gex, J. & S. 261, 271; Allen v. Martin, L. R. 20 Eq. 462; Carpenter v. Gwynn, 35 Barb. 395; Musselman v. Marquis, 1 Bush. 463, 89 **Am. Dec.** 637.

Examples of cases where an injunction was *refused*: Smith v. Pettingill, 15 Vt. 82, 40 **Am. Dec.** 667; Attaquin v. Fish, 5 Met. 140, 147; Blake v. Brooklyn, 26 Barb. 301; Hart v. Albany, 9 Wend. 571; Southard v. Morris Canal Co., 1 N. J. Eq. 519, 521; Lutheran Church v.



the courts of equity in defining their jurisdiction, the jurisdiction itself has practically been enlarged; judges have been brought to see and to acknowledge—contrary to the opinion held by Chancellor Kent—that the com-

Maschop, 10 N. J. Eq. 57; Cross v. Morristown, 18 N. J. 305; Torrey v. Camden etc. R. R., 18 N. J. Eq. 293; Colwell v. Mays Landing etc. Co., 19 N. J. Eq. 245; Mulvany v. Kennedy, 26 Pa. St. 44; Georges Creek etc. Co. v. Detmold, 1 Md. Ch. 371; Duvall v. Waters, 1 Bland, 569, 577, 18 **Am. Dec.** 350; Davis v. Reed, 14 Md. 152; Cherry v. Stein, 11 Md. 1; Shipley v. Ritter, 7 Md. 408, 61 **Am. Dec.** 371; Gause v. Perkins, 3 Jones Eq. 177, 69 **Am. Dec.** 728; Scofield v. Van Bokkelen, 5 Jones Eq. 342; Thomas v. James, 32 Ala. 723; Lyon v. Hunt, 11 Ala. 295, 306, 46 **Am. Dec.** 216; Indianapolis etc. Co. v. Indianapolis, 29 Ind. 245; Blanchard v. Doering, 23 Wis. 200; Weigel v. Walsh, 45 Mo. 560. See, also, the following cases, illustrating,—1. Trespasses which, though single, wrought great injury to property; and 2. Trespasses which were continuous: Powell v. Aiken, 4 Kay & J. 343, 355; Great North. etc. R'y v. Clarence R'y, 1 Coll. C. C. 507; Phillips v. Truby, 8 Jur., N. S., 999; Manchester etc. R'y v. Worksop Board of Health, 23 Beav. 198, 209; Corning v. Troy Iron and Nail Factory, 40 N. Y. 191, 205, 206; 39 Barb. 311, 319, 325–238; 34 Barb. 485, 491, 492; 6 How. Pr. 89; Davis v. Lambertson, 56 Barb. 480, 485; Niagara Falls etc. Co. v. Great W. R'y, 39 Barb. 212, 224. Further illustrations: Stannard v. Vestry of St. Giles, L. R. 20 Ch. Div. 190, 196; Strelley v. Pearson, L. R. 15 Ch. Div. 113, 116; Hall v. Byron, L. R. 4 Ch. Div. 667; Stanford v. Hurlstone, L. R. 9 Ch. 116; Hext v. Gill, L. R. 7 Ch. 699; Lord Auckland v. Westminster Board, L. R. 7 Ch. 597; London etc. R'y v. Lancashire etc. R'y, L. R. 4 Eq. 174; Bowser v. Maclean, 2 De Gex, F. & J. 415; Lloyd v. London etc. R'y, 2 De Gex, J. & S. 568, 578; Watson v. Sutherland, 5 Wall. 74; Chapman v. Toy Long, 4 Saw. 28; Patton v. Moore, 16 W. Va. 428, 37 **Am. Rep.** 789; Pierpont v. Harrisville, 9 W. Va. 215; West v. Smith, 52 Cal. 322; Gilman v. Sheboygan etc. R. R., 40 Wis. 653; Carpenter v. Grisham, 59 Mo. 247; Clark v. Jeffersonville etc. R. R., 44 Ind. 248; Folley v. Passaic, 26 N. J. Eq. 216; Southmayd v. McLaughlin, 24 N. J. Eq. 181; Johnston v. Hyde, 25 N. J. Eq. 454; 33 N. J. Eq. 632; Echelkamp v. Schrader, 45 Mo. 505; Hacker v. Barton, 84 Ill. 313; Bohlman v. Green Bay etc. R'y, 40 Wis. 157, 169; Wilson v. Mineral Point, 39 Wis. 160; Avery v. Empire Woolen Co., 82 N. Y. 582; Henderson v. N. Y. Cent. R. R., 78 N. Y. 423; Prot. Ref. Dutch Church v. Bogardus, 5 Hun, 304; Morgan v. Palmer, 48 N. H. 336; Creely v. Bay State B. Co., 103 Mass. 514; and see the California cases cited *ante*, under Private Nuisance.

mon-law theory of not *interfering* with persons until they shall have actually committed a wrong is fundamentally erroneous, and that a remedy which *prevents* a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it by the pecuniary damages which a jury may assess. The ideal remedy in any perfect system of administering justice would be that which absolutely precludes the commission of a wrong, not that which awards punishment or satisfaction for a wrong after it is committed. I have placed in the foot-note some illustrations of numerous particular cases in which the injunction has been granted, all depending upon their own circumstances, but all resting upon the same general principle, that the legal remedy of damages is not adequate, and the ends of justice require the relief of prevention in place of mere compensation.

**§ 1358. Slander of Title — Libels — Wrongful Use of Name.<sup>a</sup>**—Partly by analogy with the restraint of trespasses, and partly by analogy with the restraint of that fraud upon the public and upon the proprietor which is involved in the use of counterfeited trade-marks, the English courts have, by recent decisions, exercised the injunctive jurisdiction to restrain injurious publications concerning property which operate as a slander of the owner's title, and libelous publications which are injurious to the plaintiff's business, trade, or profession, and the wrongful use of a name by which the public would be misled, and the plaintiff injured in his business.<sup>1</sup>

§ 1358, <sup>1</sup> Such publications may be restrained by preliminary as well as by final injunction. The jurisdiction is exercised with great caution, and only where the facts are clearly established, and the untruth of the publication is satisfactorily shown. The following are the most important cases: Quartz Hill etc. Co. v. Beall, L. R. 20 Ch. Div. 501, 507 (libel on a corporation); Halsey v. Brotherhood, L. R. 19 Ch.

§ 1358, (a) For further treatment of this subject, see Pom. Equitable Remedies, chap. XIX, §§ 629-631.

This extension of the jurisdiction is not based, as it seems, upon any statutory enlargement of the inherent powers of equity; but is the result of the new system by which the one court is empowered to administer both legal and equitable remedies in any and all actions. The American courts seem, thus far, unwilling to follow the example of the recent English decisions, and they decline to extend the jurisdiction so as to restrain such torts as libels on business, slanders of title, and the like.<sup>2b</sup>

Div. 386; 15 Ch. Div. 514 (slander of title to a patent right); *Dicks v. Brooks*, L. R. 15 Ch. Div. 22 (same); *Thomas v. Williams*, L. R. 14 Ch. Div. 864, 871, 872 (libel injurious to a trade); *Thorley's Cattle Food Co. v. Massam*, L. R. 14 Ch. Div. 763, reversing L. R. 6 Ch. Div. 582 (same; a leading case). In *Prudential Ass. Co. v. Knott*, L. R. 10 Ch. 142, *Fisher v. Appollinaris Co.*, L. R. 10 Ch. 297, *Clover v. Royden*, L. R. 17 Eq. 190, and *Mulkern v. Ward*, L. R. 13 Eq. 619, the jurisdiction to enjoin such libelous publications was denied; while in *Dixon v. Holden*, L. R. 7 Eq. 488, and *Springhead etc. Co. v. Riley*, L. R. 6 Eq. 551, it had been exercised. See, also, *Shaw v. Earl of Jersey*, L. R. 4 C. P. D. 120, 359; *Saxby v. Easterbrook*, L. R. 3 C. P. D. 339. As to restraining the use of plaintiff's name by defendant in his own business, see *Fullwood v. Fullwood*, L. R. 9 Ch. Div. 176; *James v. James*, L. R. 13 Eq. 421; *Massam v. Thorley's etc. Co.*, L. R. 6 Ch. Div. 574; *Day v. Brownrigg*, L. R. 10 Ch. Div. 294. In *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217, it was held that an injunction would be granted at the suit of a foreign sovereign to restrain the manufacture and issue, within English territory, of spurious notes and securities of the foreign government.

§ 1358, 2 In Massachusetts these decisions are expressly repudiated: *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69, 19 *Am. Rep.* 310; *Whitehead v. Kitson*, 119 Mass. 484. Injunctions to restrain libelous publications concerning the plaintiff's business were also refused in *Life Ass'n v. Boogher*, 3 Mo. App. 173; *Mauger v. Dick*, 55 How. Pr. 132; and *Singer Mfg. Co. v. Domestic etc. Co.*, 49 Ga. 70, 15 *Am. Rep.* 674. In *Celluloid Mfg. Co. v. Goodyear etc. Co.*, 13 Blatchf. 375, the jurisdiction is recognized to restrain such publications when they are not only false and injurious, but also malicious.

§ 1358, (b) *Injunctions against strikes, boycotts, combinations, etc.*: See Pom. *Equitable Remedies*, chap. XXVIII.

*Injunctions against miscellaneous torts*: See Pom. *Equitable Remedies*, chap. XXIX.

## SECTION III.

## MANDATORY INJUNCTIONS.

## ANALYSIS.

## § 1359. Nature and object; when granted.

§ 1359. **Nature and Object—When Granted.**<sup>a</sup>—This term, in strictness, is confined to interlocutory or preliminary injunctions. Where, on the final hearing in a case of nuisance, or interference with easements, or continued trespass analogous to nuisance, the relief is granted compelling the defendant to remove his obstructions or erections, and to restore the plaintiff to his original condition, and thereby to end the wrong, the remedy is in fact an ordinary decree for an abatement, and is in no proper sense an injunction of any kind. But in these and similar cases the *preliminary* injunction, while purporting simply to restrain the wrong, and while negative in its terms, may be so framed that it restrains the defendant from permitting his previous wrongful act to operate, and therefore virtually compels him to undo it by removing the obstructions or erections, and by restoring the plaintiff to his former condition. Such an injunction is termed mandatory, and resembles in its effect the restorative interdict of the Roman law. It is used where the injury is immediate, and pressing, and irreparable, and clearly established by the proofs, and not acquiesced in by the plaintiff, since an order directly compelling an abatement of the nuisance, or a removal of the obstructions, cannot be made upon interlocutory

§ 1359, (a) For annotations to this section, see Pom. Equitable Remedies, chap. XXX, § 636.



motion.<sup>1</sup> The rule is fully established, at least by the English decisions, and is not controverted by American authority, that in such cases, where the facts are clearly established and the injury is real, and the plaintiff acted promptly upon his acquiring knowledge of the defendant's proceeding, a preliminary mandatory injunction may be granted, although the act complained of was fully completed before the suit was commenced. It should be observed, however, that no other equitable remedy is

§ 1359, <sup>1</sup> Preliminary mandatory injunctions have undoubtedly been granted more freely by the English courts than by the American. Indeed, it has been said in some American decisions that a mandatory *interlocutory* injunction would never be granted. This doctrine is not only opposed to the overwhelming weight of authority, but is contrary to the principle which regulates the administration of preventive relief, and is manifestly absurd.

In *Robinson v. Lord Byron*, 1 Brown Ch. 588, Lord Eldon granted a preliminary injunction restraining defendant "from using and maintaining certain dams, gates, etc., so as to prevent water from flowing to plaintiff's mill as it had done." This was done for the express purpose of compelling defendant to remove the dams, gates, etc., which he had constructed. In *Lane v. Newdigate*, 10 Ves. 192, Lord Eldon granted a preliminary injunction restraining defendant "from impeding plaintiff from navigating [a certain canal] by continuing to keep the canal banks and works out of repair, by diverting the water, or by continuing the removal of the stop-gate." Lord Eldon said this would have the effect of causing defendant to restore the stop-gate and repair the banks; and he avowedly granted the injunction for that express object. These two cases are among the earliest, if not the very earliest, instances of preliminary injunctions intentionally and expressly mandatory in their operation. The following cases will furnish numerous illustrations, and will also show the limitations placed upon their use: *Rankin v. Huskisson*, 4 Sim. 13; *Hervey v. Smith*, 1 Kay & J. 389, 392; *Att'y-Gen. v. Metropolitan Board of Works*, 1 Hem. & M. 298, 312; *Hepburn v. Lordan*, 2 Hem. & M. 345, 352; *Earl of Mexborough v. Bower*, 7 Beav. 127, 133; *Greatrex v. Greatrex*, 1 De Gex & S. 692; *Green v. Green*, 5 Hare, 400, note; *Great North of England R'y v. Clarence R'y*, 1 Coll. C. C. 507, 517, 521, 526; *Blakemore v. Glamorgan-shire Canal Nav.*, 1 Mylne & K. 154, 183; *Spencer v. Birmingham R'y*, 8 Sim. 193, 198; *Att'y-Gen. v. Manchester R'y*, 8 Sim. 436; *Hooper v.*

more liable to be defeated by acquiescence, or by delay on the plaintiff's part from which acquiescence may be inferred. The cases require of the plaintiff a promptness in objecting and in taking steps to enforce his objection, upon receiving notice of the defendant's structures or erections which are sought to be restrained, if the circumstances are such that the defendant would be unnecessarily prejudiced by the plaintiff's delay.<sup>2</sup>

Brodrick, 11 Sim. 47; Gaskin v. Balls, L. R. 13 Ch. Div. 324; Krehl v. Burrell, L. R. 7 Ch. Div. 551; Cooke v. Chilcott, L. R. 3 Ch. Div. 694; Lord Manners v. Johnson, L. R. 1 Ch. Div. 673; City of London etc. Co. v. Tennant, L. R. 9 Ch. 212; Holmes v. Upton, L. R. 9 Ch. 214, note; Goodson v. Richardson, L. R. 9 Ch. 221; Att'y-Gen. v. Mid-Kent R'y, L. R. 3 Ch. 100; Durell v. Pritchard, L. R. 1 Ch. 244; Smith v. Smith, L. R. 20 Eq. 500; Lady Stanley v. Earl of Shrewsbury, L. R. 19 Eq. 616; Bowes v. Law, L. R. 9 Eq. 636; Senior v. Pawson, L. R. 3 Eq. 330; Beadel v. Perry, L. R. 3 Eq. 465; Martin v. Headon, L. R. 2 Eq. 425; Spokes v. Banbury Board of Health, L. R. 1 Eq. 42; Curriers' Co. v. Corbett, 4 De Gex, J. & S. 764; Jacomb v. Knight, 3 De Gex, J. & S. 533; Low v. Innes, 4 De Gex, J. & S. 286; Isenberg v. East India House Co., 3 De Gex, J. & S. 263; Kernot v. Potter, 3 De Gex, F. & J. 447; Black v. Good Intent etc. Co., 31 La. Ann. 497; Longwood etc. R. R. v. Baker, 27 N. J. Eq. 166; Rogers Locomotive Works v. Erie R. R., 20 N. J. Eq. 379; Cole etc. Min. Co. v. Virginia etc. Water Co., 1 Saw. 685; Corning v. Troy Iron etc. Factory, 40 N. Y. 191, 205; Auburn etc. P. R. v. Douglass, 12 Barb. 553; Penniman v. N. Y. Balance etc. Co., 13 Haw. Pr. 40.

§ 1359, <sup>2</sup> See *ante*, vol. 2, § 817. In some cases a delay by the plaintiff would clearly not be prejudicial to defendant. For example, in *Greatrex v. Greatrex*, 1 De Gex & S. 692, one partner had wrongfully removed the partnership books from the place of business, and a preliminary injunction was granted, restraining him "from keeping them or permitting them to be kept at any other place than the place of business," thus compelling him to restore the books. Here a delay of weeks or even months could work the defendant no harm. Where the injunction is sought to compel the removal of structures, walls, buildings, and the like, if the plaintiff knowingly permit the defendant to go on and incur any considerable further expenditure of money before he makes objection, he will generally lose his right to the somewhat special remedy of a mandatory injunction.

## SECTION IV.

## TO RESTRAIN ACTIONS OR JUDGMENTS AT LAW.

## ANALYSIS.

- § 1360. Origin of the jurisdiction.
- § 1361. When the jurisdiction is not exercised: General doctrine.
- § 1362. When the jurisdiction may be exercised: First class; exclusive equitable interests or rights involved.
- § 1363. The same: Second class; legal remedies inadequate.
- § 1364. The same: Third class; fraud, mistake, or accident in the trial at law.
- § 1365. Jurisdiction to grant new trials at law in the United States.

§ 1360. **Origin of the Jurisdiction.**<sup>a</sup>—The use of injunctions to stay actions at law was almost coeval with the establishment of the chancery jurisdiction. Without this means of interference to protect the rights of its suitors, the court of chancery could never have established, extended, and enforced its own jurisdiction.<sup>1</sup> It is no exaggeration to say that, during its formative periods, the equitable jurisdiction was built up through the instrumentality of the injunction restraining the prosecution of legal actions, where the defendants sought the aid of chancery, which alone could take cognizance of the equities that would defeat a recovery at law against them. This was not accomplished, however, without a long and severe opposition from the common-law judges, which continued until the reign of James I.<sup>2</sup> The jurisdiction then firmly estab-

§ 1360, <sup>1</sup> See 1 Spence's Eq. Jur. 674.

§ 1360, <sup>2</sup> For a full account of this memorable contest, and its settlement under James I., see 1 Lord Campbell's Lives of the Chancellors, 235; 1 Spence's Eq. Jur. 675; 1 Hallam's Const. Hist. 472.

§ 1360, (a) For a detailed treatment of this subject, see Pom. Equitable Remedies, chap. XXXI, §§ 637-674.

lished by judicial authority has never since been questioned.<sup>3</sup> The reasons urged by the common-law judges were frivolous. The injunction is not addressed to, nor does it operate upon, the courts of law; instead of denying or interfering with, it virtually admits and assumes, their jurisdiction. It is addressed to the litigant parties, and prohibits them from resorting to the legal jurisdiction, because their controversies, depending upon equitable principles, or involving equitable features, can only be fully and finally determined by a tribunal having the equitable jurisdiction. Injunction is the remedy which, above all others, necessarily operates *in personam*.

**§ 1361. When the Jurisdiction is not Exercised—General Doctrine.**<sup>a</sup>—Where a court of law can do as full justice to the parties and to the matter in dispute as can be done in equity, a court of equity will not stay proceedings at law.<sup>1</sup> Equity will not restrain a legal action or judgment where the controversy would be decided by the court of equity upon a ground equally available at law, unless the party invoking the aid of equity can show some special *equitable* feature or ground of relief; and in the case assumed, this special feature or ground must necessarily be something connected with the mode of trying and deciding the legal action, and not with the cause of action or the defense themselves.<sup>2</sup> It is not such

§ 1360, <sup>3</sup> *Ayloffe v. Duke*, 2 Freem. Ch. 152 (A. D. 1655); *Hawshaw v. Parkins*, 2 Swanst. 539, 548; *Franklyn v. Thomas*, 3 Mer. 225, 234.

§ 1361, <sup>1</sup> *Southampton Dock Co. v. Southampton etc. Board*, L. R. 11 Eq. 254.

§ 1361, <sup>2</sup> Because it assumed that the ground of decision is equally available at law and in equity, and therefore the special equitable feature must be something *dehors* the very issues and merits of the controversy: See *Harrison v. Nettleship*, 2 Mylne & K. 423.

§ 1361, (a) For annotations and additions to this paragraph, see Pom. *Equitable Remedies*, §§ 638, 639.



a special equitable ground of interference that the party has, by his own act or omission, failed to effectually avail himself of a valid defense at law, nor that the court of law has decided a question of law or of fact erroneously.<sup>3</sup> The principle is well established, and is uni-

§ 1361, <sup>3</sup> *Simpson v. Lord Howden*, 3 Mylne & C. 97, 108; *Protheroe v. Forman*, 2 Swanst. 227, 233; *Ware v. Horwood*, 14 Ves. 28, 31; *Bateman v. Willoe*, 1 Schoales & L. 201, 204, 206. In the last-named case Lord Redesdale stated this rule in language which has ever since been regarded as a correct exposition of the principle: "It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize the court to interfere. Because if a matter has already been investigated in a court of justice, according to the common and ordinary rules of investigation, a court of equity cannot take on itself to enter into it again. Rules are established, some by the legislature, some by the courts themselves, for the purpose of putting an end to litigation, and it is more important that an end should be put to litigation, than that justice should be done in every case. . . . The inattention of parties in a court of law can scarcely be made a subject for the interference of a court of equity. There may be cases cognizable at law and also in equity, and of which cognizance cannot be *effectually* taken at law; and therefore equity does sometimes interfere, as in cases of complicated accounts, where the party has not made a defense, because it was impossible for him to do it effectually at law. So where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has an unconscientious advantage at law, which equity will put out of the way or restrain him from using. But without circumstances of that kind, I do not know that equity ever does interfere to grant a trial of a matter which has already been discussed in a court of law,—a matter capable of being discussed there, and over which a court of law had full jurisdiction." It should be carefully observed that the chancellor is not speaking of those cases which involve, in their very cause of action or defense, features or interests cognizable only by courts of equity; nor of the other class of cases which, in ordinary phraseology, belong to the concurrent jurisdiction both of law and equity; he refers to cases which in *themselves* present no equitable aspect, and properly come within the jurisdiction of the law, but which, for some reason or another, *have been wrongly tried and decided by the court of law*. There must have been some special *equitable* ground connected with this wrongful trial and decision, in order that equity may interfere

versal in its application, that when a cause belongs to the jurisdiction of the law courts, equity will never interfere to restrain the prosecution of the action, nor to stay proceedings on the judgment or execution, *upon any mere legal grounds*, although it may be demonstrated that the complainant in equity (generally the defendant at law) had a valid legal defense, which was not made available either through the error of the court in determining the law or the facts, or the omissions of himself or his counsel in presenting it, or in obtaining the evidence by which it could have been supported.<sup>4</sup>

and restrain the judgment. See, also, *Holmes v. Stateler*, 57 Ill. 209; *McClure v. Miller*, Bail. Eq. 107, 21 *Am. Dec.* 522; *New Orleans v. Morris*, 3 Woods, 103; *Hungerford v. Sigerson*, 20 How. 156; *Tyler v. Hamersley*, 44 Conn. 419, 26 *Am. Rep.* 479; *Wallack v. Soc. Ref. Juv. Del.*, 67 N. Y. 23; *Jackson v. Bell*, 31 N. J. Eq. 554; 32 N. J. Eq. 411; *Holmes v. Steele*, 28 N. J. Eq. 173; *Van Syckel v. Emery*, 18 N. J. Eq. 387; *Vanarsdalen v. Whitaker*, 10 Phila. 153; *Nelson v. Turner*, 2 Md. Ch. 73; *Chambers v. Penland*, 78 N. C. 53; *Att'y-Gen. v. Baker*, 9 Rich. Eq. 521; *Williams v. Stewart*, 56 Ga. 663; *Brown v. Wilson*, 56 Ga. 534; *Shaw v. Lindsey*, 60 Ala. 344; *Womack v. Powers*, 50 Ala. 5; *O'Connor v. Sheriff*, 30 La. Ann. pt. 1, 441; *Graham v. Roberts*, 1 Head, 56, 59; *Chadwell v. Jordan*, 2 Tenn. Ch. 635; *Hartman v. Heady*, 57 Ind. 545; *Comstock v. Henneberry*, 66 Ill. 212; *La Crosse etc. Co. v. Reynolds*, 12 Minn. 213; *Kemp v. Tucker*, L. R. 8 Ch. 369; *Baron de Womes v. Millier*, L. R. 16 Eq. 554.

§ 1361, *4 Hendrickson v. Hinckley*, 17 How. 443, 445; *Walker v. Robbins*, 14 How. 584; *Creath's Adm'r v. Sims*, 5 How. 192; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Barker v. Elkins*, 1 Johns. Ch. 465; *Windwart v. Allen*, 13 Md. 196; *Katz v. Moore*, 13 Md. 566; *Lyday v. Duple*, 17 Md. 188; *Methodist Church v. Baltimore*, 6 Gill. 391, 48 *Am. Dec.* 540; *Brandon v. Green*, 7 Humph. 130; *Duckworth v. Duckworth's Adm'r*, 35 Ala. 70; *Holmes v. Stateler*, 57 Ill. 209; *Vennum v. Davis*, 35 Ill. 568; *Hinrichsen v. Van Winkle*, 27 Ill. 334; *Johnson v. Lyon*, 14 Iowa, 431. In *Hendrickson v. Hinckley*, *supra*, Mr. Justice Curtis stated the principle in a very concise manner: "A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law because it did not amount to a legal defense, or had a good defense at law which

§ 1362. **When the Jurisdiction may be Exercised—First Class—Equitable Rights.**<sup>a</sup>—I pass from this negative view to consider the doctrine on its affirmative side. The cases in which, according to its original jurisdiction unaffected by statute, equity may interfere by injunction, and restrain an action at law either before or after judgment, may be reduced to three general classes: 1. Where the controversy, in addition to its legal aspect, involves some equitable estate, right, or interest which is exclu-

he was prevented from availing himself of by fraud or accident unmixed with negligence of himself or his agents.”

It is immaterial whether the question or matter relied upon by the complainant in equity was considered by the law court or not. Omission to present or to make out a defense at law is not a ground for equitable relief: *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Day v. Cummings*, 19 Vt. 496; *Peace v. Nailing*, 1 Dev. Eq. 289; *Champion v. Miller*, 2 Jones Eq. 194; *White v. Cahal's Adm'r*, 2 Swan, 550.

The error of the court of law in admitting or excluding evidence, or in instructing the jury, is no ground for the interposition of equity: *Perrine v. Striker*, 7 Paige, 598; *Hartshorn v. Davenport*, 2 Barb. Ch. 77; *Vilas v. Jones*, 1 N. Y. 274; *Vaughn v. Johnson*, 9 N. J. Eq. 173; *Clapp v. Ely*, 10 N. J. Eq. 178; *Hood v. New York etc. R. R.*, 23 Conn. 609; *Dilly v. Barnard*, 8 Gill. & J. 170; *Prather v. Prather's Adm'r*, 11 Gill & J. 170; *Harnsburger's Adm'r v. Kinney*, 13 Gratt. 511; *Powell v. Watson*, 6 Ired. Eq. 94; *Yarborough v. Thompson*, 3 Smedes & M. 291, 41 *Am. Dec.* 626; *Paynter v. Evans*, 7 B. Mon. 420; *Shortridge v. Bartlett*, 14 B. Mon. 200; *Price v. Johnson Co.*, 15 Mo. 433; *Danaher v. Prentiss*, 22 Wis. 311.

That the legal defense was not successful, through the ignorance, negligence, or mistake of the party's own attorney, or counsel is no ground for interference: *Warner v. Conant*, 24 Vt. 351, 58 *Am. Dec.* 178; *Burton v. Wiley*, 26 Vt. 430; *Emerson v. Udall*, 13 Vt. 477, 37 *Am. Dec.* 604; *Powell v. Stewart*, 17 Ala. 719; *Jamison v. May*, 13 Ark. 600; *Graham v. Roberts*, 1 Head, 56.

Ignorance of the facts constituting the defense does not excuse the omission of the party to make it, nor entitle him to the aid of equity, unless it can be shown that the party could not have acquired the information by the diligent and careful labor in preparing the cause for

§ 1362, (a) For annotations to this paragraph, see *Pom. Equitable Remedies*, §645.

sively cognizable by a court of equity, so that a complete determination of the issues cannot be made by a court of law, it is well settled that equity not only may, but must, interfere at the suit of the party in whom the equitable estate or right is vested, and restrain the action at law, and decide the whole controversy. This is so when the defendant at law has a purely equitable defense which the court of law will not recognize or enforce, and especially when he is entitled to some affirmative equitable

trial which he is bound to use: *Ocean Ins. Co. v. Fields*, 2 Story, 59; *Truly v. Wanzer*, 5 How. 141; *Emerson v. Udall*, 13 Vt. 477, 37 *Am. Dec.* 604; *Slack v. Wood*, 9 Gratt. 40; *Allen v. Hamilton*, 9 Gratt. 255; *Miller v. Gaskins*, *Smedes & M. Ch.* 524; *Moran v. Woodyard*, 8 B. Mon. 537; *Smith v. Allen*, 63 Ill. 474; *Holmes v. Stateler*, 57 Ill. 209; *Hinrichsen v. Van Winkle*, 27 Ill. 334.

Criminal proceedings will never be enjoined:<sup>b</sup> *Kerr v. Corporation of Preston*, L. R. 6 Ch. Div. 463; *Saull v. Browne*, L. R. 10 Ch. 64; *Portis v. Fall*, 34 Ark. 375; *Phillips v. Stone Mt.*, 61 Ga. 386.

An injunction will not ordinarily be granted to restrain an action in a foreign country or in another state, but may be, under special circumstances:<sup>c</sup> *In re Boyse*, L. R. 15 Ch. Div. 591; *Moor v. Anglo-Italian Bank*, L. R. 10 Ch. Div. 681; *Hope v. Carnegie*, L. R. 1 Ch. 320; *In re Chapman*, L. R. 15 Eq. 75; *Ostell v. Le Page*, 2 De Gex, M. & G. 892; *Kittle v. Kittle*, 8 Daly, 72; *Cole v. Young*, 24 Kan. 435.

Proceedings in another equitable action may, in a proper case, be enjoined:<sup>d</sup> *Prudential Assur. Co. v. Thomas*, L. R. 3 Ch. 74; *Mann v. Flower*, 26 Minn. 479; *Bond v. Greenwald*, 7 Baxt. 466; *Haeseig v. Brown*, 34 Mich. 503. And see *Erie R'y v. Ramsey*, per Folger, J., quoted *post*, in note under § 1371; but see *Endter v. Lennon*, 46 Wis. 299. Restraining proceedings in probate courts for want of jurisdiction,<sup>e</sup> see *Wright v. Fleming*, 76 N. Y. 517.

§ 1361, (b) *No injunction against criminal proceedings*: See Pom. Equitable Remedies, § 644.

§ 1361, (c) *Injunctions against proceedings in foreign jurisdictions*: See Pom. Equitable Remedies, § 670.

§ 1361, (d) *Relief from equitable proceedings and decrees*: See Pom. Equitable Remedies, § 642.

§ 1361, (e) *Probate decrees*. See Pom. Equitable Remedies, § 643.

*Jurisdiction of federal courts to enjoin proceedings in state courts; state courts cannot enjoin proceedings of federal courts*: See Pom. Equitable Remedies, §§ 640, 641.



relief which will clothe him with a legal right or title, and thus defeat the legal action brought against him. Cases of this kind belong to the first branch of the exclusive jurisdiction of equity as described in the first volume.<sup>1</sup>

§ 1362, <sup>1</sup> See *ante*, § 219, and cases cited in note. The cases to which this doctrine is applicable are numberless, and in fact cover the entire domain of equitable estates, interests, and primary rights which constitute the first branch of the exclusive jurisdiction. The following cases give examples of equitable rights which have thus been protected: *Hibbard v. Eastman*, 47 N. H. 507, 93 *Am. Dec.* 467; *Ross v. Harper*, 99 Mass. 175; *Fanning v. Dunham*, 5 Johns. Ch. 122, 9 *Am. Dec.* 283; *Skinner v. White*, 17 Johns. 357; *Variek v. Edwards*, Hoff. Ch. 382; 11 Paige, 289, 5 Denio, 664, 679; *County of Armstrong v. Brinton*, 47 Pa. St. 367, 374; *Jones v. Slubey*, 5 Har. & J. 372; *White v. Crew*, 16 Ga. 416; *Pollock v. Gilbert*, 16 Ga. 398, 60 *Am. Dec.* 732; *Frith v. Roe*, 23 Ga. 139; *Greenlee v. Gaines*, 13 Ala. 198, 48 *Am. Dec.* 49; *Henwood v. Jarvis*, 27 N. J. Eq. 247; *Wyckoff v. Victor etc. Co.*, 43 Mich. 309; *Scrivin v. Hursh*, 39 Mich. 98; *Detroit etc. R. R. v. Brown*, 37 Mich. 533; *Haescig v. Brown*, 34 Mich. 503; *Pindell v. Quinn*, 7 Ill. App. 605; *Hager v. Buechler*, 6 Ill. App. 462; *Moses v. Sanford*, 2 Lea, 655; *Breeden v. Grigg*, 8 Baxt. 163; *Deaderick v. Mitchell*, 6 Baxt. 35; *Frank v. Morris*, 9 W. Va. 664; *Hill v. Billingsly*, 53 Miss. 111; *Texas Land Co. v. Turman*, 53 Tex. 619; *Earl of Aylesford v. Morris*, L. R. 8 Ch. 484; *Lord Tredegar v. Windus*, L. R. 19 Eq. 607; *Crofts v. Middleton*, 8 De Gex, M. & G. 192; *Evans v. Bremridge*, 8 De Gex, M. & G. 100; and see *ante*, vol. 2, cases in note under § 914.

Under the application of this doctrine, an action at law may be enjoined, in order to avoid a multiplicity of suits, or a circuity of action: See *ante*, vol. 1, §§ 245 *et seq.*; *Oelrichs v. Spain*, 15 Wall. 211, 228; *Penn. etc. Co. v. Delaware etc. Co.*, 31 N. Y. 91; *Eldridge v. Hill*, 2 Johns. Ch. 281; *Tice v. Annin*, 2 Johns. Ch. 125; *Trustees etc. v. Nicoll*, 3 Johns. 566; *West v. Mayor etc.*, 10 Paige, 539; *Jumel v. Jumel*, 7 Paige, 591; *Heyer v. Pruyn*, 7 Paige, 465, 34 *Am. Dec.* 355; *Marsh v. Pike*, 10 Paige, 595; *Woodruff v. Fisher*, 17 Barb. 224; *Third Ave. R. R. v. The Mayor etc.*, 54 N. Y. 159; *Paterson etc. R. R. v. Jersey City*, 9 N. J. Eq. 434; *Stevenson v. Black*, 1 N. J. Eq. 338; *Klapworth v. Dressler*, 13 N. J. Eq. 62, 78 *Am. Dec.* 69; *Woods v. Monroe*, 17 Mich. 238; *Scott v. Shreeve*, 12 Wheat. 605. And also in suits brought to obtain a discovery in aid of the defense at law: *Boughton v. Phillips*, 6 Paige, 433; *King v. Clark*, 3 Paige, 76; *Williams v. Harden*, 1 Barb. Ch. 298.

This rule assumes that the equitable questions contained in the defense extend to the entire cause, so that their decision determines the controversy. When the cause contains both legal and equitable questions which are distinct, the court of equity, while taking jurisdiction, may not restrain the proceedings at law prior to the obtaining of judgment.<sup>2</sup>

**§ 1363. The Same. Second Class.<sup>a</sup>—2.** The second general class includes those cases which belong to the second branch of the *exclusive* jurisdiction of equity as heretofore described;<sup>1</sup> or, in the ordinary nomenclature of the books, cases over the facts of which both courts of law and of equity have a concurrent jurisdiction to grant their respective and distinctive remedies; for example, cases involving actual fraud, such as suits upon instruments, where the defense is fraud in procuring their execution. Where the jurisdiction is thus said to be concurrent, or in other words, where the interests and primary rights of the parties are legal, and the only question be-

**§ 1362,** <sup>2</sup> See *Williams v. Earl of Jersey*, Craig & P. 91; *Gridley v. Garrison*, 4 Paige, 647; *Mitchell v. Oakley*, 7 Paige, 68; *Ragsdale v. Hagy*, 9 Gratt. 409; *Justice v. Scott*, 4 Ired. Eq. 108; *Hill v. Billingsly*, 53 Miss. 111.

In the cases referred to, it is supposed that there are both legal and equitable issues which may be tried and decided separately, and the decision of neither determines the whole controversy. Of course, if the equitable issues are really the very gist of the cause, and upon their decision the whole case really turns, and the ends of justice demand it, the court of equity may take control of the entire controversy by enjoining the further prosecution of the action at law. It is only where the decision of the equitable issues would necessarily defeat the whole right at law and destroy the entire legal cause of action, that the chancellor *must* take the entire controversy under his own control. It is then a matter of right, and not of discretion.

**§ 1363,** <sup>1</sup> See *ante*, §§ 220, 221, and cases cited in note 2, under § 221.

**§ 1363, (a)** For annotations to this paragraph, see *Pom. Equitable Remedies*, § 646.

tween the two courts relates to the adequacy of their respective remedies, as a general rule the tribunal which first exercises jurisdiction is entitled, or at least permitted, to retain an exclusive control of the issues.<sup>2</sup> It is therefore a well-settled doctrine that in cases of this kind, where the primary rights of both parties are legal, and courts of law will grant their remedies, and courts of equity may also grant their peculiar remedies, equity will not interfere to restrain the action or judgment at law, *provided the legal remedy will be adequate*; that is, provided the judgment at law will do full justice between the parties, and will afford a complete relief; the adequacy or inadequacy of the legal remedy is the sole and universal test.<sup>3</sup> On the other hand, in cases of this general class, equity will enjoin the action at law, and will determine the whole cause, whenever the legal remedy is inadequate; and the legal remedy is deemed to be inadequate if the ends of justice would not be satisfied by a mere judgment for the defendant in the action at law, but would require that some distinctively equitable relief, such as a cancellation or a reformation of the instrument sued upon, be conferred upon him. If any affirmative

§ 1363, <sup>2</sup> See *ante*, § 179; Mallett v. Dexter, 1 Curt. 178; Stearns v. Stearns, 16 Mass. 167, 171; Winn v. Albert, 2 Md. Ch. 42; Merrill v. Lake, 16 Ohio, 373, 47 **Am. Dec.** 377; Thompson v. Hill, 3 Yerg. 167.

§ 1363, <sup>3</sup> See *ante*, §§ 220, 221, and cases cited; Insurance Co. v. Bailey, 13 Wall. 616; Grand Chute v. Winegar, 15 Wall. 373; Hipp v. Babin, 19 How. 271; Smith v. McIver, 9 Wheat. 532; Russell v. Clark's Ex'rs, 7 Cranch, 69; Bank of Bellows Falls v. Rutland etc. R. R., 28 Vt. 470; Hazard v. Irwin, 18 Pick. 95; Fleming v. Slocum, 18 Johns. 403, 9 **Am. Dec.** 224; Roberts v. Anderson, 3 Johns. Ch. 371; 18 Johns. 515; Crane v. Bunnell, 10 Paige, 333; Camden etc. R. R. v. Stewart, 18 N. J. Eq. 489; Gould v. Hayes, 19 Ala. 438; Bumpass v. Reams, 1 Sneed, 595; Mason v. Piggott, 11 Ill. 85; Ross v. Buchanan, 13 Ill. 55; Southerland v. Harper, 83 N. C. 200; Jackson v. Bell, 31 N. J. Eq. 554; 32 N. J. Eq. 411; Imperial Fire Ins. Co. v. Gunning, 81 Ill. 236; Hoare v. Bremridge, L. R. 8 Ch. 22; 14 Eq. 522; Ochsenbein v. Papelier, L. R. 8 Ch. 695.

equitable relief is necessary to a full settlement of the controversy, and to a complete protection of the defendant's rights, a court of equity will interfere, entertain a suit for such relief, and enjoin the action at law.<sup>4</sup> The scope of this particular doctrine is plainly identical with that which governs the second branch of the exclusive jurisdiction of equity as described in the first volume. Whenever a court of equity exercises its jurisdiction over a case involving only *legal* interests and primary rights, for the purpose of awarding its exclusively equitable

§ 1363, <sup>4</sup> *Glastenbury v. McDonald's Adm'r*, 44 Vt. 453; *Atlantic etc. Co. v. Tredick*, 5 R. I. 171; *Bissell v. Beckwith*, 33 Conn. 357; *Hamilton v. Cummings*, 1 Johns. Ch. 517; *Bushnell v. Harford*, 4 Johns. Ch. 301; *Dale v. Roosevelt*, 5 Johns. Ch. 174; *Metler v. Metler's Adm'rs*, 19 N. J. Eq. 457; *Morris v. Barnwell*, 60 Ga. 147; *Mitchell v. Word*, 60 Ga. 525; *Radeliffe v. Varner*, 56 Ga. 222; *Scott v. Scott*, 33 Ga. 102; *Coville v. Gilman*, 13 W. Va. 314; *Henwood v. Jarvis*, 27 N. J. Eq. 247; *Boyce's Ex'rs v. Grundy*, 3 Pet. 210, 215; *London etc. Ins. Co. v. Seymour*, L. R. 17 Eq. 85; *Traill v. Baring*, 4 De Gex, J. & S. 318; *Athenæum L. Ass. Soc. v. Pooley*, 3 De Gex & J. 294; and cases cited *ante*, in note under § 914.

There is some disagreement among the decisions upon the question of equity taking jurisdiction to compel the cancellation of an instrument, when the contracting party who seeks this relief might set up the same defense in an action at law and defeat a recovery. Compare *Insurance Co. v. Bailey*, 13 Wall. 616, and *Grand Chute v. Winegar*, 15 Wall. 373, with *Franklin v. Green*, 2 Allen, 519, 522, and *Commercial etc. Ins. Co. v. McLoon*, 14 Allen, 351.

Within the scope of this doctrine, a court of equity will restrain the transfer of negotiable paper, or things in action, or chattels, or sometimes land, by one who has obtained their title fraudulently, to persons who would take them as *bona fide* purchasers for value, and thus hold them freed from existing equities: See *ante*, § 1340; *Poor v. Carleton*, 3 Sum. 70; *Glastenbury v. McDonald's Adm'r*, 44 Vt. 453; *Bank of Bellows Falls v. Rutland etc. R. R.*, 28 Vt. 470; *Franklin v. Green*, 2 Allen, 519; *Sherman v. Fitch*, 98 Mass. 59; *Ferguson v. Fisk*, 28 Conn. 501; *Hamilton v. Cummings*, 1 Johns. Ch. 517; *Delafield v. Illinois*, 26 Wend. 192; *Van Doren v. The Mayor etc.*, 9 Paige, 388; *Cox v. Clift*, 2 N. Y. 118; *Metler's Adm'rs v. Metler*, 18 N. J. Eq. 270; 19 N. J. Eq. 457; *Bell v. Gamble*, 9 Humph. 117.



remedies, because the legal remedies would be inadequate, it will always, if necessary, enjoin an action at law which interrupts the full exercise of its jurisdiction.

**§ 1364. The Same. Third Class.<sup>a</sup>—3.** In the two preceding classes of cases the ground for interference was some equitable element or feature involved in the very subject-matter of the controversy, or in the remedies appropriate thereto, which constituted an equitable defense in full or in part to the legal action, and over which the court of equity had either a concurrent or an exclusive jurisdiction. In the present class there is no such equitable element or feature of the controversy; there is no equitable defense embraced in any possible issues, no equitable right or interest of the defendant which defeats or modifies the legal cause of action; all the issues are wholly legal. The ground for the equitable jurisdiction to interfere is, therefore, something *dehors* the issues, something arising out of or connected with the *trial* itself of the legal action in the court of law. It was a settled doctrine of the equitable jurisdiction—and is still the subsisting doctrine except where it has been modified or abrogated by statute, or has become obsolete through the enlarged powers of the law courts to grant new trials—that where the legal judgment was obtained or entered through fraud, mistake, or accident, or where the defendant in the action, having a valid legal defense on the merits, was prevented in any manner from maintaining it by fraud, mistake, or accident, and there had been no negligence, laches, or other fault on his party, or on the part of his agents, then a court of equity will interfere at his suit, and restrain proceedings on the judgment which cannot be conscientiously enforced. From the very

§ 1364, (a) For a detailed treatment of the subject of this paragraph, see Pom. Equitable Remedies, §§ 647-669.

nature of the case, this interference takes place after the judgment, and not while the action at law is pending.<sup>1</sup>

§ 1364, 1 *Truly v. Wanzer*, 5 How. 141; *David v. Tileston*, 6 How. 114; *Hendrickson v. Hinckley*, 17 How. 443; 5 McLean, 211; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Ocean Ins. Co. v. Fields*, 2 Story, 59; *Robinson v. Wheeler*, 51 N. H. 384; *Wingate v. Haywood*, 40 N. H. 437, 441; *Emerson v. Udall*, 13 Vt. 477, 37 *Am. Dec.* 604; *Gainly v. Russi*, 40 Conn. 450; *Dobson v. Pearce*, 12 N. Y. 156, 62 *Am. Dec.* 152; *Mann v. Worrall*, 16 Barb. 221; *Foster v. Wood*, 6 Johns. Ch. 87; *Tomkins v. Tomkins*, 11 N. J. Eq. 512, 514; *Gifford v. Thorn*, 9 N. J. Eq. 703; *Moore v. Gamble*, 9 N. J. Eq. 246; *Glover v. Hedges*, 1 N. J. Eq. 113, 119; *Boulton v. Scott's Adm'rs*, 3 N. J. 231, 236, 241; *Wistar v. McManes*, 54 Pa. St. 318, 93 *Am. Dec.* 700; *Webster v. Skipworth*, 26 Miss. 341; *Humphries v. Barte*, 10 Smedes & M. 282, 295; *Pelham v. Moreland*, 11 Ark. 442; *Nelson v. Rockwell*, 14 Ill. 375; *How v. Mortell*, 28 Ill. 479; *New Orleans v. Morris*, 3 Woods, 103; *Smith v. McLain*, 11 W. Va. 654; *Shields v. McClung*, 6 W. Va. 79; *Crim v. Handley*, 94 U. S. 652.

Among the examples of the fraud,<sup>b</sup> etc., which are a ground for this equitable jurisdiction, are the following: Where the defendant is prevented from defending by false and fraudulent promises or representations that the proceeding will not be carried on against him, and relying thereon, he does not contest the case, as he might have done, and a judgment is thus obtained against him: *Pearce v. Olney*, 20 Conn. 544; *Huggins v. King*, 3 Barb. 616; *Powers's Ex'rs v. Butler's Adm'r*, 4 N. J. Eq. 465; *Holland v. Trotter*, 22 Gratt. 136; *Booth v. Stamper*, 6 Ga. 172; *Brooks v. Whitson*, 7 Smedes & M. 513; *How v. Mortell*, 28 Ill. 479; *Perry v. Siter*, 37 Mo. 273; *Jarboe v. Kepler*, 4 Ind. 177; *McLeran v. McNamara*, 55 Cal. 508; *Miller v. Harrison*, 32 N. J. Eq. 76; *Cregar v. Cramer*, 31 N. J. Eq. 375; *Purviance v. Edwards*, 17 Fla. 140; *Hinckley v. Miles*, 15 Hun, 170; *Scriven v. Hursh*, 39 Mich. 98; *Harris v. Western etc. R. R.*, 59 Ga. 830; *Baker v. Redd*, 44 Iowa, 179; *Markham v. Angier*, 57 Ga. 43; *Ellis v. Kelly*, 8 Bush, 621, 631. The same would be true of fraudulent practices by which the defendant's witnesses were tampered with or removed, or his evidence was destroyed, so that he was unable to substantiate his defenses.

Accident,<sup>c</sup> if without any negligence on the part of the one who asks the relief,—as, for example, sickness preventing a defendant from mak-

§ 1364, (b) *Fraud as a ground of relief*: See Pom. *Equitable Remedies*, §§ 649–656.

§ 1364, (c) *Accident, mistake and surprise*: See Pom. *Equitable Remedies*, §§ 657–662.

§ 1365. **Jurisdiction to Grant New Trials at Law in the United States.** — How far does the doctrine of this third general class of cases operate under the modern legislation, and the principles of equity jurisprudence as administered in the United States? The jurisdiction of the English chancery to enjoin judgments at law, not by reason of any equitable right involved in the controversy itself, but on account of wrongful acts or omissions accompanying the trial at law, originated at a time when the law courts had little or no power to grant new trials for such causes. To prevent a failure of justice, a distinct head of equitable jurisdiction was admitted, that of

ing his legal defense: *Bell v. Cunningham*, 1 Sum. 89; *Devoll v. Seales*, 49 Me. 320; *Carrington v. Holabird*, 17 Conn. 530; 19 Conn. 87; *Forrester v. Wilson*, 1 Duer, 624; *Griffith v. Brown*, 3 Rob. (N. Y.) 627; *Aaron v. Baum*, 7 Rob. (N. Y.) 340; *Owen v. Ranstead*, 22 Ill. 161; *Rice v. R. R. Bank*, 7 Humph. 30. Also surprise, ignorance, etc.: *Roach v. Duckworth*, 61 How. Pr. 128; *Beveridge v. Hewitt*, 8 Ill. App. 467; *Miller v. Harrison*, 32 N. J. Eq. 76; *Stanton v. Embry*, 46 Conn. 65; *Markham v. Angier*, 57 Ga. 43; *Smith v. Pearce*, 6 Baxt. 72 (the judge incompetent to sit). Failure to summon, notify, or serve process on the defendant, so that he was ignorant of the proceedings against him: <sup>d</sup> *Crafts v. Dexter*, 8 Ala. 767, 42 Am. Dec. 666; *Stubbs v. Leavitt*, 30 Ala. 352; *Bell v. Williams*, 1 Head, 229; *Ridgeway v. Bank of Tenn.*, 11 Humph. 523, 525; *Owens v. Ranstead*, 22 Ill. 161; *Harshey v. Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520; *Walker v. Gilbert*, Freem. (Miss.) 85; *McNeill v. Edie*, 24 Kan. 108; *Ryan v. Boyd*, 33 Ark. 778; *Blake-slee v. Murphy*, 44 Conn. 188; see *Graham v. Roberts*, 1 Head, 56, 59. In general, the party seeking the aid of equity to enjoin a judgment at law against him must not only show some ground for interference, within the doctrine of the text, but must also show that he has a good and sufficient defense to the cause of action, so that on a re-examination and retrial the result would be different: <sup>e</sup> *Bradley v. Richardson*, 23 Vt. 720; *Tomkins v. Tomkins*, 11 N. J. Eq. 512, 514; *Reeves v. Cooper*, 12 N. J. Eq. 223; *Dawson v. Merch. etc. Bank*, 30 Ga. 664; *Saunders v. Albritton*, 37 Ala. 716; *Way v. Lamb*, 15 Iowa, 79, 83; *Stokes v. Knarr*,

§ 1364, (<sup>d</sup>) *Want of jurisdiction; failure to serve summons or process:* See Pom. Equitable Remedies, §§ 663–666.

§ 1364, (<sup>e</sup>) *Meritorious defense must be shown:* See Pom. Equitable Remedies, § 667.

virtually granting new trials—of entertaining suits for a new trial—when a judgment at law had been thus obtained by fraud, mistake, or accident; and the injunction against further proceedings on the judgment was a mere incident of the broader relief which set aside the judgment and granted a rehearing of the controversy in the court of chancery. The original occasion for this special jurisdiction has disappeared. In England, and in most if not all of the American states, either through statutes or

11 Wis. 389; *Payne v. Dudley*, 1 Wash. (Va.) 196; *Sauer v. Kansas*, 69 Mo. 46; *Lemon v. Sweeney*, 6 Ill. App. 507.

The party seeking the aid of equity must also show diligence. A judgment will not be enjoined for any defense or right which could be asserted in the court of law, unless such party can show,—1. That he was prevented by fraud, mistake, or accident from maintaining his legal rights; and 2. That the obstacle which prevented him could not have been overcome or avoided by any reasonable diligence or care on his part. These requisites are absolutely indispensable; the rule is inflexible, and it is enforced with special strictness when the ground relied upon for relief is newly discovered evidence, which the party had failed to obtain, through ignorance amounting to accident or through fraud: *Fletcher v. Warren*, 18 Vt. 45; *Emerson v. Udall*, 13 Vt. 477, 37 **Am. Dec.** 604; *Warner v. Conant*, 24 Vt. 351, 58 **Am. Dec.** 178; *Floyd v. Jayne*, 6 Johns. Ch. 479; *Foster v. Wood*, 6 Johns. Ch. 87; *Duncan v. Lyon*, 3 Johns. Ch. 351, 8 **Am. Dec.** 513; *Graham v. Stagg*, 2 Paige, 321; *Vilas v. Jones*, 1 N. Y. 274; *Vaughn v. Johnson*, 9 N. J. Eq. 173; *Bierne v. Mann*, 5 Leigh, 364; *Meem v. Rucker*, 10 Gratt. 506; *Bellamy v. Woodson*, 4 Ga. 175, 48 **Am. Dec.** 221; *Robb v. Halsey*, 11 Smedes & M. 140; *Williams v. Jones*, 10 Smedes & M. 108; *Conway v. Ellison*, 14 Ark. 360; *Paynter v. Evans*, 7 B. Mon. 420; *Thompson v. Meek*, 3 Sneed, 271; *Smith v. Allen*, 63 Ill. 474; *Smith v. Powell*, 50 Ill. 21; *Ruppertsberger v. Clark*, 53 Md. 402; *Kirby v. Pascault*, 53 Md. 531; *Hays v. Urquhart*, 63 Ga. 323; *Carolus v. Koch*, 72 Mo. 645; *Devinney v. Mann*, 24 Kan. 682; *Noble v. Butler*, 25 Kan. 645; *Burke v. Wheat*, 22 Kan. 722; *Wilson v. Coolidge*, 42 Mich. 112; *Hannon v. Maxwell*, 31 N. J. Eq. 318; *Jackson v. Bell*, 31 N. J. Eq. 554; 32 N. J. Eq. 411; *Holmes v. Steele*, 28 N. J. Eq. 173; *Earl v. Matheney*, 60 Ind. 202; *Kern v. Strausberger*, 71 Ill. 413; *Higgins v. Bullock*, 73 Ill. 205; *Fuller v. Little*, 69 Ill. 229; *Newman v. Morris*, 52 Miss. 402; *New York etc. R. R. v. Haws*, 56 N. Y. 175; *Richmond Enquirer Co. v. Robinson*, 24 Gratt. 548; *Rogers v. Parker*, 1 Hughes, 148.



through judicial action, the courts of law have acquired, and constantly exercise, full powers to grant new trials, whenever from the wrongful acts or omissions of the successful party, or from accident or the mistake of the other party, or from error or misconduct of the judge or the jury, there has been a failure of justice. In other words, the powers of the law courts to set aside verdicts or judgments are so ample as to meet all the requirements of equity and justice, and the special equitable jurisdiction with respect to this matter has become obsolete in the very large majority of the states, if not in all of them.<sup>1</sup> The result is, in my opinion, that practically the only jurisdiction now exercised by courts of equity to enjoin judgments at law, where no equitable right or interest is involved in the controversy, on account of wrongful acts or omissions connected with the trial, is a part of and incidental to the broad jurisdiction which equity possesses to set aside and cancel judgments, deeds, contracts, and the like which have been obtained through fraud, undue influence, or mistake. A court of equity, in general, no longer assumes control over a legal judgment for the purpose of a new trial or any similar relief; it will, in a proper case of fraud or mistake, set aside such judgment; and wherever it will grant this final remedy, it will, as a preliminary and incidental relief, restrain by injunction all proceedings upon the judgment.<sup>2a</sup> How

§ 1365, <sup>1</sup> As an illustration, the California Code of Civil Procedure, sec. 657, authorizes a new trial to be granted for the following causes: 1. Irregularity in the proceedings of the court, jury, or adverse party, or misconduct of the court; 2. Misconduct of the jury; 3. Accident or surprise; 4. Newly discovered evidence; 5. Excessive damages; 6. Insufficiency of the evidence; 7. Error of law.

§ 1365, <sup>2</sup> The modern cases, where such judgments at law have been enjoined, will be found, on examination, to have arisen under the more

§ 1365, (a) As to the effect of statutory remedies, see, also, Pom. Equitable Remedies, § 669.

*Injunctions against executions:* See Pom. Equitable Remedies, §§ 671-674.

far the jurisdiction to enjoin actions and judgments at law in the two other general classes of cases above described has been affected by the reformed procedure, in the states where that procedure prevails, is discussed in the next following chapter.

general power, which equity clearly possesses, of setting aside the most solemn proceedings when tainted by fraud. The equitable jurisdiction to entertain bills for a new trial, if it exist at all, must be confined to a very few states.

## CHAPTER SECOND.

## EQUITABLE DEFENSES INTERPOSED IN LEGAL ACTIONS AS A SUBSTITUTE FOR INJUNCTIONS.

## ANALYSIS.

- § 1366. General object.
- § 1367. Equitable pleas under the common-law procedure.
- § 1368. Equitable defenses under the reformed procedure.
- § 1369. Meaning and nature of an equitable defense.
- § 1370. General effect: Injunction against actions at law unnecessary.
- § 1371. Cases in which an injunction may still be necessary: First class; to avoid multiplicity of suits.
- § 1372. The same: Second class; new parties needed.
- § 1373. The same: Third class; no affirmative relief.
- § 1374. Some illustrations of equitable defenses.

§ 1366. **General Object.**—I shall not attempt in this chapter any general discussion of “equitable defenses” as provided for by the reformed procedure; such a discussion would be foreign to the purposes of this work.<sup>1</sup> My sole object is to consider, and if possible to answer, the more narrow questions: How far do equitable defenses interposed in legal actions, under the reformed procedure, interfere with, supersede, or abrogate the jurisdiction to enjoin actions and judgments at law in the first and second classes of cases mentioned in the last preceding section? and in what cases, if any, does that jurisdiction still remain operative, notwithstanding this peculiar feature of the reformed procedure? These inquiries are practically important only in the states and territories which have adopted the new procedure.

§ 1366, 1 The subject of “equitable defenses” includes that of equitable “counterclaims,” and both are treated of at large in my work on Remedies by the Civil Action.

**§ 1367. Equitable Pleas Under the Common-law Procedure.**—In some states where the two jurisdictions of law and equity are still kept distinct and separate, an equitable defense may be allowed by statute to be pleaded in a legal action pending in a court of law. Would this legislation modify the first two general doctrines formulated in §§ 1362 and 1363 of the last section? A similar statute in England was held to produce no effect whatever upon the equitable jurisdiction; and the same interpretation must undoubtedly be given to any such enactment in the United States.<sup>1</sup>

**§ 1368. Equitable Defenses Under the Reformed Procedure—Legislation.**—The provisions of the reformed procedure are much broader, and must *practically* modify to a great extent the original jurisdiction of equity over actions at law. In the single “civil action” which it establishes, legal and equitable causes of action may be united and remedies obtained; legal and equitable defenses may be combined; equitable defenses may be set up to defeat a strictly legal cause of action, in actions which are otherwise wholly legal; and finally, either under the name of “equitable defense” or of “counterclaim,” the defendant, as against a legal cause of action and in an action otherwise legal, may obtain the affirmative equitable relief, connected with the subject-matter,

§ 1367, <sup>1</sup> The common-law procedure act of 1854 (17 & 18 Vict., c. 125, sec. 83) authorized pleas upon equitable grounds. In *Jefferies v. Day*, L. R. 1 Q. B. 372, the court held that such equitable defenses only were admissible which would be a simple bar to the action, and would entitle defendant to the common-law judgment “that the plaintiff take nothing by his writ.” That the equitable jurisdiction was unaffected, see *Gompertz v. Pooley*, 4 Drew. 448, 453; *Kingsford v. Swinford*, 28 L. J. Ch. 413; *Waterlow v. Bacon*, L. R. 2 Eq. 514; *Terrell v. Higgs*, 1 De Gex & J. 388; *Evans v. Bremridge*, 8 De Gex, M. & G. 100.



which under the former system he could only obtain by a separate suit brought in a court of equity.<sup>1</sup>

**§ 1369. Meaning and Nature of an Equitable Defense.**

It is important to determine, in the first place, the nature and meaning of an "equitable defense." A defense is a right possessed by the defendant, arising from the facts alleged in his pleadings, which defeats the plaintiff's cause of action or claim for the remedy demanded by his action. An equitable defense is such a right, which exists solely by virtue of equitable doctrines, and which was originally recognized by courts of equity alone. The right constituting an equitable defense may be one which, when consummated and enforced, confers upon the defendant some affirmative equitable relief clothing him with a paramount *legal* title or estate, and thus defeating the plaintiff's claim; or it may be one which is purely defensive, which entitles the defendant to no affirmative relief, and which simply operates to bar the plaintiff's action. The general term "equitable defense" plainly includes both of these classes.<sup>1</sup> This con-

**§ 1368,** <sup>1</sup> Legal and equitable defenses may also be united in the same answer: See New York, Code Proc., sec. 150; Code Civ. Proc. (new code), secs. 501, 507; Wisconsin, c. 125, sec. 13; Ohio, sec. 93; Missouri, art. 5, secs. 13, 14 (secs. 3522, 3523); Minnesota, c. 66, sec. 98; Florida, sec. 101; Oregon, sec. 72; California, sec. 441; North Carolina, sec. 102; South Carolina, sec. 173; Dakota, sec. 119; Kansas, sec. 94 (3621); Indiana, (1881), sec. 347; Iowa, sec. 2655.

**§ 1369,** <sup>1</sup> Under the English statute of 1854 allowing equitable pleas in actions at law, the courts recognized the fact that some equitable defenses would only operate to bar the plaintiff's action, and would entitle the defendant to no affirmative specific relief, and held that such equitable defenses alone could be pleaded: See *ante*, § 1367. In *Dobson v. Pearce*, 12 N. Y. 156, 168, 62 Am. Dec. 152, Johnson, J., said: "An equitable defense to a civil action is now as available as a legal defense. The question now is, *Ought the plaintiff to recover?* and anything which shows that he ought not is available to the defendant, whether it was formerly of equitable or of legal cognizance." See, also, *Chase v. Peek*, 21 N. Y. 581, 586; *Wisner v. Ocumpaugh*, 71 N. Y. 113, 117; *Webster*

clusion has not, however, been uniformly accepted. The doctrine is supported by the decisions of able courts, and seems to be settled in some of the states, that a defendant cannot avail himself of a defense as equitable, unless the facts thereof entitle him to equitable relief against the plaintiff's legal cause of action, nor unless he demands and obtains that specific remedy which, when granted, destroys the cause of action. In other words, he cannot invoke the right as a mere defense, or as long as he treats it and relies upon it as a mere defense. If he simply avers facts as a negative defense, he will not be permitted to rely upon them and to defeat the plaintiff's recovery by that means.<sup>2</sup>

**§ 1370. General Effect—Injunctions Against Actions at Law Unnecessary.**—The provisions of the codes, mentioned in the last paragraph but one, render the equi-

v. Bond, 9 Hun, 437; *Wa Ching v. Constantine*, 1 Idaho, 266; *Harrington v. Fortner*, 58 Mo. 468, 474; *Holland v. Johnson*, 51 Ind. 346; *Maxwell v. Campbell*, 45 Ind. 360, 363; *Hammond v. Perry*, 38 Iowa, 217; *Crary v. Goodman*, 12 N. Y. 266, 64 *Am. Dec.* 506; *Seeley v. Engell*, 13 N. Y. 542; *New York Cent. Ins. Co. v. Nat. Protec. Ins. Co.*, 14 N. Y. 85; *Despard v. Walbridge*, 15 N. Y. 374; *Carpenter v. Oakland*, 30 Cal. 439, 442; *Harris v. Vinyard*, 42 Mo. 568; *Kennedy v. Daniels*, 20 Mo. 104; *Carman v. Johnson*, 20 Mo. 108, 61 *Am. Dec.* 593.

§ 1369, <sup>2</sup> Among the decisions tending to support this view, see *Follett v. Heath*, 15 Wis. 601; *Lombard v. Cowham*, 34 Wis. 486, 492; *Du Pont v. Davis*, 35 Wis. 631, 639; *Hicks v. Sheppard*, 4 Lans. 335, 337; *Cramer v. Benton*, 60 Barb. 216; *Dewey v. Hoag*, 15 Barb. 365; *Conger v. Parker*, 29 Ind. 380; *Kenyon v. Quinn*, 41 Cal. 325; *Bruck v. Tucker*, 42 Cal. 346, 352; *Miller v. Fulton*, 47 Cal. 146; *McClane v. White*, 5 Minn. 178, 190. In Wisconsin the defendant is required by statute to demand affirmative relief in pleading an equitable defense: *Rev. Stats.*, c. 141, sec. 7. See, also, on the general question, *Webster v. Bond*, 9 Hun, 437; *Quebec Bank v. Weyand*, 30 Ohio St. 126; *Hinkle v. Margerum*, 50 Ind. 240; *Winslow v. Winslow*, 52 Ind. 8; *Hampson v. Fall*, 64 Ind. 382; *Pennoyer v. Allen*, 51 Wis. 360; 50 Wis. 308; *Lawe v. Hyde*, 39 Wis. 345; *Kentfield v. Hayes*, 57 Cal. 409; *Hatcher v. Briggs*, 6 Or. 31; *Ten Broeck v. Orchard*, 74 N. C. 409; *Pomeroy on Remedies*, sec. 91.

table jurisdiction to restrain legal actions in the great majority of instances wholly useless; and as a matter of fact such jurisdiction, if not actually abrogated, has become practically obsolete, except when certain special circumstances may require its exercise. Whether the defendant's case involves equitable elements which belong to either branch of the exclusive jurisdiction of equity, or has features which bring it within the concurrent jurisdiction, the defendant may, as a general rule, set up his equitable estate, interest, right, or claim by way of defense, and procure the entire controversy to be decided, and the affirmative equitable relief awarded, in the one civil action. There is thus no need of a separate equitable suit and an injunction restraining the legal action; and any resort to the former jurisdiction of equity for such a purpose will be discountenanced and repressed by the courts, unless it should be necessary, from special circumstances, to prevent a failure of justice.<sup>1</sup>

**§ 1371. Cases in Which an Injunction may Still be Necessary. First Class—Multiplicity of Suits.**—There are, however, special circumstances in which a resort to the injunctive jurisdiction may still be necessary, in order to prevent a failure of justice. These cases may, I think, be reduced to a few general classes: 1. Where it is essen-

**§ 1370, 1** Under the new procedure all the courts of general original jurisdiction possess full equity powers; and this fact somewhat enlarges the scope of the chancery rule, that one court of equity will not, in general, enjoin the proceedings in another tribunal having the same equitable powers. As illustrations of the text, see *Grant v. Quick*, 5 Sand. 612; *Carpenter v. Keating*, 10 Abb. Pr., N. S., 223, 228; *Minor v. Webb*, 10 Abb. Pr. 284; *Harman v. Remsen*, 23 How. Pr. 174; *Bowers v. Tallmadge*, 16 How. Pr. 325; *Arndt v. Williams*, 16 How. Pr. 244; *Bennett v. Le Roy*, 14 How. Pr. 178; *Hunt v. Farmers' L. & T. Co.*, 8 How. Pr. 416; *Dederick v. Hoysradt*, 4 How. Pr. 350; *Platto v. Deuster*, 22 Wis. 482; *Anthony v. Dunlap*, 8 Cal. 26; *Revalk v. Kraemer*, 8 Cal. 66, 68 *Am. Dec.* 304; *Gorham v. Toomey*, 9 Cal. 77; *Uhlfelder v. Levy*, 9 Cal. 607; *Wood v. Swift*, 81 N. Y. 31.

tial to promote the ends of justice that an entire controversy should be determined in one proceeding, so that the rights and duties of all parties interested may be finally settled, it may be necessary to restrain other suits, so as to prevent the pendency of two or more actions involving the same subject-matter, or to prevent a partial litigation of the controversy, or to prevent a multiplicity of suits depending upon the same facts or principles. In short, the jurisdiction must sometimes be exercised to prevent a multiplicity of actions, or partial investigations which would work injustice.<sup>1</sup> It should be observed that the proceeding enjoined under this doctrine may be equitable as well as legal.

§ 1371, 1 *Erie R'y v. Ramsey*, 45 N. Y. 637; *Uhlfelder v. Levy*, 9 Cal. 607, 615; *Engels v. Lubeck*, 4 Cal. 31. In the first of these cases the whole subject of the jurisdiction as modified by the new procedure was so fully and ably examined that I shall quote from the opinion of Folger, J., at some length. Ramsey had commenced an equitable suit against the Erie railroad before the supreme court in one district (the sixth). The company thereupon brought another equitable suit against Ramsey before the same court in a different district (the first), and obtained a preliminary injunction restraining Ramsey from the further prosecution of *his* action. Ramsey was adjudged by the court in the first district to have violated this injunction, and was fined for the contempt. He appealed to the court of appeals. It held that the supreme court in the first district had jurisdiction to grant the injunction, so that it was not void. The opinion of Folger, J., discusses the doctrines which I have stated in the text: "In this state, since the adoption of the system of practice now existing, the equitable jurisdiction of a court to restrain proceedings at law in another court can be but seldom invoked. For there are but few courts, and they inferior, which have only a common-law jurisdiction. The courts of original jurisdiction are mostly possessed of both equitable and common-law powers, and they are, moreover, mostly of co-ordinate jurisdiction. So that it may have been well held that one court of equitable jurisdiction may not, as a usual procedure, restrain the proceedings in another court of equal powers. For one, as much as the other, has, in most cases, the means of doing exact justice to all the suitors before it, and may, as well as the other, afford to the suitor any remedy, equitable or legal, to which he is entitled, and in any proceeding consistent with its established rules and practice,



§ 1372. **The Same. Second Class—New Parties.**—2. A second possible case for injunction may arise under the codes in some of the states. It is suggested in the opinion of Mr. Justice Folger, quoted in the foot-note, that whenever the decision of all the matters embraced within the equitable defense would require the presence of other parties besides those who are parties to the legal action,

though it would be too much to say that in no case can a court restrain the suitors in another court of co-ordinate powers. Thus the jurisdiction of a court of equity to interfere to prevent a multiplicity of suits, or to draw to one action cognate questions and interests sought to be litigated in many actions, is well established. But is it to be held that the exercise of this jurisdiction is thwarted when the numerous suits are divided among several courts of co-ordinate law and equity powers? The suit to bring to one judgment all the actions must be in one of the courts, and to make that suit effectual to the end sought, the power must be in that court to enjoin the parties to the suits in the co-ordinate courts from proceeding therein. An instance of the exercise of one branch of this power sanctioned by this court is found in the case of *N. Y. & N. H. R. R. Co. v. Schuyler*, 17 N. Y. 592. Nor is it without other precedent that a court of equity, by action instituted before it, may question the proceedings in another court of equity. Thus one court of equity has overhauled the decree of another court of equity for fraud, contrivance, or covin in the obtaining of it: *Earl of Bandon v. Becher*, 3 Clark & F. 479; *Manaton v. Molesworth*, 1 Eden, 25. If it may entertain an action for that purpose, in which its decree, if favorable to the moving party, will have the effect to forever restrain the execution of the decree, the validity of which is brought into question, why may it not, pending the suit before it, restrain, by temporary injunction, the execution and enforcement of that decree? If it may thus restrain the proceedings in another court of equity to *enforce* the decree of that court, may it not restrain the proceedings in that court to obtain the decree?" I remark that this consequence by no means necessarily follows. The reasons for attacking and setting aside a decree already obtained, on account of fraud, after the litigation is ended, do not necessarily apply to an interference with the litigation while pending in another court having full powers to deal with all questions which may arise. "We speak of it, not as a power usually to be exercised, but as one beyond the jurisdiction of the court. The affirmative answer to this query is found in the fact that it has done so: *Jackson v. Leaf*, 1 Jacob & W. 229-232; *Clarke v. Earl of Ormonde*, Jacob, 546;

the defendant is not bound to set up the facts constituting his equitable claim for relief as a defense to the legal action, but may, and indeed must, institute a separate equitable suit, and enjoin, if necessary, the further prosecution of the legal action. The resort, under such circumstances, to a second equitable suit and an injunction against the prior action at law, may be proper in the

Earl of Newburg v. Wren, 1 Vern. 220, and notes; Vendall v. Harvey, Nels. 19-21; Booth v. Leycester, 3 Mylne & C. 459; Beckford v. Kemble, 1 Sim. & St. 7; Beauchamp v. Marquis of Huntley, Jacob, 546; Schuyler v. Pelissier, 3 Edw. Ch. 191, 192. But this ground of equitable jurisdiction, viz., that to restrain proceedings in a court of law, is not removed when the same court is clothed with powers both at law and in equity. Granted that since the conjunction in this state of law and equity powers in nearly all courts of original jurisdiction, one court may not, as a usual thing, interfere with the proceedings in another court co-ordinate in power, yet the jurisdiction to restrain proceedings at law remains. A court, upon its equity side, may enjoin its own suitors proceeding upon its law side. The only question can be as to the method in which it shall be done. Is the method this alone: that in the action on the law side of the court, the facts be set up by answer, and affirmative equitable relief being prayed for upon them, the action be transformed into an equitable one, and thus there be, though not formally, yet practically, an injunction upon the party plaintiff from enforcing his strict legal right, until there shall be a determination of the claim of the party defendants for equitable relief? In a case in which all parties and all interests necessary to a full and complete determination of the controversy were or could be brought before the court in the original action in a proper attitude to each other, there could be such a determination: Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Despard v. Walbridge, 15 N. Y. 374; Chase v. Peck, 21 N. Y. 581. But this is not always practicable." It should be remembered that several of the state codes provide for bringing in all necessary new parties in such cases. "If it be said, as is said, that a court cannot restrain itself, the answer is, that a court of equity never sought or claimed to restrain a court of law, but did enjoin the suitors in it. If it be said that the court can act upon its suitors by way of restraint in the very action which they are then prosecuting before it, one answer is, that all the persons to be restrained and affected by injunction, temporary and perpetual, may not be parties to that action, and so not in the power of the court. And another answer is, that a party defendant may some-

states whose codes of procedure make no provision whatever for bringing in the new parties requisite for a full and final determination of the defendant's equitable claim; but the necessity of such a proceeding is certainly confined to those states. The rule as thus suggested is expressly repudiated by some of the decisions which hold

times, for immediate or full remedy, need relief against as well a co-defendant in the original action as the plaintiff therein, and that he cannot always have relief against this co-defendant, based upon the allegations of new matter in his own answer, inasmuch as the co-defendant may not in that action have opportunity of taking and contesting an issue upon those allegations, and the transaction out of which the equity arises may be of too complicated a nature to be investigated on a motion in the same court for summary relief: *Decker v. Judson*, 16 N. Y. 439-450, per Denio, C. J.; *Jones v. Grant*, 10 Paige, 348. So that it may well be that in an action pending in a court of both law and equity powers, the tribunal may not be able to mete out full justice to the parties litigant in the action pending before it, without entertaining a cross-action, in which other facts shall be presented and other persons made parties, and in which last action it may be needful that an injunction order issue restraining the prosecution of the first." The codes of several states provide that, in addition to an "equitable defense" and a "counterclaim," one or more defendants may file a cross-complaint against any or all of the plaintiffs, and any or all of the co-defendants, and against additional parties, for the purpose of obtaining equitable relief connected with the subject-matter of the action.

The same general doctrine, including the same single exception of restraining a multiplicity of actions, is fully sustained by California decisions: *Uhlfelder v. Levy*, 9 Cal. 607, 614, 615; *Crowley v. Davis*, 37 Cal. 268, 269; *Hoekstacker v. Levy*, 11 Cal. 76; *Gorham v. Toomey*, 9 Cal. 77; *Anthony v. Dunlap*, 8 Cal. 26; *Rickett v. Johnson*, 8 Cal. 34, 36; *Revalk v. Kraemer*, 8 Cal. 66, 71, 68 *Am. Dec.* 304; *Chipman v. Hibbard*, 8 Cal. 268, 270; *Flaherty v. Kelly*, 51 Cal. 145; *Agard v. Valencia*, 39 Cal. 292, 303; and see Cal. Civ. Code, sec. 3423, subd. 1.

The general doctrine of the text is also approved in Wisconsin: *Platto v. Deuster*, 22 Wis. 482; *Farmers' etc. Bank v. Luther*, 14 Wis. 96; *State ex rel. Mills v. Kispert*, 21 Wis. 387; *Wilson v. Jarvis*, 19 Wis. 597; and in Indiana: *Rieker v. Pratt*, 48 Ind. 73; *Hardy v. Stone*, 23 Ind. 597.

While the strong current of the authorities is in this direction, the decisions are not wholly uniform. For example, in Kentucky, the case

that the necessity of bringing in other parties, in order to a complete determination of the entire controversy, makes no difference in the operation of the general doctrine resulting from the provisions of the new procedure.<sup>1</sup> In several of the states, the codes of procedure expressly provide for this contingency, by enacting that when the decision upon equitable defenses or counterclaims requires the presence of new parties, such parties may be brought in.<sup>2</sup> The cross-complaint or cross-petition as authorized by the codes in certain states seems also to preclude the necessity of a separate suit and injunction in most instances, even for the purpose of preventing a multiplicity of actions.<sup>3</sup>

**§ 1373. The Same. Third Class — No Affirmative Relief.**—3. There is another case which would seem to require a resort to an equitable suit and the injunction

of *Dorsey v. Reese*, 14 B. Mon. 127, goes to the full length of the old chancery methods, and declares: "There is nothing, however, contained in the code which precludes him [the defendant], if he fails to avail himself of this privilege [i. e., the provision allowing equitable defenses and counterclaims], and permits a judgment to go against him, from bringing an equitable action to obtain relief against the judgment."

It should be added that the codes in some of the states expressly require every cross-right in the shape of a counterclaim to be interposed as such by a defendant, and if he fails to do so, he cannot enforce it by direct action. This provision, of course, includes all cases of equitable affirmative relief which might be set up as an equitable defense in a legal action, since such defenses are a species of counterclaims. For example, see Minn. Code 1858, sec. 72; *Lowry v. Hurd*, 7 Minn. 356, 363. In some other states a similar provision is made applicable only to one class of counterclaims.

§ 1372, 1 See the California cases cited in the last note.

§ 1372, 2 See, among others, the codes of Ohio, sec. 96; Kansas, sec. 97; Nebraska, sec. 103; Indiana, sec. 63; Iowa, sec. 2662. This provision clearly obviates the necessity of a resort to a separate suit, even if it does not prevent such resort under all circumstances.

§ 1372, 3 For example, see Cal. Code Civ. Proc., sec. 442.



restraining a prior action at law in a portion of the states. Wherever the doctrine is settled that an "equitable defense," within the meaning of the codes, must consist of facts entitling the defendant to some equitable affirmative specific relief, and must be pleaded with a demand for such relief, and must result in the granting thereof, it would seem that facts constituting a defense in equity, though not at law, but which operate solely by way of defense, *defeating the plaintiff's recovery*, and do not entitle the defendant to any affirmative relief, could only be taken advantage of by a separate equitable suit and an injunction perpetually restraining the action at law. Such facts do not, by its very definition, constitute a counterclaim, nor do they furnish an occasion for a "cross-complaint," which always involves affirmative relief. That there may be such defenses, constituting simply an *equitable* though not a legal *bar*, is undeniable; they were recognized by the former chancery jurisdiction; and their only mode of enforcement, prior to all legislation, was by suit in equity seeking as its only relief a perpetual injunction against the action at law.<sup>1</sup> It would seem to follow, as a necessary result, that if

§ 1373, <sup>1</sup> I have already shown that under the statute of 1854 the English law courts confined the "equitable pleas" allowed by the statute to this very species of equitable defense, which simply *barred* the action, and was equivalent, as the courts said, to the remedy of perpetual injunction: *Ante*, § 1367. One or two examples of such defenses will be sufficient to show their possible existence and to illustrate their nature. In an action at law for money had and received, the defendant might allege that he held and was entitled to the money by an equitable assignment; for example, that he held it under an order given by the person then entitled on the depositary of a future fund, non-existing at the time the order was given. These facts would show that the defendant was owner of the money in equity, though not at law; they would bar the plaintiff's right to recover; no affirmative relief would be necessary for the defendant; in fact, no affirmative relief would be possible. Again, in an action of trover to recover damages for the alleged conversion of chattels, the defendant might state that he was

these defenses, operating only as an *equitable bar*, cannot be set up by answer as a defense under the codes, they must be enforced by a separate equitable suit to perpetually enjoin the action at law. Such a result furnishes a cogent reason for holding that the term "equitable defense" as used in the codes of procedure embraces all possible defenses which are valid upon equitable doctrines, and is not confined to those which entitle the defendant to affirmative relief.

**§ 1374. Some Illustrations of Equitable Defenses.**—

While it does not come within the purposes of this book to discuss the scope and effect of "equitable defenses," I have placed in the foot-note a number of well-considered and important cases which illustrate their operation.<sup>1</sup> They have been used most frequently in actions to re-

entitled to the chattels by virtue of an equitable assignment from the original owner, such as an order on his depositary, or a sale or mortgage of the chattels which were to be acquired in the future. This would be a perfect equitable defense, but would require no affirmative relief. Under the former system these defenses could not be set up in the action at law; the defendant would be driven to a separate suit in equity, in which the only relief asked or obtained would be a perpetual injunction against the action at law or against the judgment. For an illustration of such suits, see *Burn v. Carvalho*, 7 Sim. 109; 4 Mylne & C. 690; *Carvalho v. Burn*, 4 Barn. & Adol. 382; 1 Ad. & E. 883.

§ 1374, <sup>1</sup> In actions to recover possession of land: *Heermans v. Robertson*, 64 N. Y. 332; *Hoppough v. Struble*, 60 N. Y. 430; *Crary v. Goodman*, 12 N. Y. 266, 64 **Am. Dec.** 506; *Bartlett v. Judd*, 21 N. Y. 200, 78 **Am. Dec.** 131; *Chase v. Peck*, 21 N. Y. 581; *Harrington v. Fortner*, 58 Mo. 468; *Hubble v. Vaughan*, 42 Mo. 138; *Collins v. Rogers*, 63 Mo. 515; *Maxwell v. Campbell*, 45 Ind. 360; *McMannus v. Smith*, 53 Ind. 211; *Hampson v. Fall*, 64 Ind. 382; *Hammond v. Perry*, 38 Iowa, 217; *Richardson v. Bates*, 8 Ohio St. 257; *McClane v. White*, 5 Minn. 178; *Guediei v. Boots*, 42 Cal. 452; *Ten Broeck v. Orchard*, 74 N. C. 409. In actions by vendors against vendees: *Cavalli v. Allen*, 57 N. Y. 508; *Duffy v. O'Donovan*, 46 N. Y. 223, 227; *Leaird v. Smith*, 44 N. Y. 618; *Hubbell v. Von Schoening*, 49 N. Y. 326, 330; *Giles v. Austin*, 62 N. Y. 486; *Cythe v. La Fontain*, 51 Barb. 186; *Ingles v. Patterson*, 36 Wis. 373; *Onson v. Cown*, 22 Wis. 329; *Harris v. Vinyard*, 42 Mo. 568;

cover possession of land, analogous to ejectment, and in actions by vendors in contracts for the sale of land, against their vendees. They have also been resorted to in actions upon mercantile contracts, in actions upon covenants, and in many other miscellaneous suits. These cases further show that the jurisdiction to restrain actions at law by injunction has become of very little importance, and almost obsolete, in the states where the reformed procedure prevails.

*Petty v. Malier*, 15 B. Mon. 591, 604; *Creager v. Walker*, 7 Bush, 1; *Talbert v. Singleton*, 42 Cal. 390; *Bruck v. Tucker*, 42 Cal. 346; *Hughes v. Davis*, 40 Cal. 117. In actions on mercantile contracts: *Seeley v. Engell*, 13 N. Y. 542; *New York Cent. Ins. Co. v. Nat. Protec. Ins. Co.*, 14 N. Y. 85; *Despard v. Walbridge*, 15 N. Y. 374; *Holland v. Johnson*, 51 Ind. 346; *Hinkle v. Margerum*, 50 Ind. 240; *Struman v. Robb*, 37 Iowa, 311; *Hablitzel v. Latham*, 35 Iowa, 550; *Becker v. Sandusky City Bank*, 1 Minn. 311. In miscellaneous actions for damages: *Haire v. Baker*, 5 N. Y. 357; *Pitcher v. Hennessey*, 48 N. Y. 415; *Dobson v. Pearce*, 12 N. Y. 156, 62 **Am. Dec.** 152; *Pennoyer v. Allen*, 51 Wis. 360; 50 Wis. 308. As to affirmative relief, see *Massie v. Stradford*, 17 Ohio St. 596; *Klonne v. Bradstreet*, 7 Ohio St. 322; *Quebec Bank v. Weyand*, 30 Ohio St. 126; *Reed v. Newton*, 22 Minn. 541; *Kellogg v. Aberin*, 48 Iowa, 299; *Hatcher v. Briggs*, 6 Or. 31; *Tucker v. McCoy*, 3 Col. 284; *Mills v. Buttrick*, 4 Col. 53, 123; *Douglas v. Haberstro*, 25 Hun, 262.

## THIRD GROUP.

### REMEDIES WHICH INDIRECTLY ESTABLISH OR PROTECT INTERESTS AND PRIMARY RIGHTS, EITHER LEGAL OR EQUITABLE.

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#### CHAPTER FIRST.

#### REFORMATION AND CANCELLATION.

##### ANALYSIS.

§ 1375. General nature and object.

§ 1376. Reformation and re-execution of instruments.

§ 1377. Cancellation, surrender up, or discharge of instruments.

§ 1375. **General Nature and Object.**—The ultimate object of the remedies belonging to this group is the establishment or protection of interests, estates, and primary rights; but this object is accomplished *indirectly*. While these remedies are not so completely ancillary as interpleader and receivership, yet they are to a certain extent auxiliary. They do not, like a specific performance, or the execution of a trust, or an assignment of dower, or partition of land, operate directly and immediately to establish the plaintiff's title, and to confer upon him the complete dominion over his estate,—the ultimate relief which he seeks. Their effect in establishing his ultimate dominion is indirect. They are often used as the preparatory step which enables him to obtain, sometimes in the same action, and sometimes in a subsequent suit, the ultimate remedy which finally establishes his rights or obligations, or restores him to the full enjoyment of his estate. The reformation of a policy of insurance is



not a final remedy; but it establishes the real contract, and thus enables the assured to recover the amount actually due according to the terms of that contract. The reformation of a deed does not directly restore the grantee to the dominion and possession of the land which had been omitted; but it places him in a position which enables him, if necessary, to assert his dominion and recover the possession. The cancellation of a deed does not of itself *directly* establish the plaintiff's title and put him in possession of the land, but it enables him, if necessary, to assert his title and obtain the possession. These remedies may be obtained on behalf of either a legal or an equitable interest, by either a legal or an equitable owner. The remedies constituting this group are the two following: reformation or re-execution of instruments, and rescission, cancellation, surrender up, or discharge of instruments.<sup>1</sup> Since they are chiefly occasioned by fraud or mistake, the general doctrines and rules determining the jurisdiction to grant them, and regulating their use, have already been fully examined in the preceding volume.<sup>2</sup> In the present chapter I merely collect and arrange the classes of cases in which the jurisdiction will be or will not be exercised.

§ 1375, <sup>1</sup> Reformation and re-execution are in fact one and the same remedy, depending upon the same rules; and the same is true of rescission, cancellation, surrender up, and discharge. The decree for cancellation generally includes a direction for a surrender up, and, if necessary, for a discharge of record.

§ 1375, <sup>2</sup> See vol. 2, §§ 838-871 (on mistake); §§ 872-921 (on actual fraud); and §§ 922-974 (on constructive fraud). A large number of cases cited in these chapters illustrate the remedies of "reformation" and "cancellation." In particular, see, as to jurisdiction to grant the relief of reformation or of cancellation on account of mistake, and the conditions of fact which must exist, §§ 870, 871, and cases in notes. As to cancellation on account of fraud, see §§ 910-921; English doctrine: § 912. The American doctrine: § 914. Incidents of the relief, what is required of the plaintiff as a condition to granting the relief: §§ 915-917. Persons against whom granted: § 918. Illustrations: §§ 919-921.

§ 1376. **Reformation and Re-execution of Instruments.**<sup>a</sup>—This subject has already been treated under the head of Mistake, and little more need here be said.<sup>1</sup> Equity has jurisdiction to reform written instruments in but two well-defined cases: 1. Where there is a mutual mistake,—that is, where there has been a meeting of minds,—an agreement actually entered into, but the contract, deed, settlement, or other instrument, in its written form, does not express what was really intended by the parties thereto; and 2. Where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties.<sup>2</sup> In such cases

§ 1376, 1 Vol. 2, §§ 838–871. The remedy of reformation virtually includes that of re-execution, since, in many cases, the latter follows as an incident to the former. In some instances the mistake occurs only in the execution: See *Miller v. Davis*, 10 Kan. 541; *Heaton v. Fryberger*, 38 Iowa, 185; *Parlin v. Stone*, 1 McCrary, 443. Equity has, however, a special jurisdiction to decree the re-execution of such instruments as deeds which have become accidentally lost or destroyed, on the ground that otherwise the plaintiff's title would be defective or embarrassed: *Bennett v. Ingoldsby*, Finch, 262; *Cummings v. Coe*, 10 Cal. 529; *Hoddy v. Hoard*, 2 Ind. 474, 54 *Am. Dec.* 456; and see *Clarke v. Featherston*, 32 Ind. 142.

§ 1376, 2 Vol. 2, §§ 845–850, 852–856, 870, and cases cited. See, also, the following additional cases: *Kilmer v. Smith*, 77 N. Y. 226, 33 *Am. Rep.* 613; *Albany Sav. Inst. v. Burdick*, 87 N. Y. 40; *Paine v. Upton*, 87 N. Y. 327, 41 *Am. Rep.* 371; *Arthur v. Homestead F. Ins. Co.*, 78 N. Y. 462, 34 *Am. Rep.* 550; *Ford v. Joyce*, 78 N. Y. 618; *Steinbach v. Relief F. Ins. Co.*, 77 N. Y. 498, 33 *Am. Rep.* 655; *Whittemore v. Farrington*, 76 N. Y. 452; *Moran v. McLarty*, 75 N. Y. 25; *Paine v. Jones*, 75 N. Y. 593; *Ramsey v. Smith*, 32 N. J. Eq. 28; *Real Estate Trust Co. v. Balch*, 13 Jones & S. 528; *Robertson v. Walker*, 51 Ala. 484; *Sutherland v. Sutherland*, 69 Ill. 481; *Evarts v. Steger*, 5 Or. 147; *Bradford v. Bradford*, 54 N. H. 463; *Botsford v. McLean*, 42 Barb. 445; 45 Barb. 478; *Snell v. Insurance Co.*, 98 U. S. 85. As to laches, carelessness, and the like, cutting off rights of remedy, see *Sable v. Maloney*, 48 Wis. 331; *McFadden v. Rogers*, 70 Mo. 421; *Snyder v. Ives*, 42 Iowa, 157; *Nicoll v. Mason*, 49 Ill. 358; *Hutson v. Fumas*, 31

§ 1376, (a) *Reformation*.—For a detailed treatment of this subject, see *Pom. Equitable Remedies*, chap. XXXII, §§ 675–683.

the instrument may be made to conform to the agreement or transaction entered into according to the intention of the parties. The conditions of fact giving rise to the exercise of the jurisdiction to grant reformation are numerous. Almost all written instruments may be reformed when a proper occasion is furnished. The following are among the most important: Deeds of conveyance,<sup>3</sup> mortgages,<sup>4</sup>

Iowa, 154; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290; McIntosh v. Saunders, 68 Ill. 128; Toops v. Snyder, 70 Ind. 554; Witt-  
haus v. Schaek, 57 How. Pr. 310.

§ 1376, <sup>3</sup> The cases of reformation of deeds are many. As illustrations of the various questions which may arise, see Harris v. Pepperell, L. R. 5 Eq. 1; Bloomer v. Spittle, L. R. 13 Eq. 427; White v. White, L. R. 15 Eq. 247; Gillespie v. Moon, 2 Johns. Ch. 585, 7 Am. Dec. 559; Clayton v. Freet, 10 Ohio St. 544; Deford v. Mercer, 24 Iowa, 118, 92 Am. Dec. 460 (quitclaim); Mattingly v. Speak, 4 Bush, 316; Lestrade v. Barth, 19 Cal. 660; Brown v. Balen, 33 N. J. Eq. 469; Weston v. Wilson, 31 N. J. Eq. 51; Day v. Day, 84 N. C. 408; Sawyer v. Hanson, 48 Wis. 611; Kilmer v. Smith, 77 N. Y. 226, 33 Am. Rep. 613; Jackson v. Andrews, 59 N. Y. 244; Bush v. Hicks, 60 N. Y. 298; Albany Sav. Inst. v. Burdick, 87 N. Y. 40; Crippen v. Baums, 15 Hun, 136; Johnson v. Johnson, 8 Baxt. 261; Blackburn v. Randolph, 33 Ark. 119; Michel v. Tinsley, 69 Mo. 442; Baker v. Massey, 50 Iowa, 399; Ballentine v. Clark, 38 Mich. 395; Pasman v. Montague, 30 N. J. Eq. 385; Fly v. Brooks, 64 Ind. 50; Nicholson v. Caress, 59 Ind. 39; Gerald v. Elley, 45 Iowa, 322; Parish v. Scott, 10 Heisk. 438; Dart v. Barbour, 32 Mich. 267; Cummings v. Freer, 26 Mich. 128; Burr v. Hutchinson, 61 Me. 514; Huss v. Morris, 63 Pa. St. 367; Blakeman v. Blakeman, 39 Conn. 320. *Voluntary deeds*: Froman v. Froman, 13 Ind. 317; Randall v. Ghent, 19 Ind. 271; Hunt v. Frazier, 6 Jones Eq. 90. *Deeds of married women*: Heaton v. Fryberger, 38 Iowa, 185; Leonis y. Lazzarovich, 55 Cal. 52; Styers v. Robbins, 76 Ind. 547; Purcell v. Goshorn, 17 Ohio, 105, 49 Am. Dec. 448.

§ 1376, <sup>4</sup> Parlin v. Stone, 1 McCrary, 443; Miller v. Davis, 10 Kan. 541; Albany Sav. Inst. v. Burdick, 87 N. Y. 40; Coe v. N. J. Midland R'y, 31 N. J. Eq. 105; Wilson v. King, 27 N. J. Eq. 374; Wheeler v. Kirtland, 23 N. J. Eq. 13; Petesch v. Hambach, 48 Wis. 443; First Nat. Bank v. Gough, 61 Ind. 147; Wilson v. Stewart, 63 Ind. 294; Exchange Bank v. Russell, 50 Mo. 531; Schwickerath v. Cooksey, 53 Mo. 75; Baskins v. Calhoun, 45 Ala. 582; Alexander v. Rea, 50 Ala. 450;

leases,<sup>5</sup> policies of insurance,<sup>6</sup> bonds of various kinds,<sup>7</sup> negotiable instruments,<sup>8</sup> marriage and family settlements,<sup>9</sup> and compromises.<sup>10</sup> Judgments and other records may also be corrected.<sup>11</sup> Other instances are given in the foot-note.<sup>12</sup>

Goodman v. Randall, 44 Conn. 321; Milmine v. Burnham, 76 Ill. 362; Quivey v. Baker, 37 Cal. 465; Rubling v. Hackett, 1 Nev. 360. *Deeds of trust*: Allen v. McGaughey, 31 Ark. 252; Young v. Coleman, 43 Mo. 179; Haynes v. Seachrest, 13 Iowa, 455.

§ 1376, <sup>5</sup> Henry v. Smith, 76 N. C. 311; Mays v. Dwight, 82 Pa. St. 462; Murray v. Dake, 46 Cal. 644; Campbell v. Hatchett, 55 Ala. 548.

§ 1376, <sup>6</sup> Knox v. Lycoming F. Ins. Co., 50 Wis. 671; Hearn v. Equitable etc. Ins. Co., 4 Cliff. 192; Dean v. Equitable F. Ins. Co., 4 Cliff. 575; Brugger v. State Invest. Ins. Co., 5 Saw. 304; Hay v. Star F. Ins. Co., 77 N. Y. 235, 33 **Am. Rep.** 607; Mercantile Ins. Co. v. Jaynes, 87 Ill. 199; Mead v. Westchester etc. Ins. Co., 64 N. Y. 453; National Traders' Bank v. Ocean Ins. Co., 62 Me. 519; Keith v. Globe Ins. Co., 52 Ill. 518, 4 **Am. Rep.** 634; Miaghan v. Hartford F. Ins. Co., 12 Hun, 321; Mackenzie v. Coulson, L. R. 8 Eq. 368.

§ 1376, <sup>7</sup> Emery v. Mohler, 69 Ill. 221; Evarts v. Steger, 5 Or. 147; Craft v. Dickens, 78 Ill. 131; State v. Frank's Adm'r, 51 Mo. 98; Schwear v. Haupt, 49 Mo. 225; Pickersgill v. Lahens, 15 Wall. 140; Garnar v. Bird, 57 Barb. 277.

§ 1376, <sup>8</sup> Botsford v. McLean, 42 Barb. 445; 45 Barb. 478; Talley v. Courtney, 1 Heisk. 715; Gammage v. Moore, 42 Tex. 170; Ottenheimer v. Cook, 10 Heisk. 309; Loomis v. Freer, 4 Ill. App. 547; Potter v. Potter, 27 Ohio St. 84; Druiff v. Lord Parker, L. R. 5 Eq. 131.

§ 1376, <sup>9</sup> See vol. 2, §§ 850, 855, 871. See, also, the following additional cases: Clark v. Girdwood, L. R. 7 Ch. Div. 9; Lovesy v. Smith, L. R. 15 Ch. Div. 655; Welman v. Welman, L. R. 15 Ch. Div. 570; Hanley v. Pearson, L. R. 13 Ch. Div. 545; Lister v. Hodgson, L. R. 4 Eq. 30.

§ 1376, <sup>10</sup> See vol. 2, §§ 850, 855, 871, and cases cited.

§ 1376, <sup>11</sup> Vol. 2, § 871; Partridge v. Harrow, 27 Iowa, 96, 99 **Am. Dec.** 643; Snyder v. Ives, 42 Iowa, 157; Cohen v. Dubose, Harp. Eq. 102, 14 **Am. Dec.** 709 (verdict).

§ 1376, <sup>12</sup> Moran v. McLarty, 75 N. Y. 25 (assignment of mortgage); Kelley v. McKinney, 5 Lea, 164 (contract for sale of land); Stafford v. Fetters, 55 Iowa, 484 (indorsement of note); Hervey v. Savery, 48 Iowa, 313 (release of mortgage); Mastelar v. Edgerton, 44



§ 1377. **Cancellation and Surrender Up or Discharge of Instruments.**<sup>a</sup>—The jurisdiction of equity to grant the remedy of cancellation exists and will always be exercised when it is necessary to protect or maintain equitable primary estates, interests, or rights; where, however, the estate, interest, or right is legal, the jurisdiction always *exists*, but its *exercise* depends upon the adequacy of the legal remedies,—a party being left to his affirmative or defensive remedy at law, where full and complete justice can thereby be done.<sup>1</sup> The occasions giving rise to the exercise of this jurisdiction are mistake, fraud, and other instances where enforcing instruments or agreements

Iowa, 495 (agreement establishing highway); *Thomas v. Raymond*, 4 S. C. 347 (military order; not corrected). As to reforming and correcting mistakes in wills, see vol. 2, § 871.

§ 1377, 1 Vol. 1, §§ 219–221; vol. 2, §§ 911, 914; *Globe Mut. L. Ins. Co. v. Reals*, 79 N. Y. 202; *Ryerson v. Willis*, 81 N. Y. 277 (when mortgage will not be canceled for failure of consideration); *Kelly v. Christal*, 81 N. Y. 619 (when a judgment will not be set aside); *United States v. Throckmorton*, 98 U. S. 61 (the same). In the exercise of the remedy of cancellation instruments are almost necessarily directed to be “delivered up.” “Delivery up,” under these circumstances, can hardly be called a distinct remedy. In England, courts of equity have entertained jurisdiction from the earliest times to decree instruments of a peculiar and exceptional character—as muniments of title—to be delivered up to persons entitled to their custody and possession. The reasons for the exercise of this jurisdiction do not apply in this country: *Armitage v. Wadsworth*, 1 Madd. 189, 192; *Jackson v. Butler*, 2 Atk. 306; 9 Mod. 297; *Grey v. Cockeril*, 2 Atk. 114; *Harrison v. Southcote*, 1 Atk. 528, 540; *Banbury v. Briscoe*, 2 Cas. Ch. 42; *Ford v. Peering*, 1 Ves. 72; *Duncombe v. Mayer*, 8 Ves. 320; *Francis v. Francis*, 2 De Gex, M. & G. 73; *Dunn v. Dunn*, 7 De Gex, M. & G. 25; *Turner v. Letts*, 7 De Gex, M. & G. 243; *Newton v. Newton*, L. R. 6 Eq. 135; *Thorpe v. Holdsworth*, L. R. 7 Eq. 139; *Wilson’s Case*, L. R. 12 Eq. 516, 521; *Waldy v. Gray*, L. R. 20 Eq. 238; *Jenner v. Morris*, L. R. 1 Ch. 603; *Heath v. Crealock*, L. R. 10 Ch. 22; *Leathes v. Leathes*, L. R. 5 Ch. Div. 221; *James v. Rumsey*, L. R. 11 Ch. Div. 398; *In re Morgan*, L. R. 18 Ch. Div. 93; *In re Cooper*, L. R. 20 Ch. Div. 611.

§ 1377, (a) *Cancellation and rescission.*—For a detailed treatment of this subject, see *Pom. Equitable Remedies*, chap. XXXII, §§ 684–688.

would be inequitable or unjust.<sup>2</sup> A doubt was formerly entertained as to whether a court of equity ought to exercise its jurisdiction to order instruments absolutely void at law, and not merely voidable, to be delivered up and canceled, since the legal remedy of a party was adequate and complete, and no case was presented for equitable interference;<sup>3</sup> but it is now well settled that jurisdiction will be exercised in such cases,<sup>4</sup> except where the invalidity of the instrument is apparent on its face.<sup>5</sup> The particular instances in which this remedy is most often given are instruments concerning land,<sup>6</sup> and negotiable

§ 1377, <sup>2</sup> The various rules as to when jurisdiction will be exercised, and the evidence necessary, in cases of fraud and mistake, have already been discussed, and the reader is referred to the sections on those subjects.

§ 1377, <sup>3</sup> *Ryan v. Mackmath*, 3 Brown Ch. 15; *Hilton v. Barrow*, 1 Ves. 284; *Bromley v. Holland*, 5 Ves. 610, 618; *Franco v. Bollon*, 3 Ves. 368.

§ 1377, <sup>4</sup> Forged deeds: *In re Cooper*, L. R. 20 Ch. Div. 611; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474. For illustrations of the general rule, see *Hamilton v. Cummings*, 1 Johns. Ch. 517, 520, and cases cited: *Lord St. John v. Lady St. John*, 11 Ves. 526; *Jervis v. White*, 7 Ves. 413; *Simpson v. Lord Howden*, 3 Mylne & C. 97, 102; *Mayor of Colchester v. Lowten*, 1 Ves. & B. 226, 244; *Bromley v. Holland*, 7 Ves. 3, 16; *Hayward v. Dimsdale*, 17 Ves. 111; *Chennel v. Churchman*, 3 Brown Ch. 16, note; *Minshaw v. Jordan*, 3 Brown Ch. 16, note; *Pierce v. Webb*, 3 Belt's Brown Ch. 16, note 2; *Lisle v. Liddle*, 3 Anstr. 649; *Ryan v. Mackmath*, cited 13 Ves. 584; *Jackman v. Mitchell*, 13 Ves. 581; *Peirsoll v. Elliott*, 6 Pet. 95, 98; and see cases cited in subsequent notes under this section.

§ 1377, <sup>5</sup> *Gray v. Mathias*, 5 Ves. 286; *Simpson v. Lord Howden*, 3 Mylne & C. 97; *Smyth v. Griffin*, 13 Sim. 245; *Bromley v. Holland*, 7 Ves. 3, 21; *Peirsoll v. Elliott*, 6 Pet. 95, 98; *Van Doren v. Mayor etc.*, 9 Paige, 388. See § 1399, in regard to removing deeds void on their faces, as being clouds on title. As to removing cloud, see, also, *Strusburgh v. Mayor etc.*, 87 N. Y. 452; *Dederer v. Voorhies*, 81 N. Y. 153; *Wells v. Buffalo*, 80 N. Y. 253; *Townsend v. Mayor etc.*, 77 N. Y. 542 (void tax).

§ 1377, <sup>6</sup> *Deeds*: The following of the many cases will serve as illustrations: *Blenkinsopp v. Blenkinsopp*, 1 De Gex, M. & G. 495; *Harri-*

paper before maturity,<sup>7</sup> the legal remedies in these cases being, as a general rule, inadequate. The remedy is also

son v. Guest, 6 De Gex, M. & G. 424; Wright v. Vanderplank, 8 De Gex, M. & G. 133; Gresley v. Mousley, 4 De Gex & J. 78; Nortcliffe v. Warburton, 4 De Gex, F. & J. 449; Clark v. Malpas, 4 De Gex, F. & J. 401; Baker v. Monk, 4 De Gex, J. & S. 388; Broun v. Kennedy, 4 De Gex, J. & S. 217; De Hoghton v. Money, L. R. 1 Eq. 154; Lister v. Hodgson, L. R. 4 Eq. 30; Heath v. Crealock, L. R. 10 Ch. 22; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474; Reid v. Burns, 13 Ohio St. 49; Hamilton v. Batlin, 8 Minn. 403, 83 **Am. Dec.** 787; Woodruff v. Garner, 27 Ind. 4, 89 **Am. Dec.** 477; Shewmake v. Williams, 54 Ga. 206; Lindsey v. Lindsey, 50 Ill. 79, 99 **Am. Dec.** 489; Bayliss v. Williams, 6 Cold. 440; Parrott v. Parrott, 1 Heisk. 681; Bogle v. Hammons, 2 Heisk. 136; Hyer v. Little, 20 N. J. Eq. 443; Warnock v. Campbell, 25 N. J. Eq. 485; Mead v. Coombs, 26 N. J. Eq. 173; Lyons v. Van Riper, 26 N. J. Eq. 337; Yard v. Yard, 27 N. J. Eq. 114; Turner v. Turner, 44 Mo. 535; Davis v. Fox, 59 Mo. 125; Hollocher v. Hollocher, 62 Mo. 267; Davis v. Luster, 64 Mo. 43; Dean v. Younell's Adm'r, 8 Wall. 14, note; Murphy v. Paynter, 1 Dill. 333; Allore v. Jewell, 94 U. S. 506; Barfield v. Price, 40 Cal. 535; Hearst v. Pujol, 44 Cal. 230; Hightower v. Nuber, 26 Ark. 604; Freeman v. Reagan, 26 Ark. 373; Seymour v. Belding, 83 Ill. 222; Stone v. Wilbern, 83 Ill. 105; Hough v. Cook etc. Co., 73 Ill. 23, 24 **Am. Rep.** 230; Wiley v. Ewalt, 66 Ill. 26; Pickerell v. Morss, 97 Ill. 220; Walton v. Tusten, 49 Miss. 569; Case v. Case, 26 Mich. 484; Ritter v. Ritter, 42 Mich. 108; Rath v. Vanderlyn, 44 Mich. 597; Smith v. Rowley, 66 Barb. 502; Larsen v. Burke, 39 Iowa, 703; Montgomery v. Shockey, 37 Iowa, 107; Benson v. Cowell, 52 Iowa, 137; Cook v. Moore, 39 Tex. 255; Mattair v. Payne, 15 Fla. 682; Morrison v. Morrison, 27 Gratt. 190; Stearns v. Beckham, 31 Gratt. 379; Biglow v. Leabo, 8 Or. 147; Bishop v. Aldrich, 48 Wis. 619. *Mortgages*: Spurgin v. Traub, 65 Ill. 170; Burlington Tp. v. Cross, 15 Kan. 74; Dolan v. Kehr, 9 Mo. App. 351; Connelly v. Fisher, 3 Tenn. Ch. 382; Schenck v. O'Neill, 23 Hun, 209; Foote v. Beecher, 78 N. Y. 155; Schaper v. Schaper, 84 Ill. 603; Starr v. Ellis, 6 Johns. Ch. 393. *Leases*: Wood v. Hubbell, 10 N. Y. 479; Field v. Herrick, 5 Ill. App. 54; Arnold v. Bright, 41 Mich. 207; Wilson v. Deen, 74 N. Y. 531; Watson etc. Co. v. Casteel, 68 Ind. 476. *Contracts concerning lands*: Roy v. Haviland, 12 Ind. 364; Matlock v. Todd, 25 Ind. 128; Wambaugh v. Bimer, 25 Ind. 368; Brainard v. Holsaple, 4 G. Greene, 485; McGuire v. Bowman, 6 Bush, 550; Belknap v. Sealey, 14 N. Y. 143, 67 **Am. Dec.** 120; Young v. Hughes, 32 N. J. Eq. 372.

§ 1377, 7 Minshaw v. Jordan, 3 Brown Ch. 17, note; Jervis v. White, 7 Ves. 413; Bishop of Winchester v. Fournier, 2 Ves. Sr. 445; Wynne

frequently given in case of bonds,<sup>8</sup> policies of insurance,<sup>9</sup> settlements and compromises,<sup>10</sup> awards,<sup>11</sup> and judgments.<sup>12</sup>

*v. Callander*, 1 Russ. 293; *Town of Springport v. Teutonia Sav. Bank*, 75 N. Y. 397 (cancellation of bonds illegally issued in name of a town, to avoid a multiplicity of suits; a very important decision); *Town of Wellsborough v. N. Y. & C. R. R.*, 76 N. Y. 182 (the same); *Western R. R. v. Bayne*, 75 N. Y. 1 (surrender up of securities); *Gould v. Cayuga Co. etc. Bank*, 86 N. Y. 75; *Metler's Adm'r's v. Metler*, 18 N. J. Eq. 270; 19 N. Y. 457; *Hughes v. United States*, 4 Wall. 232; *Ferguson v. Fisk*, 28 Conn. 501; *Lewis v. Tobias*, 10 Cal. 574; *Smith v. Smith's Adm'r*, 30 N. J. Eq. 564; *Crowe v. Peters*, 63 Mo. 429; *Hosleton v. Dickinson*, 51 Iowa, 244; *Fuller v. Percival*, 126 Mass. 381; *Fowler v. Palmer*, 62 N. Y. 533. An injunction against transferring is often given in such cases.

§ 1377, <sup>8</sup> *Jackman v. Mitchell*, 13 Ves. 581; *Hamilton v. Cummings*, 1 Johns. Ch. 517; *Town of Venice v. Woodruff*, 62 N. Y. 462, 20 *Am. Rep.* 495; *Town of Springport v. Teutonia Sav. Bank*, 75 N. Y. 397; *Town of Wellsborough v. N. Y. & C. R. R.*, 76 N. Y. 182; *Western R. R. v. Bayne*, 75 N. Y. 1; *Gould v. Cayuga Co. etc. Bank*, 86 N. Y. 75. These cases overrule the decision in *Town of Venice v. Woodruff*.

§ 1377, <sup>9</sup> *Whittingham v. Thornburgh*, 2 Vern. 506; *Traill v. Baring*, 4 De Gex, J. & S. 318; *Commercial etc. Ins. Co. v. McLoon*, 14 Allen, 351; *Insurance Co. v. Bailey*, 13 Wall. 616; *Derrick v. Lamar Ins. Co.*, 74 Ill. 404; *Life Ins. Co. v. Bangs*, 103 U. S. 780; *Tabor v. Michigan etc. Ins. Co.*, 44 Mich. 324; *Globe etc. Ins. Co. v. Reals*, 48 How. Pr. 502; 79 N. Y. 202.

§ 1377, <sup>10</sup> Vol. 2, §§ 850, 855, 875.

§ 1377, <sup>11</sup> Vol. 2, §§ 871, 919.

§ 1377, <sup>12</sup> Vol. 2, §§ 871, 914, 919. Rescission of a fraudulent sale under a decree: *Fisher v. Hersey*, 78 N. Y. 387. A judgment will not be set aside on the ground of fraud, when the very fraud alleged was tried and passed upon by the issues of the former action: *United States v. Throckmorton*, 98 U. S. 61; nor when the facts could have been set up as a complete defense in the former action: *Kelly v. Christal*, 81 N. Y. 619. For further illustrations of cancellation, see vol. 2, pp. 410, 411, in note under § 914. As to canceling conveyances in fraud of creditors, see vol. 2, §§ 966-974.



## FOURTH GROUP.

REMEDIES BY WHICH ESTATES, INTERESTS, AND PRIMARY RIGHTS, EITHER LEGAL OR EQUITABLE, ARE DIRECTLY DECLARED, ESTABLISHED, OR RECOVERED, OR THE ENJOYMENT THEREOF FULLY RESTORED.

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### CHAPTER FIRST.

SUITS BY WHICH PURELY LEGAL ESTATES ARE ESTABLISHED, AND THE ENJOYMENT THEREOF RECOVERED: NAMELY, ASSIGNMENT OF DOWER, ESTABLISHMENT OF DISPUTED BOUNDARIES, PARTITION OF LAND, AND OF PERSONAL PROPERTY.

#### ANALYSIS.

- § 1378. General nature and object of this group.
- § 1379. Nature and object of the first class.
- §§ 1380-1383. Assignment of dower.
  - § 1380. Legal remedies.
  - § 1381. Origin and grounds of the equitable jurisdiction.
  - § 1382. The jurisdiction now concurrent.
  - § 1383. Exclusive jurisdiction over dower in equitable estates.
- § 1384. Establishment of disputed boundaries.
- § 1385. The same; equitable incidents and grounds.
- §§ 1386-1390. Partition of lands.
  - § 1386. Common-law remedy.
  - § 1387. Equitable jurisdiction and remedies.
  - § 1388. The title of the plaintiff.
  - § 1389. Mode of partition.
  - § 1390. Partition by means of a sale.
  - § 1391. Partition of personal property.
  - § 1392. The same: issue of title.

**§ 1378. General Nature and Object of This Group.—**

All the remedies belonging to this group have one most important distinctive feature in common, which is apparent upon even a slight examination. In all of them the estate or interest of the complaining party, whether it be legal or equitable, is *directly* established or recovered, or the enjoyment thereof is *directly* restored. These remedies are not, therefore, provisional or auxiliary, but they are, for the purposes of the complaining party, as truly final or ultimate reliefs as is the judgment in an action of ejectment or of replevin.<sup>1</sup> The estate, interest, or primary right to be established or recovered, or fully enjoyed by their means, may be either legal or equitable; and when it is equitable, the establishment *may* consist in clothing the plaintiff with the legal estate.<sup>2</sup> The remedies composing this group are separated, by a natural line of division, into *three* general classes, namely:

§ 1378, <sup>1</sup> This is manifestly so in "assignment of dower," settlement of disputed boundaries," and "partition of land," since in each of these instances the plaintiff establishes his individual right to and obtains sole possession of a specific tract of land, and in "partition of personal property," he procures the same with respect to specific chattels. The statement is no less true of the other suits included within this group. In a suit to construe a will, estates in specific property are directly established; in suits to quiet title, the very object of the judgment is to declare and establish the plaintiff's legal or equitable estate in some specific property, and perhaps to convert his equitable estate into a legal one. Even in suits to remove a cloud from title, although the relief is often obtained by means of a cancellation, yet from the nature of the whole proceeding, the plaintiff's estate is thereby established, and he is left in its full enjoyment. In strict foreclosures of mortgages or pledges, and in redemptions of mortgages or pledges, the plaintiff plainly establishes his estate in, and secures his possession of, the specific land or chattels, free from any claim of the defendant. However much these remedies may differ in appearance, they all have this same *essential* element which brings them within the same group.

§ 1378, <sup>2</sup> As in some statutory suits to quiet title, and some suits to remove a cloud from title.

1. Suits by which purely legal estates are established, and the enjoyment thereof recovered; 2. Suits by which some general right, either legal or equitable, is established; and 3. Suits by which some particular estate or interest, either legal or equitable, is established.

§ 1379. **Nature and Object of the First Class.**—Since the particular cases belonging to this class are primarily adapted to purely legal interests, the common law gives similar relief by means of appropriate legal actions. The jurisdiction of equity was based wholly upon the superiority of the equitable methods and procedure; and while the equitable jurisdiction in cases of dower and partition has become so established that it has almost displaced the legal remedies, that of settling disputed boundaries still requires the presence of some special equitable incident or circumstance.<sup>1</sup> I purpose to state the general doctrines and rules which regulate the jurisdiction to grant these remedies, and determine the circumstances under which and the parties between whom it will be exercised.

§ 1380. **Assignment of Dower—Legal Remedies.**—The right known as the wife's right of dower was purely legal, and was asserted at law through the writ of right of dower, and the writ of dower *unde nihil habet*, both of which were in the nature of real actions. As early as the reign of Queen Elizabeth, courts of equity began to assume jurisdiction over cases of dower, but only tentatively, and as ancillary to proceedings at law.<sup>1</sup> This jurisdiction, originally narrow and auxiliary, has, by the course of decision, and on familiar equitable principles,

§ 1379, <sup>1</sup> Under all ordinary circumstances, the action of ejectment is an adequate remedy by which to settle disputed claims to legal titles and estates.

§ 1380, <sup>1</sup> *Wild v. Wells*, 1 Dick. 3; *Toth*. 82.

been expanded to the extent of affording complete relief between the parties.

§ 1381. **Origin and Grounds of the Equitable Jurisdiction.**—Equitable interposition in cases of dower was at first invoked for the removal of impediments in the way of recovery at law. As the title deeds to real estate were held by heirs, devisees, or trustees, it would be important, and even necessary, for the widow, on the event of a contest of her dower, to resort to equity, for the purpose of ascertaining the lands of which her husband had been seised during marriage. To accomplish this purpose, a bill of discovery would be entertained in equity; and where the land of the husband was an undivided interest in a greater portion, equity would decree a partition in aid of the assignment to the widow of her dower.<sup>1</sup> This jurisdiction was, in its earlier stages, strictly auxiliary; and if no obstacle in the way of recognition and assignment of dower at law was disclosed, the equitable proceedings would be arrested.<sup>2</sup> The equitable jurisdiction, having once attached, was not slow in maturing so as to confer full relief. When the widow came into equity for a discovery respecting the title deeds to her husband's estate, which were in the hands of the heir, it was held that she should have complete relief.<sup>3</sup> If her title to dower was denied, it would be incumbent upon her to establish such title at law. Equity would, for that purpose, retain the bill for a reasonable time, and upon the determination of the issue at law in the widow's favor, would proceed to administer final relief.<sup>4</sup>

§ 1381, <sup>1</sup> *Moor v. Black*, Cas. t. Talb. 126.

§ 1381, <sup>2</sup> *Shute v. Shute*, Prec. Ch. 111; *Wallis v. Everard*, 3 Ch. Rep. 161.

§ 1381, <sup>3</sup> *Curtis v. Curtis*, 2 Brown Ch. 620, 631, 632.

§ 1381, <sup>4</sup> *Curtis v. Curtis*, *supra*; *Mundy v. Mundy*, 2 Ves. 122, 128; *D'Arcy v. Blake*, 2 Schoales & L. 387; *Swaine v. Perine*, 5 Johns. Ch.



§ 1382. **The Jurisdiction Now Concurrent.**—Although it was thus, at one time, supposed that the jurisdiction of equity was ancillary, and could not attach in the absence of impediments at law, it is now well settled that courts of equity have concurrent jurisdiction in cases of legal dower, or dower in legal estates.<sup>1a</sup> The advantages of the equitable procedure are obvious. An outstanding term could be removed and satisfied;<sup>2</sup> a partition in the case of undivided interests could be decreed, and an account could be taken;<sup>3</sup> fraudulent conveyances could be canceled;<sup>4</sup> and antagonistic claims to the subject-matter could be determined without multiplicity of suits.<sup>5</sup> Equity will also award damages which could not be re-

482, 9 *Am. Dec.* 318; *Hartshorne v. Hartshorne*, 2 *N. J. Eq.* 349; *Rockwell v. Morgan*, 13 *N. J. Eq.* 384; *Wells v. Beall*, 2 *Gill & J.* 458. And assuming the widow's title to be established or conceded, equity will not only assist her by way of discovery and assignment, but will decree her a due share of the mesne profits, and this, not from the time of the demand merely, but from the time when her title accrued; *Dormer v. Fortescue*, 3 *Atk.* 124, 130; *Chase's Case*, 1 *Bland*, 206, 17 *Am. Dec.* 277; *Wells v. Beall*, 2 *Gill & J.* 458; *Keith v. Trapier*, *Bail. Eq.* 63; *Hazen v. Thurber*, 4 *Johns. Ch.* 604.

§ 1382, <sup>1</sup> In a leading case the question was presented on the pleadings, which failed to disclose any impediment in the way of a proceeding at law, but the court determined in favor of the jurisdiction: *Mundy v. Mundy*, 2 *Ves.* 122. And such is now the established doctrine in England and in the United States: *Pulteney v. Warren*, 6 *Ves.* 73, 89; *Strickland v. Strickland*, 6 *Beav.* 77; *Herbert v. Wren*, 7 *Cranch*, 370; *Powell v. Monson etc. Mfg. Co.*, 3 *Mason*, 347; *Hazen v. Thurber*, 4 *Johns. Ch.* 604; *Swaine v. Perine*, 5 *Johns. Ch.* 482, 9 *Am. Dec.* 318; *Badgley v. Bruce*, 4 *Paige*, 98; *Hartshorne v. Hartshorne*, 2 *N. J. Eq.* 349.

§ 1382, <sup>2</sup> *Dormer v. Fortescue*, 3 *Atk.* 124, 130.

§ 1382, <sup>3</sup> *Hill v. Gregory*, 56 *Miss.* 341; *Nye v. Patterson*, 35 *Mich.* 413; *Herbert v. Wren*, 7 *Cranch*, 370.

§ 1382, <sup>4</sup> *Swaine v. Perine*, 5 *Johns. Ch.* 482, 9 *Am. Dec.* 318.

§ 1382, <sup>5</sup> *Goodburn v. Stevens*, 1 *Md. Ch.* 420.

§ 1382, (a) For additions and annotations, see *Pom. Equitable Remedies*, § 691.

covered at law on an application for dower. At law, if the tenant dies after judgment, and before assessment of damages, the damages are lost to the widow; and if she herself dies before such assessment of damages, her personal representatives are without recourse. In these instances, the widow, or her personal representatives, by a resort to equity, obtain adequate relief.<sup>6</sup>

**§ 1383. Exclusive Jurisdiction Over Dower in Equitable Estates.**<sup>a</sup>—In England since the statute of 3 and 4 William IV,<sup>1</sup> and in the United States from an early day, equity has assumed an exclusive jurisdiction over claims for dower in equitable estates.<sup>2</sup> Where the husband's estate was an equity of redemption, the widow may proceed against the mortgagee by a bill in equity to redeem.<sup>3</sup> Where the husband's estate was a portion of the assets of a partnership, and where the settlement of the partnership affairs has been unconscionably protracted, the widow may appeal to equity for relief.<sup>4</sup> If the husband should die seised of land on which a part of the purchase-money was due, the widow may resort to equity for a sale of the land in satisfaction of the unpaid balance, and for her dower in the surplus.<sup>5</sup> On the conversion of the husband's estate into money, equity

§ 1382, 6 *Curtis v. Curtis*, 2 Brown Ch. 620, 632; *Dormer v. Fortescue*, 3 Atk. 124, 130; *Mordant v. Thorold*, 2 Lev. 275.

§ 1383, 1 Chapter 105.

§ 1383, 2 *McMahan v. Kimball*, 3 Blackf. 1.

§ 1383, 3 *Dawson v. Bank of Whitehaven*, L. R. 4 Ch. Div. 639; *Anderson v. Pignet*, L. R. 11 Eq. 329; *Gibson v. Crehore*, 3 Pick. 475; *Farwell v. Cotting*, 8 Allen, 211; *Chiswell v. Morris*, 14 N. J. Eq. 101; *Eldridge v. Eldridge*, 14 N. J. Eq. 195.

§ 1383, 4 *Goodburn v. Stevens*, 1 Md. Ch. 420.

§ 1383, 5 *Danton v. Nanny*, 8 Barb. 618; *Thompson v. Cochran*, 7 Humph. 72, 46 Am. Dec. 68; *Daniel v. Leitch*, 13 Gratt. 195.

§ 1383, (a) For additions and annotations, see Pom. *Equitable Remedies*, § 693.

will award to the widow her proportionate share.<sup>6</sup> And where the husband has sought, by fraudulent conveyances, to defeat the wife's dower, equity will, on her application, grant appropriate relief.<sup>7</sup> The widow's right of dower, while yet unmeasured and unassigned, may be transferred by her, or reached by her judgment creditors, and her voluntary transferee, or the receiver appointed in aid of the judgment creditor, may maintain a suit in equity to have the dower assigned to him.<sup>8</sup> The assignment of dower is usually effected by a reference to a master and a commission, and the share is set out by metes and bounds. Where an account is needed, it may be taken by means of a similar reference. In many of our states summary proceedings have been provided by statute for the assignment of dower, especially where the widow's right thereto is not contested.

§ 1383, <sup>6</sup> *In re Hall's Estate*, L. R. 9 Eq. 179; *Lawrence v. Miller*, 1 Sand. 516; *Higbie v. Westlake*, 14 N. Y. 281.

§ 1383, <sup>7</sup> *Swaine v. Perine*, 5 Johns. Ch. 482, 9 Am. Dec. 318; *Holmes v. Holmes*, 3 Paige, 363; *Tate v. Tate*, 1 Dev. & B. Eq. 22; *Petty v. Petty*, 4 B. Mon. 215, 39 Am. Dec. 501; *London v. London*, 1 Humph. 1; *Smart v. Waterhouse*, 10 Yerg. 94; *Davis v. Davis*, 5 Mo. 183. As to the defense of a *bona fide* purchase for value without notice, against the widow suing in equity for her dower, see *ante*, vol. 2, § 765; *Joyce v. De Moleyns*, 2 Jones & L. 374; *Jerrard v. Saunders*, 2 Ves. 254; *Snelgrove v. Snelgrove*, 4 Desaus. Eq. 274; *Blain v. Harrison*, 11 Ill. 384; *Larrowe v. Beam*, 10 Ohio, 498; *Blake v. Heyward*, Bail. Eq. 208; *Campbell v. Murphy*, 2 Jones Eq. 357; *Ridgeway v. Newbold*, 1 Harr. (Del.) 385; *Jenkins v. Bodley*, *Smedes & M. Ch.* 338; *Wailes v. Cooper*, 24 Miss. 208; *Daniel v. Hollingshead*, 16 Ga. 190.

§ 1383, <sup>8</sup> *Potter v. Everitt*, 7 Ir. R. Eq. 152 (transferee); *Payne v. Becker*, 87 N. Y. 153 (receiver appointed in aid of an execution); *Tompkins v. Fonda*, 4 Paige, 448 (receiver); *Stewart v. McMartin*, 5 Barb. 438 (same); *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200 (transferee).

**§ 1384. Establishment of Disputed Boundaries.**<sup>a</sup>—

Where the boundaries between two adjacent parcels of land, even when held by their respective owners under purely legal titles, have become confused or obscure, equity has, from an early period, exercised a jurisdiction to settle them.<sup>1</sup> Whether this jurisdiction originated in the consent of the parties, and proceeded by analogy to the writs *de rationalibus divisis* and *de perambulatione facienda* used at law,<sup>2</sup> or arose in avoidance of a multiplicity of suits,<sup>3</sup> has been discussed; but the determination of the question remains uncertain and conjectural. The mere fact, however, that certain boundaries are in controversy is not of itself sufficient to authorize the interference of equity; and upon such a showing, the parties would be left to their rights and remedies at law. Courts of equity will not interpose to ascertain boundaries, unless, in addition to a naked confusion of the controverted boundaries, there is suggested some peculiar equity, which has arisen from the conduct, situation, or relations of the parties.<sup>4</sup>

§ 1384, 1 *Wake v. Conyers*, 1 Eden, 331; 2 Lead. Cas. Eq., 4th Am. ed., 850, 853, 860; *Mullineux v. Mullineux*, Toth. 39; *Peckering v. Kimpton*, Toth. 39; *Boteler v. Spelman*, Finch, 96; *Perry v. Pratt*, 31 Conn. 433.

§ 1384, 2 *Speer v. Crawter*, 2 Mer. 410, 417.

§ 1384, 3 *Wake v. Conyers*, *supra*.

§ 1384, 4 *Wake v. Conyers*, *supra*; *Miller v. Warmington*, 1 Jacob & W. 484; *Speer v. Crawter*, 2 Mer. 410, 417; *Atkins v. Hatton*, 2 Anstr. 386; *O'Hara v. Strange*, 11 Ir. R. Eq. 262; *Ireland v. Wilson*, 1 Ir. R. Ch. 623; *St. Lukes v. St. Leonards*, cited 2 Anstr. 395; *Perry v. Pratt*, 31 Conn. 433; *Wolcott v. Robbins*, 26 Conn. 236; *De Veney v. Gallagher*, 20 N. J. Eq. 33; *Norris's Appeal*, 64 Pa. St. 275; *Tillmes v. Marsh*, 67 Pa. St. 507; *Merriman v. Russell*, 2 Jones Eq. 470; *Hill v. Proctor*, 10 W. Va. 59; *Fraley v. Peters*, 12 Bush, 469; *Doggett v. Hart*, 5 Fla. 215, 58 Am. Dec. 464; *Wolf v. Scarborough*, 2 Ohio St.

§ 1384, (a) For additions and annotations, see Pom. *Equitable Remedies*, § 694.



§ 1385. **Equitable Incidents and Grounds.**<sup>a</sup>—The fraud or neglect of duty of the party against whom relief is sought by way of establishment of boundaries will afford a sufficient ground for equitable interference.<sup>1</sup> And where a settlement of the boundaries in dispute cannot be had at law without a multiplicity of suits, relief may be obtained in equity.<sup>2</sup> It may happen that such a relation exists between the parties as to make it incumbent upon one of them to preserve the boundaries. Such would be the case where one of the parties was a tenant or a copyholder; and in all such cases, equity will entertain the suit of the aggrieved party—as of a landlord—to compel the defendant—as in the example, a tenant—to preserve the boundaries from confusion.<sup>3</sup> In the case of a rent-charge, where, by reason of a confusion of the boundaries, the remedy of distress is defeated, a court of equity will issue a commission to fix the boundaries.<sup>4</sup> Where several parcels of land allotted to the

361; *Hale v. Darter*, 5 Humph. 79; *Topp v. Williams*, 7 Humph. 569; *Wetherbee v. Dunn*, 36 Cal. 249.

§ 1385, <sup>1</sup> *Atkins v. Hatton*, 2 Anstr. 386; *Rous v. Barker*, 4 Brown Parl. C. 660; *Speer v. Crawter*, 2 Mer. 410, 418; *Duke of Leeds v. Earl of Strafford*, 4 Ves. 180; *Grierson v. Eyre*, 9 Ves. 341, 345; *Pratt v. Bryant*, 20 Vt. 333; *Perry v. Pratt*, 31 Conn. 433; *Fraley v. Peters*, 12 Bush, 469.

§ 1385, <sup>2</sup> *Wake v. Conyers*, *supra*; *Bouverie v. Prentice*, 1 Brown Ch. 200; *Marquis of Bute v. Glamorganshire Can. Co.*, 1 Phill. Ch. 681; *Whaley v. Dawson*, 2 Schoales & L. 367, 370; *Commissioners etc. v. Glasse*, 41 L. J. Ch. 409.

§ 1385, <sup>3</sup> *Aston v. Lord Exeter*, 6 Ves. 288; *Miller v. Warmington*, 1 Jacob & W. 484; *Att'y-Gen. v. Fullerton*, 2 Ves. & B. 263; *Speer v. Crawter*, 17 Ves. 216; *Duke of Leeds v. Earl of Strafford*, 4 Ves. 180; *Godfrey v. Littel*, 1 Russ. & M. 59; 2 Russ. & M. 630; *Att'y-Gen. v. Stephens*, 6 De Gex, M. & G. 111, 133; *Clayton v. Cookes*, 2 Atk. 449; *Spike v. Harding*, L. R. 7 Ch. Div. 871.

§ 1385, <sup>4</sup> *Bowman v. Yeat*, cited in 1 Ch. Cas. 145; *Duke of Leeds v. Powell*, 1 Ves. Sr. 171; *North v. Earl of Strafford*, 3 P. Wms. 148;

§ 1385, (a) For details of this subject, see Pom. *Equitable Remedies*, §§ 695–700.

holders of certain offices were for a number of years in the possession of a single occupant, who held all the offices, it would seem that a confusion of boundaries resulting from such holding would furnish a sufficient ground for the equitable relief.<sup>5</sup> It is necessary for the complainant to show that some portion of the lands, in respect of which the relief of establishing their boundaries is sought, is in the possession of the defendant.<sup>6</sup>

**§ 1386. Partition of Lands—Common-law Remedy.<sup>a</sup>**

At common law, the writ of partition lay only in case of lands held in coparcenary.<sup>1</sup> The remedy was afterwards extended by statute to joint tenancies and tenancies in common.<sup>2</sup> Where the tenure was copyhold, partition might be had in the lord's court by a plaint in the nature of a writ of partition. As the plaint and the writ have both been abolished by statute,<sup>3</sup> this jurisdiction of equity is now, in the absence of statutory provision, ex-

Duke of Leeds v. Corp. of New Radnor, 2 Brown Ch. 338; Att'y-Gen. v. Stephens, 6 De Gex, M. & G. 111; Mayor etc. v. Lord Bolton, 1 Drew. 270, 289.

§ 1385, 5 Kennedy v. Trott, 6 Moore P. C. C. 449, 467.

§ 1385, 6 Att'y-Gen. v. Stephens, 6 De Gex, M. & G. 111; Godfrey v. Littel, 1 Russ. & M. 59; 2 Russ. & M. 630. As to the parties in suits to establish boundaries, all persons interested, whether their estates are present or future, remaindermen, and reversioners should be made parties, although, of course, all need not be joined as plaintiffs: 1 Daniell's Chancery Practice, 209; Rayley v. Best, 1 Rust. & M. 659; Miller v. Warmington, 1 Jacob & W. 484; Speer v. Crawler, 2 Mer. 410; Att'y-Gen. v. Stephens, *supra*; Pope v. Melone, 2 A. K. Marsh. 239.

§ 1386, 1 The reason given was, that as tenancy in coparcenary arose by operation of law, it was only proper that the law should afford the means of severance.

§ 1386, 2 31 Henry VIII., c. 1; 32 Henry VIII., c. 32.

§ 1386, 3 3 & 4 Wm. IV., c. 27.

§ 1386, (a) For a detailed treatment of partition, see Pom. Equitable Remedies, chap. XXXIV; for annotations and additions to this paragraph, *Id.*, §§ 701, 702.

clusive. The operation of the common-law remedy, even after its extension to joint tenancies and tenancies in common, was imperfect and narrow. The writ of partition lay only against the tenant in possession, and was incompetent to reach the remainderman or the reversioner. As the judgment at law proceeded according to the titles proved, it was necessary for the plaintiff to show the title of the defendant as well as his own. And as partition at law was made by the sheriff by actual division, it might happen that, where the undivided interests were incapable of exact apportionment, the judgment of the court would be powerless to compensate the inequalities.

§ 1387. **Equitable Jurisdiction and Remedies.**<sup>a</sup>—These difficulties, illustrating the inadequacy of the legal remedy, gave rise to the equitable interference. As early as the reign of Elizabeth, partition became a matter of equitable cognizance;<sup>1</sup> and now the jurisdiction is established as of right in England and in the United States.<sup>2</sup>

§ 1387, 1 1 Fonblanque's Equity, b. 1, c. 1, sec. 3, note f; *Speke v. Walrend*, Toth. 155.

§ 1387, 2 *Agar v. Fairfax*, 17 Ves. 533; 2 Lead. Cas. Eq., 4th Am. ed., 865, 880, 894; *Baring v. Nash*, 1 Ves. & B. 551; *Parker v. Gerard*, Amb. 236; *Wood v. Little*, 35 Me. 107; *Bailey v. Sisson*, 1 R. I. 233; *Donnell v. Mateer*, 7 Ired. Eq. 94; *Holmes v. Holmes*, 2 Jones Eq. 334; *Howey v. Goings*, 13 Ill. 95, 54 Am. Dec. 427. And see *Wotten v. Copeland*, 7 Johns. Ch. 140; *Sebring v. Merserau*, Hopk. Ch. 501; 9 Cow. 344; *Harwood v. Kirby*, 1 Paige, 469; *Teal v. Woodworth*, 3 Paige, 470; *Wilkinson v. Parish*, 3 Paige, 653; *Burhans v. Burhans*, 2 Barb. Ch. 398; *Van Arsdale v. Drake*, 2 Barb. 599; *Green v. Putnam*, 1 Barb. 500; *Tanner v. Niles*, 1 Barb. 560; *Scott v. Guernsey*, 60 Barb. 163; 48 N. Y. 106; *Mead v. Mitchell*, 17 N. Y. 210, 72 Am. Dec. 455; *Clemens v. Clemens*, 37 N. Y. 59; *Gregory v. Gregory*, 69 N. C. 522; *Tabler v. Wiseman*, 2 Ohio St. 207; *Williams v. Van Tuyl*, 2 Ohio St. 336; *Gregory v. High*, 29 Ind. 527; *Milligan v. Poole*, 35 Ind. 64; *Larned v. Renshaw*, 37 Mo. 458; *Waugh v. Blumenthal*, 28 Mo. 462; *Reinhardt v. Wendek*, 40 Mo. 577; *De Uprey v. De Uprey*, 27 Cal. 329, 87 Am. Dec. 81; *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139.

§ 1387, (a) See Pom. Equitable Remedies, § 703 et seq.

The remedy in equity is not confined to the tenants in possession, but extends to all persons interested, whether presently or in expectancy; and remaindermen, reversioners, infants, and persons not *in esse* may be bound by the decree.<sup>3</sup>

§ 1387, <sup>3</sup> Lord Brook v. Lord Hertford, 2 P. Wms. 518; Gaskell v. Gaskell, 6 Sim. 643; Hobson v. Sherwood, 4 Beav. 184; Wills v. Slade, 6 Ves. 498. But while all persons interested in the land, whether in possession or in expectancy, are proper parties to a bill in partition, only those in possession are entitled to file the bill; Evans v. Bagshaw, L. R. 8 Eq. 469; L. R. 5 Ch. 340; Agar v. Fairfax, 2 Lead. Cas. Eq. 880, 894. The mortgagors of undivided interests may have partition of the equity of redemption: Wotten v. Copeland, 7 Johns. Ch. 140. But the mortgagees and judgment creditors of tenants in common are not proper, or at least not necessary, parties to a bill of partition: Sebring v. Mersereau, 9 Cow. 344; Harwood v. Kirby, 1 Paige, 469; Low v. Holmes, 17 N. J. Eq. 148; Speer v. Speer, 14 N. J. Eq. 240; Thurston v. Minke, 32 Md. 571. Where a mortgagee's interests require that he should be joined, he may be made a party: Whitton v. Whitton, 38 N. H. 127, 135, 75 Am. Dec. 163. It has been held that the mortgagee of an undivided share may sue in equity for a foreclosure and partition, and obtain a receiver of the rents and profits issuing out of the share of the mortgagor: Fall v. Elkins, 9 Week. Rep. 861. In general, all the tenants in common or joint tenants should be made parties; but all need not be plaintiffs: Anonymous, 3 Swanst. 139, note; Cornish v. Gest, 2 Cox, 27; Brashear v. Macey, 3 J. J. Marsh. 89; Braker v. Devereaux, 8 Paige, 513; Borah v. Archers, 7 Dana, 176; Rosekrans v. White, 7 Lans. 486 (wife of tenant); Scott v. Guernsey, 60 Barb. 163, 181 (administrator of deceased tenant); Sullivan v. Sullivan, 4 Hun, 198. Suit by a lessee of a share without making his lessor a party: Baring v. Nash, 1 Ves. & B. 551; Heaton v. Dearden, 16 Beav. 147. As to how far a decree between tenants for life will bind future contingent interests, see Wotten v. Copeland, 7 Johns. Ch. 140; Mead v. Mitchell, 17 N. Y. 210, 214, 72 Am. Dec. 455; Clemens v. Clemens, 37 N. Y. 59; Striker v. Mott, 2 Paige, 387, 389, 22 Am. Dec. 646; Woodworth v. Campbell, 5 Paige, 518; Gaskell v. Gaskell, 6 Sim. 643. See Pomeroy on Remedies, sec. 254. With reference to parties defendant, and especially the legislation of various states on that subject, see Pomeroy on Remedies, secs. 373-377.



§ 1388. **The Title of the Plaintiff.**<sup>a</sup>—The difficulty under which the complainant labored at law in proving the title as well of the defendant as of himself is, in equity, obviated by a discovery, and if need be by a reference to the master. The complainant must show title in himself, and such a title as will establish his right, as against the defendant, to a partition.<sup>1</sup> Where the complainant's legal title is disputed, courts of equity decline the jurisdiction to try this question; but, in analogy to the case of dower, they will retain the bill for a reasonable time, until the issue of title has been determined at law.<sup>2</sup> If the disputed titles are equitable, courts of equity will exercise jurisdiction to settle them, and will then grant final relief by way of partition, under the same bill.<sup>3</sup> Where the subject-matter of the suit is an equitable estate<sup>4</sup> or an incorporeal hereditament,<sup>5</sup> a partition may be had in equity.

§ 1389. **Mode of Partition—Pecuniary Compensation.**<sup>a</sup> In the original jurisdiction of equity the partition was

§ 1388, <sup>1</sup> *Agar v. Fairfax*, *supra*; *Jope v. Morshead*, 6 Beav. 213; *Parker v. Gerard*, Amb. 236.

§ 1388, <sup>2</sup> *Slade v. Barlow*, L. R. 7 Eq. 296; *Giffard v. Williams*, L. R. 5 Ch. 546; *Bolton v. Bolton*, L. R. 7 Eq. 298, note; *Potter v. Waller*, 3 De Gex & S. 410; *Simpson v. Wallace*, 83 N. C. 477; *Mattair v. Payne*, 15 Fla. 682; *Hardy v. Mills*, 35 Wis. 141; *Hoffman v. Beard*, 22 Mich. 59; *Wilkin v. Wilkin*, 1 Johns. Ch. 111, 118; *Manners v. Manners*, 2 N. J. Eq. 384, 35 Am. Dec. 512; *Currin v. Sprauell*, 10 Gratt. 145.

§ 1388, <sup>3</sup> *Crosier v. McLaughlin*, 1 Nev. 348; *Leverton v. Waters*, 7 Cold. 20; *Ross v. Cobb*, 48 Ill. 111; *Foust v. Moorman*, 2 Ind. 17; *Donnell v. Mateer*, 7 Ired. Eq. 94; *Carter v. Taylor*, 3 Head, 30; *Obert v. Obert*, 10 N. J. Eq. 98; *Longwell v. Bentley*, 23 Pa. St. 99.

§ 1388, <sup>4</sup> *Hitchcock v. Skinner*, Hoff. Ch. 21; *Crosier v. McLaughlin*, 1 Nev. 348.

§ 1388, <sup>5</sup> *Bailey v. Sisson*, 1 R. I. 233.

§ 1388, (a) See Pom. Equitable Remedies, § 712, etc.

§ 1389, (a) See, further, Pom. Equitable Remedies, §§ 718, 719.

effected by means of mutual conveyances; and where the land was incapable of exact or fair division, the court had power to compensate for the inequality by awarding what was known as "owelty of partition," being a pecuniary compensation, or a charge upon the land by way of rent, servitude, or easement.<sup>1</sup> And if one of the joint owners or owners in common has received more than his share of the rents and profits, the court will direct an account for the purpose of decreeing a reimbursement.<sup>2</sup> And if it should appear that one of the parties had made improvements on the land of which partition is sought, he will be awarded suitable compensation.<sup>3</sup> The inconvenience or difficulty attending the partition is no ground for refusing the relief.<sup>4</sup>

§ 1389, <sup>1</sup> *Earl of Clarendon v. Hornby*, 1 P. Wms. 446; *Turner v. Morgan*, 8 Ves. 143; *Story v. Johnson*, 2 Younge & C. 586; *Hornecastle v. Charlesworth*, 11 Sim. 315; *Mole v. Mansfield*, 15 Sim. 41; *Smith v. Smith*, 10 Paige, 470; *Larkin v. Mann*, 2 Paige, 27; *Phelps v. Green*, 3 Johns. Ch. 302; *Haywood v. Judson*, 4 Barb. 228; *Norwood v. Norwood*, 4 Har. & J. 112; *Warfield v. Warfield*, 5 Har. & J. 459; *Cox v. McMullin*, 14 Gratt. 82; *Wynne v. Tunstall*, 1 Dev. Eq. 23; *Graydon v. Graydon*, *McMull. Eq.* 63; *Oliver v. Jernigan*, 46 Ala. 41.

§ 1389, <sup>2</sup> *Lorimer v. Lorimer*, 5 Madd. 363; *Hill v. Fulbrook*, Jac. 574; *Story v. Johnson*, 2 Younge & C. 586; *Leach v. Beattie*, 33 Vt. 195; *Hitchcock v. Skinner*, Hoff. Ch. 21; *Early v. Friend*, 16 Gratt. 21, 78 *Am. Dec.* 649; *Carter's Ex'r v. Carter*, 5 Munf. 108; *Backler v. Farrow*, 2 Hill. Ch. 111; *Rozier v. Griffith*, 31 Mo. 171.

§ 1389, <sup>3</sup> *Swan v. Swan*, 8 Price, 518; *Green v. Putnam*, 1 Barb. 500; *Conklin v. Conklin*, 3 Sand. Ch. 64; *St. Felix v. Rankin*, 3 Edw. Ch. 323; *Brookfield v. Williams*, 2 N. J. Eq. 341; *Obert v. Obert*, 5 N. J. Eq. 397; *Sneed's Heirs v. Atherton*, 6 Dana, 276, 32 *Am. Dec.* 70; *Borah v. Archers*, 7 Dana, 176; *Respass v. Breckenridge's Heirs*, 2 A. K. Marsh, 581; *Dean v. O'Meara*, 47 Ill. 120; *Martindale v. Alexander*, 26 Ind. 104, 87 *Am. Dec.* 458.

§ 1389, <sup>4</sup> *Warner v. Baynes*, Amb. 589; *Parker v. Gerard*, Amb. 236. In one case the doctrine was carried to the extent of making partition of a house by building a wall through the middle of it: *Turner v. Morgan*, 8 Ves. 143. Where the defendants, however, objected to the division of their own shares, the partition would be confined to the setting

§ 1390. **Partition by Means of a Sale.**<sup>a</sup>—On account of the difficulty of making an equable apportionment and division of the land, it might sometimes be expedient for the court to order a sale of the property and a division of the proceeds. By the original equitable jurisdiction, independent of any statute, if all the parties *sui juris* were willing, the court had power to decree a sale; and this, even though infants might be among the parties interested.<sup>1</sup> But where one of the parties *sui juris* refused his consent, the court had no option but to proceed with the ordinary mode of partition.<sup>2</sup> This restriction has in England been removed by a modern statute.<sup>3</sup> In the United States an unqualified power of sale has been conferred on the courts in very many of the states, the power to be exercised whenever it shall appear to the court, independently of the consent of the parties, that a sale would be more beneficial, or less injurious, than an actual division.<sup>4</sup> As between a sale and a partition, however, the courts will *favor* a partition, as not disturbing the existing form of the inheritance.<sup>5</sup>

out and severing the share of the complainant: *Hobson v. Sherwood*, 4 Beav. 184.

§ 1390, <sup>1</sup> *Davis v. Turvey*, 32 Beav. 554; *Hubbard v. Hubbard*, 2 Hem. & M. 38; *Thackeray v. Parker*, 1 N. R. 567.

§ 1390, <sup>2</sup> *Griffies v. Griffies*, 11 Week. Rep. 943; *Wood v. Little*, 35 Me. 107; *Codman v. Tinkham*, 15 Pick. 364.

§ 1390, <sup>3</sup> 31 & 32 Viet., c. 40.

§ 1390, <sup>4</sup> *Thompson v. Hardman*, 6 Johns. Ch. 436; *McCall's Appeal*, 56 Pa. St. 363; *Matter of Skinner's Heirs*, 2 Dev. & B. Eq. 63; *Steedman v. Weeks*, 2 Strob. Eq. 145, 49 Am. Dec. 660; *Royston v. Royston*, 13 Ga. 425; *Wilson v. Duncan*, 44 Miss. 642; *Higginbottom v. Short*, 25 Miss. 160, 57 Am. Dec. 198; *Graham v. Graham*, 8 Bush, 334; *Welsh v. Freeman*, 21 Ohio St. 402.

§ 1390, <sup>5</sup> *Davidson v. Thompson*, 22 N. J. Eq. 83; *Thruston v. Minke*, 32 Md. 571; *Graham v. Graham*, 8 Bush, 334.

§ 1390, (a) For additions and annotations, see *Pom. Equitable Remedies*, § 722.

§ 1391. **Partition of Personal Property — Equitable Jurisdiction and Remedy.**<sup>a</sup>—The rules and proceedings which obtained at common law and by statute on the subject of partition related exclusively to real estate.<sup>1</sup> At common law the co-owner of a chattel could maintain an action respecting the common property against his co-tenant only where a loss, destruction, or sale of the property was provable against the defendant.<sup>2</sup> However expedient the partition of chattels might appear, or however desirable it might be to the co-tenants, the common law furnished no instrumentality by which the partition could be judicially effected. There was not merely an inadequacy of legal remedy, there was an utter absence of it. The situation clearly demanded the intervention of equity. And although the inception of the equitable jurisdiction for the partition of chattels is not traceable with certainty, the jurisdiction itself is unquestioned; and where a literal partition is not practicable, the court will order a sale.<sup>3</sup>

§ 1392. **The Issue of Title.**<sup>a</sup>—In the partition of real estate, the rule was well settled, that where the title of the complainant was put in issue, a court of equity would suspend its interference until the question of title had been determined at law in an action of ejectment. But

§ 1391, 1 Allnatt on Partition, 48.

§ 1391, 2 Gilbert v. Dickerson, 7 Wend. 449, 22 Am. Dec. 592; Tinney v. Stebbins, 28 Barb. 290; Cowles v. Garrett's Adm'rs, 30 Ala. 341; Hinds v. Terry, Walk. (Miss.) 80.

§ 1391, 3 Tripp v. Riley, 15 Barb. 333; Fobes v. Shattuck, 22 Barb. 568; Tinney v. Stebbins, 28 Barb. 290; Wetmore v. Zabriskie, 29 N. J. Eq. 62; Crapster v. Griffith, 2 Bland, 525; Smith v. Smith, 4 Rand. 95, 102; Kerley v. Clay, 4 Bibb. 241; Marshal v. Crow's Adm'r, 29 Ala. 278; Conover v. Earl, 26 Iowa, 167.

§ 1391, (a) For annotations to this paragraph, see Pom. Equitable Remedies, § 705.

§ 1392, (a) See Pom. Equitable Remedies, § 711.



no ejectment lay to try the title to personalty. A refusal, then, by a court of equity, in proceedings for the partition of chattels, to pass upon an issue of title would be tantamount to a complete failure of justice. Courts of equity, therefore, when partition of personalty is sought, have of necessity departed from the analogies of the law of real estate, and have assumed jurisdiction to determine as well the issue of title as any other issue pertinent to the case.<sup>1</sup>

§ 1392, <sup>1</sup> *Weeks v. Weeks*, 5 Ired. Eq. 111, 47 *Am. Dec.* 358; *Edwards v. Bennett*, 10 Ired. 363; *Smith v. Dunn*, 27 *Ala.* 315.

## CHAPTER SECOND.

SUITS BY WHICH SOME GENERAL RIGHT,  
EITHER LEGAL OR EQUITABLE, IS ESTAB-  
LISHED—BILLS OF PEACE AND BILLS QUIA  
TIMET QUIETING TITLE.

## ANALYSIS.

§ 1393. Nature and object.

§ 1394. Bills of peace—Bills *quia timet*—Quieting title.

**§ 1393. Nature and Object.**—In all the remedies belonging to this class, some *general* right, which may be either legal or equitable, is declared and established.<sup>1</sup> The class includes suits to establish a will, suits to construe a will, and the bills of peace and bills *quia timet* for the purpose of quieting title, which belong to the original general jurisdiction of equity.<sup>2</sup>

**§ 1394. Bills of Peace—Quieting Title.**—The origin, grounds, growth, and extent of the jurisdiction of equity to entertain bills of peace have been fully discussed in the section which treats of the jurisdiction to prevent a

**§ 1393,** <sup>1</sup> Some of the remedies of this class undoubtedly depend upon what the early chancellors called the “jurisdiction *quia timet*.” Since the conception of a *quia timet* jurisdiction is so broad, and runs through so many different branches of the remedial jurisprudence, I have not adopted it as a basis of classification. The object of suits to establish and to construe wills is plainly the establishment of a general right; and the same is no less true of those suits to quiet title, bills of peace, and the like, which belong to the original jurisdiction of equity.

**§ 1393,** <sup>2</sup> All of these remedies have been fully considered in the preceding parts of this work, and I shall only add here a few observations concerning bills of peace, etc.

For suits to establish a will, see *ante*, § 1158. For suits to construe a will, see *ante*, §§ 1155–1157; also see *Dill v. Wisner*, 88 N. Y. 153; *Delaney v. McCormack*, 88 N. Y. 174; *Bliven v. Seymour*, 88 N. Y. 469 (will of personal property). For suit quieting title, bills of peace, etc., see *ante*, vol. 1, §§ 243–275.

multiplicity of suits.<sup>1</sup> It was shown that there were two distinct kinds of bills of peace,—the one brought for the purpose of establishing a general right between a single party and numerous persons claiming distinct and individual interests, and the other for the purpose of quieting a complainant's title to land against a single adverse claimant.<sup>2</sup> In the first class, the original jurisdiction to maintain "bills of peace" or "*bills quia timet*," properly so called, will only be exercised where the claims of the numerous individuals have some community of interest in the subject-matter, or arise from a common title; but the jurisdiction has been enlarged so as to entertain analogous suits, where the community of interest is in respect merely to the questions involved or to the kind of relief demanded.<sup>3</sup> In the second class, the suit can be maintained by a party in possession against a single defendant ineffectually seeking to establish a legal title by repeated actions of ejectment. It is here necessary that the title of the complainant should be established by at least one successful trial at law before equity will entertain jurisdiction.<sup>4</sup>

§ 1394, <sup>1</sup> Vol. 1, p. 254, sec. iv.

§ 1394, <sup>2</sup> Vol. 1, § 246.

§ 1394, <sup>3</sup> See the cases cited in vol. 1, §§ 273, 274, and the following additional cases on the last branch of the statement: *Thorpe v. Brumfitt*, L. R. 8 Ch. 650, 655, 656; *White v. Jameson*, L. R. 18 Eq. 303; *Duke of Buccleuch v. Cowan*, 5 Macph. (5 Ses. Cas. S., 3d series) 214; *Chipman v. Palmer*, 77 N. Y. 51, 56, 33 *Am. Rep.* 566; *Chenango Bridge Co. v. Lewis*, 63 Barb. 111; *Henshaw v. Clark*, 14 Cal. 460, 465; *Hillman v. Newington*, 57 Cal. 56, 64; *Blaisdell v. Stephens*, 14 Nev. 17, 23, 33 *Am. Rep.* 523; *Gaines v. Chew*, 2 How. 619, 642; *Oliver v. Piatt*, 3 How. 333, 412; *Central Pac. R. R. v. Dyer*, 1 Saw. 641, 650; *Woodruff v. North Bloomfield etc. Co.*, 8 Saw. 628, 636; *Troy & B. R. R. v. Boston etc. R'y*, 86 N. Y. 107; *Town of Springport v. Teutonia Sav. Bank*, 75 N. Y. 397.

§ 1394, <sup>4</sup> Vol. 1, §§ 253, 272; *Thompson v. Engle*, 4 N. J. Eq. 271; *Gunn v. Harrison*, 7 Ala. 585. This class is practically obsolete in many states, owing to the effect given to judgments, by statute, in the action of ejectment.

## CHAPTER THIRD.

SUITS BY WHICH SOME PARTICULAR ESTATE,  
INTEREST, OR RIGHT, EITHER LEGAL OR  
EQUITABLE, IS ESTABLISHED — STATU-  
TORY SUIT TO QUIET TITLE — SUIT TO  
REMOVE A CLOUD FROM TITLE.

## ANALYSIS.

§ 1395. Nature and object.

§ 1396. Statutory suit to quiet title; legislation.

§ 1397. The same; essential features and requisites; possession; title.

§ 1398. Suit to remove a cloud from title; to prevent a cloud.

§ 1399. The same; when the jurisdiction is exercised; general doctrine.

**§ 1395. Nature and Object.**—In all the instances of this class, as distinguished from those of the preceding one, the direct object of the remedy is to declare and establish some particular estate, interest, or right, either legal or equitable, in the property which is the subject-matter.<sup>1</sup> The class as a whole embraces suits for the strict foreclosure of a mortgage or a pledge, suits for the redemption of a mortgage, suits for the redemption of a pledge,<sup>2</sup> statutory suits to quiet title, and suits to remove a cloud from title.

§ 1395, <sup>1</sup> Some of these remedies, also, have been said to depend upon the *quia timet* jurisdiction.

§ 1395, <sup>2</sup> These three remedies have already been considered: Strict foreclosure of a mortgage: *Ante*, § 1227; of a pledge: *ante*, § 1231. Redemption of a mortgage: *Ante*, §§ 1219, 1220; of a pledge: *ante*, § 1231. I shall in this chapter only discuss the statutory suit to quiet title, and the suit to remove a cloud from title. The former of these suits has, in many of the states, become the most important and common of equitable remedies, and has even taken the place, to some extent, of the action of ejectment. The original equitable jurisdiction to quiet title has been greatly enlarged.



### § 1396. Statutory Suit to Quiet Title—Legislation.<sup>a</sup>—

The equity jurisdiction to quiet title, independent of statute, was only invoked by a plaintiff in possession, holding the legal title, when successive actions at law, all of which had failed, were brought against him by a single person out of possession, or when many persons asserted equitable titles against a plaintiff in possession holding the legal or an equitable title. The action has been greatly extended by statute, and in many states is the ordinary mode of trying disputed titles.<sup>1</sup> The states

§ 1396, 1 *Arizona*: Code Civ. Proc., sec. 256; *California*: Code Civ. Proc., sec. 738; Practice Act, sec. 254; *Colorado*: Code Civ. Proc., sec. 237; *Dakota*: Rev. Codes 1877, p. 584, sec. 635; *Idaho*: Rev. Laws 1874–75, p. 146, sec. 275; *Illinois*: Hurd's Rev. Stats. 1880, p. 192, c. 22, sec. 50; *Indiana*: 2 Davis's Stats. 1876, p. 254, sec. 611; *Iowa*: 1 Miller's Rev. Code 1880, p. 802, sec. 3273; *Kansas*: Dassel's Comp. Laws 1881, p. 683, sec. 594; *Kentucky*: 2 Stanton's Rev. Stats. 1867, c. 57, p. 102; *Michigan*: 2 Comp. Laws 1871, p. 1537, sec. 36; *Minnesota*: Young's Stats. 1880, p. 814, c. 75, sec. 2; *Mississippi*: Rev. Code 1880, p. 507, sec. 1833; *Montana*: Rev. Stats. 1879, p. 110, sec. 354; *Nebraska*: Brown's Comp. Stats. 1881, p. 394, c. 73, sec. 57; *Nevada*: 1 Comp. Laws 1873, p. 372, sec. 1317; *New Jersey*: Rev. 1877, p. 1189; *New York*: 2 Bliss's Code Civ. Proc. 1880, p. 88, sec. 1638; *Ohio*: Code Civ. Proc., sec. 557; Rev. Stats. 1880, p. 1396, sec. 5779; *Oregon*: Gen. Laws 1874, p. 212, sec. 500; *Utah*: Comp. Laws 1876, p. 477, sec. 254; *Wisconsin*: Taylor's Rev. Stats. 1872, p. 1671, c. 141, sec. 29. See also *Georgia*: Code 1882, secs. 3232, 3233; and *Louisiana*: Voorhies's Rev. Code of Prac. 1875, p. 46, arts. 46, 49, 50, 52. The statutes of Massachusetts and Missouri contain provisions concerning preliminary actions which may be brought against holders of adverse claims, to show cause why such holders should not institute proceedings to have their claims determined: See Mass. Pub. Stats. 1882, p. 1026, c. 176; Mo. Rev. Stats. 1879, p. 608, sec. 3562. The action, if brought by a plaintiff in possession, or perhaps when both parties are out of possession, is held to be equitable in its nature: *Leggett v. Cole*, 1 McCrary, 515; *Balmear v. Otis*, 4 Dill. 558; *Brandt v. Wheaton*, 52 Cal. 430.

The following are decisions arising under these various acts:—

*California*: Present code: *Leet v. Rider*, 48 Cal. 623; *Pierce v. Felter*, 53 Cal. 18; *Stoddart v. Burge*, 53 Cal. 394; *Brandt v. Wheaton*, 52

§ 1396, (a) On the statutory suit to quiet title, see Pom. Equitable Remedies, §§ 735–743.

adopting such statutes may be separated into two classes, the first and most numerous class requiring the plaintiff

Cal. 430; *San Francisco v. Ellis*, 54 Cal. 72; *Brewer v. Houston*, 58 Cal. 345; *Burton v. Le Roy*, 5 Saw. 510. Practice Act: *Merced Min. Co. v. Fremont*, 7 Cal. 317, 68 **Am. Dec.** 262; *Smith v. Brannan*, 13 Cal. 107; *Curtis v. Sutter*, 15 Cal. 259; *Van Winkle v. Hinekle*, 21 Cal. 342; *Rico v. Spence*, 21 Cal. 504; *Head v. Fordyce*, 17 Cal. 149; *Lyle v. Rollins*, 25 Cal. 437; *Horn v. Jones*, 28 Cal. 194; *Ferris v. Irving*, 28 Cal. 645; *Reed v. Calderwood*, 32 Cal. 109; *Pralus v. Pacific etc. Min. Co.*, 35 Cal. 30; *Pralus v. Jefferson etc. M. Co.*, 34 Cal. 558; *Brooks v. Calderwood*, 34 Cal. 563; 45 Cal. 519; *Ross v. Heintzen*, 36 Cal. 313; *Nevada Co. etc. Canal Co. v. Kidd*, 37 Cal. 282; *Sepulveda v. Sepulveda*, 39 Cal. 13; *Coleman v. San Rafael etc. Co.*, 49 Cal. 517.

*Illinois*: *Emery v. Cochran*, 82 Ill. 65; *Hardin v. Jones*, 86 Ill. 313; *Gage v. Abbott*, 99 Ill. 366; *Whitney v. Stevens*, 97 Ill. 482; *Oakley v. Hurlbut*, 100 Ill. 204; *Barnard v. Hoyt*, 63 Ill. 341; *Wing v. Sherrer*, 77 Ill. 200.

*Indiana*: *Cooper v. Jackson*, 71 Ind. 244; *Green v. Glynn*, 71 Ind. 336; *Rose v. Nees*, 61 Ind. 484.

*Iowa*: *Fejervary v. Langer*, 9 Iowa, 159; *Laverty v. Sexton*, 41 Iowa, 435; *Miller v. Davison*, 31 Iowa, 435; *Lewis v. Soule*, 52 Iowa, 11; *Paton v. Lancaster*, 38 Iowa, 494; *Balmear v. Otis*, 4 Dill. 558.

*Kansas*: *Eaton v. Giles*, 5 Kan. 24; *Brenner v. Bigelow*, 8 Kan. 496; *O'Brien v. Creitz*, 10 Kan. 202; *Wood v. Missouri etc. R'y*, 11 Kan. 323; *Giles v. Ortman*, 11 Kan. 59; *Douglass v. Nuzum*, 16 Kan. 515; *Entreken v. Howard*, 16 Kan. 551; *Cartwright v. McFadden*, 24 Kan. 662; *Douglass v. Bishop*, 24 Kan. 749; *Giltenan v. Lemert*, 13 Kan. 476; *Pierce v. Thompson*, 26 Kan. 714.

*Kentucky*: *Dudley v. Trustees of Frankfort*, 12 B. Mon. 610; *Armitage v. Wickliffe*, 12 B. Mon. 488, 494; *Taylor v. Embry*, 16 B. Mon. 340; *Cates v. Loftus's Heirs*, 4 T. B. Mon. 439; *Beard v. Smith*, 6 T. B. Mon. 430, 505; *Underwood v. Crutcher*, 7 J. J. Marsh, 529; *Hiatt's Heirs v. Calloway's Heirs*, 7 B. Mon. 178; *Harris v. Smith*, 2 Dana, 10; *Landrum v. Farmer*, 7 Bush, 46; *Fraley v. Peters*, 12 Bush, 469.

*Michigan*: *Stockton v. Williams*, 1 Doug. (Mich.) 546; *Hall v. Kellogg*, 16 Mich. 135; *Rowland v. Doty*, Harr. (Mich.) 3; *Blanchard v. Tyler*, 12 Mich. 339, 86 **Am. Dec.** 57; *Stetson v. Cook*, 39 Mich. 750; *Haddon v. Hemingway*, 39 Mich. 615; *Hammontree v. Lott*, 40 Mich. 190; *Barron v. Robbins*, 22 Mich. 35; *King v. Carpenter*, 37 Mich. 363; *Moran v. Palmer*, 13 Mich. 367; *Ormsby v. Barr*, 22 Mich. 80; *Jenkins v. Bacon*, 30 Mich. 154; *Meth. Church of Newark v. Clark*, 41 Mich. 730.

to be in possession, and the second allowing the action to

*Minnesota*: Steele v. Fish, 2 Minn. 153; Meighen v. Strong, 6 Minn. 177, 80 **Am. Dec.** 441; Bidwell v. Webb, 10 Minn. 59, 88 **Am. Dec.** 56; Wilder v. City of St. Paul, 12 Minn. 192; Murphy v. Hinds, 15 Minn. 182; Byrne v. Hinds, 16 Minn. 521; Conklin v. Hinds, 16 Minn. 457; Leggett v. Cole, 1 McCrary, 515.

*Mississippi*: Boyd v. Thornton, 13 Smedes & M. 338; Toulmin v. Heidelberg, 32 Miss. 268; Kerr v. Freeman, 33 Miss. 292; Ezelle v. Parker, 41 Miss. 520; Huntington v. Allen, 44 Miss. 654; Glazier v. Bailey, 47 Miss. 395; Carlisle v. Tindall, 49 Miss. 229; Handy v. Noonan, 51 Miss. 166; Griffin v. Harrison, 52 Miss. 824; Shivers v. Simmons, 54 Miss. 520, 28 **Am. Rep.** 372; Wofford v. Bailey, 57 Miss. 239.

*Nebraska*: State v. Sioux City etc. R. R., 7 Neb. 357; Harral v. Gray, 10 Neb. 186.

*Nevada*: Low v. Staples, 2 Nev. 209; Scorpion S. M. Co. v. Marsano, 10 Nev. 370; Lake Bigler Road Co. v. Bedford, 3 Nev. 399; Central Pac. R. R. v. Dyer, 1 Saw. 641.

*New Jersey*: Powell v. Mayo, 24 N. J. Eq. 178; Holmes v. Chester, 26 N. J. Eq. 79; Bogert v. City of Elizabeth, 27 N. J. Eq. 568; Jersey City v. Lembeck, 31 N. J. Eq. 255; Ludington v. City of Elizabeth, 32 N. J. Eq. 159; 34 N. J. Eq. 357; Lembeck v. Jersey City, 30 N. J. Eq. 554; Raymond v. Post, 25 N. J. Eq. 447.

*New York*: Onderdonk v. Mott, 34 Barb. 106; Haynes v. Onderdonk, 5 Thomp. & C. 176; Burnham v. Onderdonk, 41 N. Y. 425; Fisher v. Hepburn, 48 N. Y. 41; Austin v. Goodrich, 49 N. Y. 266; Barnard v. Simms, 42 Barb. 304; Donahue v. O'Connor, 13 Jones & S. 278; Schroeder v. Gurney, 10 Hun, 413; Ford v. Belmont, 69 N. Y. 567.

*Ohio*: Harvey v. Jones, 1 Disn. 65; Douglass v. Scott, 5 Ohio, 194; Clark v. Hubbard, 8 Ohio, 382; Thomas v. White, 2 Ohio St. 540; Ellithorpe v. Buck, 17 Ohio St. 72; Collins v. Collins, 19 Ohio St. 468; Rhea v. Dick, 34 Ohio St. 420; Bailey v. Hughes, 35 Ohio St. 597.

*Oregon*: Tichenor v. Knapp, 6 Or. 205; Thompson v. Woolf, 8 Or. 454; King v. French, 2 Saw. 441; Stark v. Starrs, 6 Wall. 402.

*Utah*: Goldberg v. Taylor, 2 Utah, 486.

*Wisconsin*: Pier v. Fond du Lac, 38 Wis. 470; Maxon v. Ayers, 28 Wis. 612; Shaffer v. Whelpley, 37 Wis. 334; Page v. Kennan, 38 Wis. 320; Wals v. Grosvenor, 31 Wis. 681; Jones v. Collins, 16 Wis. 594; Gamble v. Loop, 14 Wis. 465; Dean v. Madison, 9 Wis. 402.

*Georgia*: South Carolina R. R. v. Steiner, 44 Ga. 546; Jones v. Georgia R. R., 62 Ga. 718; Dart v. Orme, 41 Ga. 376; Wynne v. Lumpkin, 35 Ga. 208.

be brought by a plaintiff either in or out of possession.<sup>2</sup> In almost every instance the statutes, either by express terms or through broad and general language, allow the action to be maintained by persons having equitable

*Louisiana*: Dooley v. Gibson, 32 La. Ann. 192; Lange v. Baranco, 32 La. Ann. 697; White v. Sheriff, 32 La. Ann. 130; Dahlgreen v. Duncan, 26 La. Ann. 363; Deuchatell v. Robinson, 24 La. Ann. 176; Dickson v. Marks, 10 La. Ann. 518; Searles v. Costillo, 12 La. Ann. 203; Millard v. Richard, 13 La. Ann. 572.

*Massachusetts*: Hill v. Andrews, 12 Cush. 185; Dewey v. Bulkley, 1 Gray, 416; Macomber v. Jaffray, 4 Gray, 82; Munroe v. Ward, 4 Allen, 150; Tompkins v. Wyman, 116 Mass. 558; India Wharf v. Central Wharf, 117 Mass. 504; Tisdale v. Brabrook, 102 Mass. 374; Boston Mfg. Co. v. Burgin, 114 Mass. 340; Bowditch v. Gardner, 113 Mass. 315.

*Missouri*: Von Phul v. Penn, 31 Mo. 333; Rutherford v. Ullman, 42 Mo. 216; Deware v. Wyatt, 50 Mo. 236; Jordon v. Stevens, 55 Mo. 361; Webb v. Donaldson, 60 Mo. 394; Babe v. Phelps, 65 Mo. 27; Grant v. King, 31 Mo. 312; Campbell v. Allen, 61 Mo. 581; Bredell v. Alexander, 8 Mo. App. 110.

§ 1396, <sup>2</sup> The states and territories comprising the first class are Arizona, California (under the former Practice Act), Colorado, Kansas, Kentucky, Illinois (except where the land is unimproved and unoccupied), Michigan, Minnesota (except in the case of vacant and unoccupied land), Montana, Nevada, New Jersey, New York, Ohio, Oregon, Utah, and Wisconsin. The complaint must allege possession, the allegation is material, and if traversed, must be proved, or the plaintiff's case will fail: Ferris v. Irving, 28 Cal. 645, 647; Pralus v. Jefferson etc. Min. Co., 34 Cal. 558; Sepulveda v. Sepulveda, 39 Cal. 13, 18; Meighen v. Strong, 6 Minn. 177, 80 **Am. Dec.** 441; Douglass v. Nuzum, 16 Kan. 515; Shaffer v. Whelpley, 37 Wis. 334. In regard to the nature of the possession requisite to maintain the action, there is some conflict. It has been held on the one side that possession must be lawful,—must be accompanied by a claim of right, legal or equitable: Stark v. Starrs, 6 Wall. 402; King v. French, 2 Saw. 441; Tichenor v. Knapp, 6 Or. 205; and on the other, that it is immaterial how possession was obtained,—by collusion, fraud, or otherwise: Scorpion S. M. Co. v. Marsano, 10 Nev. 370; Calderwood v. Brooks, 45 Cal. 519. The states and territories included in the second class are California, Dakota, Idaho, Indiana, Iowa, Mississippi, and Nebraska.



titles; in other words, a plaintiff need not have a legal title.<sup>3</sup>

**§ 1397. Essential Features and Requisites.**—The essential features of the action brought in states of the first class, wherein it differs from the ordinary equitable suit to quiet title, are that the plaintiff may in all cases take the initiative, and need not wait for proceedings to be instituted against him; the statute is an enabling act; and the action may be brought against one or more claimants without regard to the interest or title—legal or equitable—which he or the plaintiff may hold.<sup>1</sup> In addition

**§ 1396,** <sup>3</sup> The excepted instances are Kentucky, Wisconsin, and formerly Ohio: See Chase's Ohio Stats. 687, 1278, 1697. In these states a plaintiff is required to have a legal title.

**§ 1397,** <sup>1</sup> See the various statutes; *Curtis v. Sutter*, 15 Cal. 259, 263; *Head v. Fordyce*, 17 Cal. 149; *Central Pac. R. R. v. Dyer*, 1 Saw. 641, 648; *Stark v. Starrs*, 6 Wall. 402, 410; *Smith v. Brannan*, 13 Cal. 107, 114; *Merced Min. Co. v. Fremont*, 7 Cal. 317, 319, 68 **Am. Dec.** 262; *Giltinan v. Lemert*, 13 Kan. 476; *Meighen v. Strong*, 6 Minn. 177, 179. See, also, *Pierce v. Felter*, 53 Cal. 18; *Stoddart v. Burge*, 53 Cal. 394,—under a statute of the second class. In New York, however, a plaintiff must have been in possession for three years, claiming an estate in fee, for life, or for a term of years not less than ten. In general, *some* interest is necessary: See note preceding last. A possessory title is held sufficient to maintain the action to quiet title to a mining claim located on public lands of the United States: *Pralus v. Pacific etc. Min. Co.*, 35 Cal. 30; *Merced Min. Co. v. Fremont*, 7 Cal. 317, 68 **Am. Dec.** 262. A mere trespasser on government land cannot maintain the action: *Wood v. Missouri etc. R'y*, 11 Kan. 323. A question has arisen in states of this class, which cannot very well arise in those of the second class, as to the effect of the statutes on the remedies of a plaintiff out of possession. It has been contended that the statutes have deprived such a plaintiff of any equitable remedy which he might otherwise have, leaving as his only resort ejectment, or a legal action to recover possession. The answer, on principle, is plain: equity is not deprived of its jurisdiction except by express language or necessary implication; none of these statutes contain such prohibitory language, nor can they be so construed as to deprive equity of jurisdiction to grant its ordinary remedies. Again, in those states which have

to the foregoing differences, possession is not required in states of the second class; the action may therefore be brought here in cases where a party at common law would be left to his remedy by ejectment.<sup>2</sup> Several of the statutes in express terms allow the action to be brought to remove clouds from title;<sup>3</sup> others are sufficiently general to include this as well as other adverse claims.<sup>4</sup>

**§ 1398. Suit to Remove a Cloud from Title.<sup>a</sup>—**The jurisdiction of courts of equity to remove clouds from

adopted the reformed procedure, all remedies, legal and equitable, are unaffected: Pomeroy on Remedies, sec. 69. While it is evident that a party out of possession holding a legal title must resort to ejectment, as before, to recover possession: *Curtis v. Sutter*, 15 Cal. 259, 264; *Van Winkle v. Hinckle*, 21 Cal. 342; *King v. Carpenter*, 37 Mich. 363; *Moran v. Palmer*, 13 Mich. 367; *Methodist Church of Newark v. Clark*, 41 Mich. 730; it is equally evident that the statutes do not prevent a party out of possession from applying for equitable relief,—as, for example, to have a cloud removed or prevent a cloud from being cast on his title: *King v. Carpenter*, 37 Mich. 363; *Ormsby v. Barr*, 22 Mich. 80; *Low v. Staples*, 2 Nev. 209; *Pier v. Fond du Lac*, 38 Wis. 470; *Jones v. Smith*, 22 Mich. 360; see, also, *Harral v. Gray*, 10 Neb. 186, 188.

§ 1397, <sup>2</sup> See *Lewis v. Soule*, 52 Iowa, 11, 13.

§ 1397, <sup>3</sup> See the statutes of Illinois, Mississippi, and New Jersey; also that of Georgia.

§ 1397, <sup>4</sup> *Head v. Fordyce*, 17 Cal. 149; *Maxon v. Ayers*, 28 Wis. 612; *Dean v. Madison*, 9 Wis. 402; *Lewis v. Soule*, 52 Iowa, 11, 13.

As to the effect of the judgment in this statutory action, see *Green v. Glynn*, 71 Ind. 336; *Reed v. Calderwood*, 32 Cal. 109. As to the proper or necessary parties in all such suits to quiet title, see *Pomeroy on Remedies*, secs. 369–372; *Flanders v. McClanahan*, 24 Iowa, 486; *Thomas v. Kennedy*, 24 Iowa, 397, 95 Am. Dec. 740; *Beckwith v. Dargets*, 18 Iowa, 303; *Pierce v. Faunce*, 47 Me. 507; *Newman v. Home Ins. Co.*, 20 Minn. 422; *Johnson v. Robinson*, 20 Minn. 170; *Durham v. Bischof*, 47 Ind. 211; *Haley v. Bagley*, 37 Mo. 363; *Mills v. Buttrick*, 4 Col. 123; *Bush v. Hicks*, 60 N. Y. 298; *Fisher v. Hepburn*, 48 N. Y. 41, 55.

§ 1398, (a) On the subject of suits to prevent or remove clouds on title, see *Pom. Equitable Remedies*, §§ 724–734.

title is well settled,<sup>1</sup> the relief being granted on the principle *quia timet*,—that is, that the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass or affect a plaintiff's title.<sup>2</sup>

**§ 1399. When the Jurisdiction is Exercised—General Doctrine.**<sup>a</sup>—Whether or not the jurisdiction will be exercised depends upon the fact that the estate or interest to be protected is equitable in its nature, or that the remedies at law are inadequate where the estate or interest is legal,—a party being left to his legal remedy where his estate or interest is legal in its nature, and full and complete justice can thereby be done.<sup>1</sup> While a

**§ 1398,** 1 Hayward v. Dimsdale, 17 Ves. 111; Mayor of Colchester v. Lowten, 1 Ves. & B. 226, 244; Pettit v. Shepherd, 5 Paige, 493, 501; Apthorp v. Comstock, 2 Paige, 482; Peirsoll v. Elliott, 6 Pet. 95, 98. Formerly there seems to have been some doubt as to the jurisdiction. Cancellation is the ordinary remedy in removing clouds. It is equally well established that equity has jurisdiction to prevent, by means of injunctions, clouds from being cast on titles: Pettit v. Shepherd, 5 Paige, 493, 28 **Am. Dec.** 437; Oakley v. Trustees etc., 6 Paige, 262; Shattuck v. Carson, 2 Cal. 588; Norton v. Beaver, 5 Ohio, 178; Bank of U. S. v. Schultz, 2 Ohio, 471; Groves v. Webber, 72 Ill. 606; O'Hare v. Downing, 130 Mass. 16; Mann v. City of Utica, 44 How. Pr. 334; Sanders v. Village of Yonkers, 63 N. Y. 489; Merriman v. Polk, 5 Heisk. 717. See, in this connection, Drake v. Jones, 27 Mo. 428. The danger, however, in such cases must be imminent and not merely speculative or potential: Sanders v. Village of Yonkers, *supra*. Cases for preventing and removing clouds from title depend generally upon the same principles, and will be discussed together. For statutory proceedings to remove clouds from title, see § 1397.

**§ 1398,** 2 1 Fonblanque's Equity, b. 1, c. 1, sec. 8, note *y*. See, also, Shell v. Martin, 19 Ark. 139, 141; Hager v. Shindler, 29 Cal. 47, 55; Eckman v. Eckman, 55 Pa. St. 269, 273.

**§ 1399,** 1 De Witt v. Hays, 2 Cal. 463, 56 **Am. Dec.** 352; Hager v. Shindler, 29 Cal. 47; Gage v. Rohrbach, 56 Ill. 262, 266; Gage v. Billings, 56 Ill. 268; Budd v. Long, 13 Fla. 288; Lockwood v. City of St.

**§ 1399,** (a) See, for a full discussion, Pom. Equitable Remedies, §§ 727–734.

court of equity will set aside a deed, agreement, or proceeding affecting real estate, where extrinsic evidence is necessary to show its invalidity, because such instrument or proceeding may be used for annoying and injurious purposes at a time when the evidence to contest or resist

Louis, 24 Mo. 20; Hall v. Whiston, 5 Allen, 126; Hinckley v. Greany, 118 Mass. 595; Daniel v. Stewart, 55 Ala. 278; Redmond v. Packenham, 66 Ill. 434; Martin v. Graves, 5 Allen, 601; Sullivan v. Finnegan, 101 Mass. 447; Plant v. Barclay, 56 Ala. 561; Jones v. De Graffenreid, 60 Ala. 145; Grigg v. Swindal, 67 Ala. 187; Miller v. Neiman, 27 Ark. 233; Crane v. Randolph, 30 Ark. 579; Munson v. Munson, 28 Conn. 582, 73 **Am. Dec.** 693; Commonwealth v. Smith, 10 Allen, 448, 87 **Am. Dec.** 672; Kennedy v. Northup, 15 Ill. 148; Moran v. Palmer, 13 Mich. 367; King v. Carpenter, 37 Mich. 363; Branch v. Mitchell, 24 Ark. 431.

As to whether possession by a plaintiff is necessary before he can resort to equity to remove a cloud, there appears to be some conflict of opinion, arising from loose and careless statements of judges, and an overlooking of the principles of equity in regard to the exercise of its jurisdiction. When the estate or interest to be protected is equitable, the jurisdiction should be exercised whether the plaintiff is in or out of possession, for under these circumstances legal remedies are not possible; but when the estate or interest is legal in its nature, the exercise of the jurisdiction depends upon the adequacy of legal remedies. Thus, for example, a plaintiff out of possession, holding the legal title, will be left to his remedy by ejectment, under ordinary circumstances: Burton v. Gleason, 56 Ill. 25; Polk v. Pendleton, 31 Md. 118; Branch v. Mitchell, 24 Ark. 431, 439; Moran v. Palmer, 13 Mich. 367, 370; Crane v. Randolph, 30 Ark. 579; Munson v. Munson, 28 Conn. 582; King v. Carpenter, 37 Mich. 363; Lawrence v. Zimpleman, 37 Ark. 643; Odle v. Odle, 73 Mo. 289. But where he is *in possession*, and thus unable to obtain any adequate legal relief, he may resort to equity: Gage v. Rohrbach, 56 Ill. 262, 266; Gage v. Billings, 56 Ill. 268; Jones v. De Graffenreid, 60 Ala. 145, 151; Hinckley v. Greany, 118 Mass. 595; Sullivan v. Finnegan, 101 Mass. 447; Clouston v. Shearer, 99 Mass. 209; Branch v. Mitchell, 24 Ark. 431, 439. Where, on the other hand, a party out of possession has an equitable title, or where he holds the legal title under circumstances that the law cannot furnish him full and complete relief, his resort to equity to have a cloud removed ought not to be questioned: Redmond v. Packenham, 66 Ill. 434; Plant v. Barclay, 56 Ala. 561; Thompson v. Lynch, 29 Cal. 189; Hager v. Shindler, 29 Cal. 47; Kennedy v. Northup, 15 Ill. 148, 152; Branch v. Mitchell,



it may not be as effectual as if used at once,<sup>2</sup> still, if the defect appears upon its face, and a resort to extrinsic evidence is unnecessary, the reason for equitable interference does not exist, for it cannot be said that any

24 Ark. 431, 439; *King v. Carpenter*, 37 Mich. 363; *Ormsby v. Barr*, 22 Mich. 80, 84; *Low v. Staples*, 2 Nev. 209, 212; *Pier v. Fond du Lac*, 38 Wis. 470; *Lawrence v. Zimpleman*, 37 Ark. 643, 645; *Booth v. Wiley*, 102 Ill. 84, 114. While it cannot be said that the cases are uniform on the above propositions, still it is believed that the rule stated in the text and the above explanations are founded on principle and are sufficient to reconcile a vast majority of the conflicting, or apparently conflicting, judicial opinions and *dicta* on this question. In some of the cases the rule is so broadly stated as to require a plaintiff, seeking to have a cloud removed, under all circumstances to be in possession: *Orton v. Smith*, 18 How. 263; *Daniel v. Stewart*, 55 Ala. 278; *Arnett v. Bailey*, 60 Ala. 435; *Tyson v. Brown*, 64 Ala. 244; *Baines v. Barnes*, 64 Ala. 375; *Smith's Ex'r v. Cockrell*, 66 Ala. 64; *Miller v. Neiman*, 27 Ark. 233; *Keane v. Kyne*, 66 Mo. 216; *Haythorn v. Margerem*, 7 N. J. Eq. 324; *Busbee v. Lewis*, 85 N. C. 332; *Herrington v. Williams*, 31 Tex. 448; *Clark v. Covenant etc. Ins. Co.*, 52 Mo. 272; while, on the other hand, it is as generally stated that possession is never essential: *Almony v. Hicks*, 3 Head, 39; *Hager v. Shindler*, 29 Cal. 47; *Thompson v. Lynch*, 29 Cal. 189; *Bunch v. Gallagher*, 5 Blatchf. 481; *Jones v. Smith*, 22 Mich. 360. Both of these extreme views are open to criticism, and the cases should always be considered with reference to the facts actually before the court.

§ 1399, <sup>2</sup> *Crooke v. Andrews*, 40 N. Y. 547; *Newell v. Wheeler*, 48 N. Y. 486; *Ward v. Dewey*, 16 N. Y. 519; *Radeliff v. Rowley*, 2 Barb. Ch. 23; *Longley v. City of Hudson*, 4 Thomp. & C. 353; *Congregation Shaarai Tephila v. Mayor etc.*, 53 How. Pr. 213; *Daniel v. Stewart*, 55 Ala. 278; *Lockett v. Hurt*, 57 Ala. 198; *Liek v. Ray*, 43 Cal. 83; *Alden v. Trubee*, 44 Conn. 455; *Brooks v. Kearns*, 86 Ill. 547; *Clark v. Covenant etc. Ins. Co.*, 52 Mo. 272; *Johnson v. Cooper*, 2 Yerg. 524, 24 Am. Dec. 502; *Almony v. Hicks*, 3 Head, 39; *Bunce v. Gallagher*, 5 Blatchf. 481; *Smith v. Fellows*, 9 Jones & S. 36; *Barton v. Drake*, 21 Minn. 299. A case for the interposition of equity is made the stronger by the fact that parol testimony is essential to show the invalidity: See the preceding cases. In *Waterbury Sav. Bank v. Lawler*, 46 Conn. 243, 246, it was held that relief would not be given where the rebutting evidence was a matter of record, and easily obtained. See, also, *Haines's Appeal*, 73 Pa. St. 169.

cloud whatever is cast upon the title.<sup>3</sup> Cases showing various conditions of facts in instruments creating clouds, and when jurisdiction will be exercised, are given in the foot-note. In the absence of statutes giving a *prima facie* validity to deeds or other proceedings, the following doctrine seems to be sustained by the great majority of the American decisions: Where the instrument or proceeding constituting the alleged cloud is absolutely void on its face, so that no extrinsic evidence is necessary to show its invalidity, and where the instrument or proceeding is not thus void on its face, but the

§ 1399, 3 Simpson v. Lord Howden, 3 Mylne & C. 97, 102, 103, 108, and cases cited; Cox v. Clift, 2 N. Y. 118; Van Doren v. Mayor etc., 9 Paige, 388; Heywood v. City of Buffalo, 14 N. Y. 534; Overing v. Foote, 43 N. Y. 290; Marsh v. City of Brooklyn, 59 N. Y. 280; Levy v. Hart, 54 Barb. 248; Tilden v. Mayor etc., 56 Barb. 340; Mulligan v. Baring, 3 Daly, 75; Howell v. City of Buffalo, 2 Abb. App. 412; Farnham v. Campbell, 34 N. Y. 480; Dederer v. Voorhies, 81 N. Y. 153; Stuart v. Palmer, 74 N. Y. 183, 30 **Am. Rep.** 289; Townsend v. Mayor etc., 77 N. Y. 542; Wells v. City of Buffalo, 80 N. Y. 253; Peirsoll v. Elliott, 6 Pet. 95; Posey v. Conaway, 10 Ala. 811; Cohen v. Sharp, 44 Cal. 29; Head v. James, 13 Wis. 641; Shepardson v. Supervisors, 28 Wis. 593; Briggs v. Johnson, 71 Me. 235; Busbee v. Macy, 85 N. C. 329; Minturn v. Smith, 3 Saw. 142; Curtis v. City of East Saginaw, 35 Mich. 508. See the rule as stated in Merchants' Bank v. Evans, 51 Mo. 335, 345.

In many states, deeds, certificates, and other instruments given on sales for taxes are made *prima facie* evidence by statute of the regularity of proceedings connected with the assessments and sales, and it is well settled that courts of equity will set aside such instruments for defects, although such defects are apparent on the faces of the instruments: Scott v. Onderdonk, 14 N. Y. 9, 67 **Am. Dec.** 106; Huntington v. Cent. Pac. R. R., 2 Saw. 503; Palmer v. Rich, 12 Mich. 414; Marquette etc. R. R. v. City of Marquette, 35 Mich. 504; Weller v. City of St. Paul, 5 Minn. 95; Allen v. City of Buffalo, 39 N. Y. 386; Hatch v. City of Buffalo, 38 N. Y. 276; Crooke v. Andrews, 40 N. Y. 547; Lewis v. City of Buffalo, 29 How. Pr. 335; Johnson v. Stevens, 13 How. Pr. 132; Mann v. City of Utica, 44 How. Pr. 334; Astor v. Mayor etc., 5 Jones & S. 539; Lennon v. Mayor etc., 5 Daly, 347; Nichols v. Voorhis, 9 Hun, 171; Masterson v. Hoyt, 55 Barb. 520.

party claiming under it, in order to enforce it, *must necessarily* offer evidence which will *inevitably* show its invalidity and destroy its efficacy,—in each of these cases the court will not exercise its jurisdiction either to restrain or to remove a cloud, for the assumed reason that there is no cloud.<sup>4</sup> While this doctrine may be settled

§ 1399, 4 *Deeds*: Lyon v. Hunt, 11 Ala. 295, 46 *Am. Dec.* 216; Hunt v. Acre, 28 Ala. 580; Barclay v. Henderson, 44 Ala. 269; Daniel v. Stewart, 55 Ala. 278; Lockett v. Hurt, 57 Ala. 198; Posey v. Conaway, 10 Ala. 811; Florence v. Paschal, 50 Ala. 28; Plant v. Barclay, 56 Ala. 561; Jones v. De Graffenreid, 60 Ala. 145; Arnett v. Bailey, 60 Ala. 435; Tyson v. Brown, 64 Ala. 244; Baines v. Barnes, 64 Ala. 375; Smith's Ex'r v. Cockrell, 66 Ala. 64; Grigg v. Swindal, 67 Ala. 187; Shell v. Martin, 19 Ark. 139; Walker v. Peay, 22 Ark. 103; Miller v. Neiman, 27 Ark. 233; Crane v. Randolph, 30 Ark. 579; Riley v. Pehl, 23 Cal. 70; Hager v. Shindler, 29 Cal. 47; Thompson v. Lynch, 29 Cal. 189; Lick v. Ray, 43 Cal. 83; Cohen v. Sharp, 44 Cal. 29; Alden v. Trubee, 44 Conn. 455; Munson v. Munson, 28 Conn. 582, 73 *Am. Dec.* 693; Stout v. Cook, 37 Ill. 283; Reed v. Tyler, 56 Ill. 288; Gage v. Billings, 56 Ill. 268; Reed v. Reber, 62 Ill. 240; Lee v. Ruggles, 62 Ill. 427; Kennedy v. Northup, 15 Ill. 149; Redmond v. Paekenhams, 66 Ill. 434; Brooks v. Kearns, 86 Ill. 547; Burton v. Gleason, 56 Ill. 25; Peck v. Sexton, 41 Iowa, 566; Gerry v. Stimson, 60 Me. 186; Polk v. Rose, 25 Md. 153, 89 *Am. Dec.* 773; Polk v. Reynolds, 31 Md. 106; Polk v. Pendleton, 31 Md. 118; Briggs v. Johnson, 71 Me. 235; Martin v. Graves, 5 Allen, 601; Burns v. Lynde, 6 Allen, 305; Sullivan v. Finnegan, 101 Mass. 447; Russell v. Deshon, 124 Mass. 342; Davis v. City of Boston, 129 Mass. 377; Merchants' Bank v. Evans, 51 Mo. 335; Clark v. Covenant etc. Ins. Co., 52 Mo. 272; Harrington v. Utterback, 57 Mo. 519; Keane v. Kyne, 66 Mo. 216; Haythorn v. Margerem, 7 N. J. Eq. 324; Downing v. Wherrin, 19 N. H. 9, 91, 49 *Am. Dec.* 139; Hall v. Fisher, 9 Barb. 17; Buffalo etc. R. R. v. Lampson, 47 Barb. 533; Remington Paper Co. v. O'Dougherty, 81 N. Y. 484; Cox v. Clift, 2 N. Y. 118; Bockes v. Lansing, 74 N. Y. 437; Hotchkiss v. Elting, 36 Barb. 38; Levy v. Hart, 54 Barb. 248; Busbee v. Macy, 85 N. C. 329; Busbee v. Lewis, 85 N. C. 332; Jones's Heirs v. Perry, 10 Yerg. 59, 30 *Am. Dec.* 430; Johnson v. Cooper, 2 Yerg. 524, 24 *Am. Dec.* 502; Almony v. Hicks, 3 Head, 39; Carter v. Taylor, 3 Head, 30; Butler v. Rutledge, 2 Cold. 4; Whillock v. Grisham, 3 Sneed, 237; Williams v. Williams, 7 Baxt. 116; Huffman v. Huffman, 1 Lea, 491; Jones v. Neale, 2 Pat. & H. 339; Carroll v. Brown, 28 Gratt. 791; Willis v.

by the weight of authority, I must express the opinion that it often operates to produce a denial of justice. It leads to the strange scene, almost daily in the courts, of defendants urging that the instruments under which they claim *are void, and therefore that they ought to be permitted to stand unmolested*, and of judges deciding that

Sweet, 49 Wis. 505; Bunce v. Gallagher, 5 Blatchf. 481; Peirsoll v. Elliott, 6 Pet. 95.

*Mortgages*: Ramsdell v. Fuller, 28 Cal. 37, 87 **Am. Dec.** 103; City of Hartford v. Chipman, 21 Conn. 488; Sherman v. Fitch, 98 Mass. 59 (personal property); Clouston v. Shearer, 99 Mass. 209; Comm. v. Smith, 10 Allen, 448, 87 **Am. Dec.** 672; Vogler v. Montgomery, 54 Mo. 577; Ward v. Dewey, 16 N. Y. 519; Smith v. Fellows, 9 Jones & S. 36; Eldridge v. Smith, 34 Vt. 484.

*Assessments for taxes*: See last preceding note; De Witt v. Hays, 2 Cal. 463, 56 **Am. Dec.** 352; Minturn v. Smith, 3 Saw. 142; Waterbury Sav. Bank v. Lawler, 46 Conn. 243; Gage v. Rohrbach, 56 Ill. 262; Gage v. Chapman, 56 Ill. 311; Barnett v. Cline, 60 Ill. 205; Holland v. Mayor etc., 11 Md. 186, 69 **Am. Dec.** 195; Scofield v. City of Lansing, 17 Mich. 437; Henry v. Gregory, 29 Mich. 68; Curtis v. City of East Saginaw, 35 Mich. 508; Lockwood v. City of St. Louis, 24 Mo. 20; Fowler v. City of St. Joseph, 37 Mo. 228; McPike v. Pen, 51 Mo. 63; Johnson v. Hahn, 4 Neb. 139; Morris Canal etc. Co. v. Jersey City, 12 N. J. Eq. 227; Longley v. City of Hudson, 4 Thomp. & C. 353; Newell v. Wheeler, 48 N. Y. 486; Cong. Shaarai Tephila v. Mayor etc., 53 How. Pr. 213; Hebrew etc. Ass'n v. Mayor etc., 4 Hun, 446; Dederer v. Voorhies, 81 N. Y. 153; Van Doren v. Mayor etc., 9 Paige, 388; Heywood v. City of Buffalo, 14 N. Y. 534; Howell v. City of Buffalo, 2 Abb. App. 412; Overing v. Foote, 43 N. Y. 290; Tilden v. Mayor etc., 56 Barb. 340; Sanders v. Village of Yonkers, 63 N. Y. 489; Marsh v. City of Brooklyn, 59 N. Y. 280; Guest v. City of Brooklyn, 69 N. Y. 506; Stuart v. Palmer, 74 N. Y. 183, 30 **Am. Rep.** 289; Townsend v. Mayor etc., 77 N. Y. 542; Wells v. City of Buffalo, 80 N. Y. 253; Burnet v. Corp. of Cincinnati, 3 Ohio, 73, 17 **Am. Dec.** 582; Culbertson v. City of Cincinnati, 16 Ohio, 574; Shepardson v. Supervisors, 28 Wis. 593; Milwaukee Iron Co. v. Town of Hubbard, 29 Wis. 51; Hamilton v. City of Fond du Lac, 25 Wis. 490; Head v. James, 13 Wis. 641.

*Judgments and executions*: Burt v. Cassety, 12 Ala. 734; Ala. etc. Co. v. Pettway, 24 Ala. 544; Rea v. Longstreet, 54 Ala. 291; Pixley v. Huggins, 15 Cal. 127; Englund v. Lewis, 25 Cal. 337; Shattuck v. Carson, 2 Cal. 588; Hall v. Theisen, 9 Pac. C. L. J. 479; Budd v. Long, 13



the court cannot interfere, *because the deed or other instrument is void*, while from a business point of view every intelligent person knows that the instrument is a serious injury to the plaintiff's title, greatly depreciating its market value, and the judge himself who repeats the rule would neither buy the property while thus affected nor loan a dollar upon its security. This doctrine is, in truth, based upon mere verbal logic, rather than upon considerations of justice and expediency.

Fla. 288; Davidson v. Seegar, 15 Fla. 671; Campbell v. McCahan, 41 Ill. 45; Tucker v. Conwell, 67 Ill. 552; Henderson v. Palmer, 71 Ill. 579, 22 **Am. Rep.** 117; Groves v. Webber, 72 Ill. 606; Key City etc. Co. v. Munsell, 19 Iowa, 305; Hall v. Whiston, 5 Allen, 126; Hinckley v. Greany, 118 Mass. 595; O'Hare v. Downing, 130 Mass. 16; Barton v. Drake, 21 Minn. 299; Hanson v. Johnson, 20 Minn. 194; Drake v. Jones, 27 Mo. 428; Uhl v. May, 5 Neb. 157; Tucker v. Kenniston, 47 N. H. 267, 93 **Am. Dec.** 425; Radeliff v. Rowley, 2 Barb. Ch. 23; Lounsbury v. Purdy, 18 N. Y. 515; Tisdale v. Jones, 38 Barb. 523; Brown v. Goodwin, 75 N. Y. 409; Fonda v. Sage, 48 N. Y. 173; Farnham v. Campbell, 34 N. Y. 480; Schroeder v. Gurney, 73 N. Y. 430; Mulligan v. Baring, 3 Daly, 75; Tear v. Mathews, Wright, 371; Bank of U. S. v. Schultz, 2 Ohio, 471; Norton v. Beaver, 5 Ohio, 178; Merriam v. Polk, 5 Heisk. 717; Rooney v. Soule, 45 Vt. 303; Goodell v. Blumer, 41 Wis. 436; Gamble v. Loop, 14 Wis. 465; Moore v. Cord, 14 Wis. 213; Standish v. Dow, 21 Iowa, 363.

*Miscellaneous cases:* Mayor etc. v. North Shore etc. Co., 9 Hun, 620 (lease); Spofford v. Bangor etc. R. R., 66 Me. 51 (ditto); Larmon v. Jordan, 56 Ill. 204 (land contract placed on record); Sea v. Morehouse, 79 Ill. 216 (ditto); Boyd v. Schlesinger, 59 N. Y. 301 (ditto); Washburn v. Burnham, 63 N. Y. 132 (ditto); Nickerson v. Loud, 115 Mass. 94 (papers recorded giving notice of claim to land); Sanxay v. Hunger, 42 Ind. 44 (papers recorded giving notice of dispute as to right of way); Yauger v. Skinner, 14 N. J. Eq. 389 (findings of commission of lunacy).

## FIFTH GROUP.

### REMEDIES BY WHICH EQUITABLE OBLIGATIONS ARE SPECIFICALLY AND DIRECTLY ENFORCED.

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#### CHAPTER FIRST.

#### SPECIFIC PERFORMANCE OF CONTRACTS.

##### ANALYSIS.

- § 1400. Nature and object.
- § 1401. Specific performance of contracts; grounds of the jurisdiction.
- § 1402. Extent of the jurisdiction; inadequacy of damages; various kinds of contracts.
- § 1403. The same: Impracticability of the legal remedy.
- § 1404. The jurisdiction discretionary.
- § 1405. Essential elements and incidents.
- § 1406. Rights under the contract; effect of events without the agency of the parties.
- § 1407. Performance by plaintiff a condition precedent.
- § 1408. Time as affecting the right to a performance.
- § 1409. Enforcement of verbal contracts part performed.
- § 1410. Damages in place of a specific performance.

§ 1400. **Nature and Object.**—The remedies embraced in this group are all purely equitable, and the rights of the complainant and obligations of the defendant which are enforced by their means are also equitable.<sup>1</sup> They belong, therefore, to the exclusive jurisdiction of equity. Their distinctive object is to specifically enforce the complainant's equitable right, and to compel the defendant to specifically perform the actual equitable obligation

§ 1400, <sup>1</sup> Although contracts may also give rise to a legal right, yet when equity compels their specific performance, it enforces the equitable obligation arising from them, and not the legal duty. In most cases, it turns the vendee's equitable *estate* into a legal one.

which rests upon him. This group, as a whole, contains the specific performance of contracts, including the performance of verbal contracts for the sale of land which have been part performed, and the delivery up of specific chattels; the specific enforcement of trusts, express and implied; and the specific enforcement of obligations arising from fiduciary relations analogous to trusts.<sup>2</sup>

**§ 1401. Specific Performance of Contracts—Ground of the Jurisdiction.**—The remedy of the specific performance of contracts is purely equitable, given as a substitute for the legal remedy of compensation, whenever the legal remedy is inadequate or impracticable. In the language of Lord Selborne: "The principle which is material to be considered is, that the court gives specific performance instead of damages only when it can by that means *do more perfect and complete justice*."<sup>1</sup> The jurisdiction depending upon this broad principle is exercised in two classes of cases: 1. Where the subject-matter of the contract is of such a special nature, or of such

§ 1400, 2 The indirect specific enforcement of certain contracts by means of an injunction has already been considered in a preceding chapter (§§ 1341–1344), and will not be here discussed.

§ 1401, 1 *Wilson v. Northampton etc. R'y*, L. R. 9 Ch. 279, 284. The foundation and measure of the jurisdiction is the desire to do justice, which the legal remedy would fail to give. This justice is primarily due to the plaintiff, but not exclusively, for the equities of the defendant are also protected. Specific performance is, therefore, a conscious attempt on the part of the court to do complete justice to both the parties with respect to all the judicial relations growing out of the contract between them: See *Buxton v. Lister*, 3 Atk. 383; *Wright v. Bell*, 5 Price, 325, 328, 329; *Adderley v. Dixon*, 1 Sim. & St. 607, 610; *Ord v. Johnston*, 1 Jur., N. S., 1063, 1064. It follows, therefore, that the remedial right, if it exists at all, must be mutual; each party must be able to enforce the remedy against the other: *Adderley v. Dixon*, *supra*: *Old Colony R. R. v. Evans*, 6 Gray, 25, 66 Am. Dec. 394; *Brown v. Haff*, 5 Paige, 235, 28 Am. Dec. 425; *Schroeppel v. Hopper*, 40 Barb. 425; *Hopper v. Hopper*, 16 N. J. Eq. 147; but see *Jones v. Newhall*, 115 Mass. 244, 15 Am. Rep. 97.

a peculiar value, that the damages, when ascertained according to legal rules, would not be a just and reasonable substitute for or representative of that subject-matter in the hands of the party who is entitled to its benefit; or in other words, where the damages are *inadequate*; 2. Where, from some special and practical features or incidents of the contract inhering either in its subject-matter, in its terms, or in the relations of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty, so that *no* real compensation can be obtained by means of an action at law; or in other words, where damages are *impracticable*.<sup>2</sup>

**§ 1402. Extent of the Jurisdiction—Inadequacy of Damages.**—The object of the present discussion is to determine the general classes of contracts which come within the jurisdiction, and which may be specifically enforced. Whether any particular contract belonging to one of these classes will actually be thus enforced depends upon other equitable elements, to be described hereafter. *Lands*: Where land, or any estate therein, is the subject-matter of the agreement, the inadequacy of the legal remedy is well settled, and the equitable jurisdiction is firmly established.<sup>1a</sup> Whenever a contract

**§ 1401,** <sup>2</sup> The ground of the jurisdiction may be practically stated thus: that an award of damages will not put the party in a situation as beneficial to him as if the agreement were specifically performed: *Harnett v. Yielding*, 2 Schoales & L. 549, 553; *Phyfe v. Wardell*, 2 Edw. Ch. 47; *Stuyvesant v. The Mayor etc.*, 11 Paige, 414; *Richmond v. Dubuque etc. R. R.*, 33 Iowa, 422; *Blanchard v. Detroit etc. R. R.*, 31 Mich. 43, 18 *Am. Rep.* 142; *Bogan v. Daughdrill*, 51 Ala. 312; *Willard v. Tayloe*, 8 Wall. 557; *Somerby v. Buntin*, 118 Mass. 279, 19 *Am. Rep.* 459; *McGarvey v. Hall*, 23 Cal. 140.

**§ 1402,** <sup>1</sup> *Harnett v. Yielding*, 2 Schoales & L. 549, 553, 554; *Adlerley v. Dixon*, 1 Sim. & St. 607; *Cud v. Rutter*, 1 P. Wms. 570, 571;

**§ 1402,** (a) See, further, *Pom. Equitable Remedies*, § 745, § 746 (contract to make a will of lands), § 747 (specific performance in favor of vendor).



concerning real property is in its nature and incidents entirely unobjectionable,—when it possesses none of those features which, in ordinary language, influence the discretion of the court,—it is as much a matter of course for a court of equity to decree its specific performance

Hollis v. Edwards, 1 Vern. 159; Duff v. Fisher, 15 Cal. 375; McGarvey v. Hall, 23 Cal. 140; Kirksey v. Fike, 27 Ala. 383, 62 **Am. Dec.** 768; Bogan v. Daughdrill, 51 Ala. 312; Barnes v. Barnes, 65 N. C. 261; Richmond v. Dubuque etc. R. R., 33 Iowa, 422; Blanchard v. Detroit etc. R. R., 31 Mich. 43, 18 **Am. Rep.** 142; Willard v. Tayloe, 8 Wall. 557; Somerby v. Buntin, 118 Mass. 279, 19 **Am. Rep.** 459. *Contracts to give or renew a lease*: Furnival v. Crew, 3 Atk. 83, 87; Tritton v. Foote, 2 Brown Ch. 636; Burke v. Smyth, 3 Jones & L. 193; Moss v. Barton, L. R. 1 Eq. 474; Buckland v. Papillon, L. R. 2 Ch. 67; Clark v. Clark, 49 Cal. 586; Switzer v. Gardner, 41 Mich. 164. *Contracts for mortgages*: Ashton v. Corrigan, L. R. 13 Eq. 76; Hermann v. Hodges, L. R. 16 Eq. 18; De Pierres v. Thorn, 4 Bosw. 266; City etc. Ins. Co. v. Olmsted, 33 Conn. 476; St. Paul Division etc. v. Brown, 11 Minn. 356; McClintock v. Laing, 22 Mich. 212; Dean v. Anderson, 34 N. J. Eq. 496. *Family settlements*: Wistar's Appeal, 80 Pa. St. 484; Henry v. Henry, 27 Ohio St. 121. *Bond to convey land*: Ewins v. Gordon, 49 N. H. 444. *Contracts concerning land in another country or state*: Penn v. Lord Baltimore, 1 Ves. Sr. 444; Lord Portarlington v. Soulby, 3 Mylne & K. 104; Sutphen v. Fowler, 9 Paige, 280; Brown v. Desmond, 100 Mass. 267; Davis v. Parker, 14 Allen, 94. For other contracts concerning land, see Johnson v. Johnson, 40 Md. 189; McNamee v. Withers, 37 Md. 171; Bleakley's Appeal, 66 Pa. St. 187; Seichrist's Appeal, 66 Pa. St. 237; Rogers v. Williams, 8 Phila. 123; Green v. Richards, 23 N. J. Eq. 32, 536; Colgate's Ex'r v. Colgate, 23 N. J. Eq. 372; Reynolds v. O'Neil, 26 N. J. Eq. 223; Wynn v. Smith, 40 Ga. 457; Porter v. Allen, 54 Ga. 623; Ridle v. Cameron, 50 Ala. 263; Warren v. Daniels, 72 Ill. 272; Yoakum v. Yoakum, 77 Ill. 85; Page Co. v. American etc. Co., 41 Iowa, 115; Warren v. Ewing, 34 Iowa, 168; Law v. Henry, 39 Ind. 414; Au Gres Boom Co. v. Whitney, 26 Mich. 42; Williams v. McGuire, 60 Mo. 254; Kuhn v. Freeman, 15 Kan. 423; Reese v. Board of Police etc., 49 Miss. 639; Grier v. Rhyne, 69 N. C. 346; Wright v. Pucket, 22 Gratt. 370; Ambrouse's Heirs v. Keller, 22 Gratt. 769; Chartier v. Marshall, 51 N. H. 400; Hayes v. Harmony Grove Cemetery, 108 Mass. 400; McClaskey v. Mayor etc., 64 Barb. 310; Olney v. Eaton, 66 Mo. 563; Gartrell v. Stafford, 12 Neb. 545, 41 **Am. Rep.** 767; Wormley v. Wormley, 98 Ill. 544; Bonner v. Little, 38 Ark. 397; Coffman v. Robbins, 8 Or. 278.

as it is for a court of law to give damages for its breach. *Chattels*: On the contrary, the doctrine is equally well settled that equity will not, in general, decree the specific performance of contracts concerning chattels, because their money value recovered as damages will enable the party to purchase others in the market of like kind and quality.<sup>2</sup> *Exceptions*: Where, however, particular chattels have some special value to the owner over and above any pecuniary estimate,—the *pretium affectionis*,—and where they are unique, rare, and incapable of being reproduced by money damages, equity will decree a specific delivery of them to their owner, and the specific performance of contracts concerning them.<sup>3b</sup> *Things in*

§ 1402, <sup>2</sup> *Cud v. Rutter*, 1 P. Wms. 570; *Nutbrown v. Thornton*, 10 Ves. 159; *Adderley v. Dixon*, 1 Sim. & St. 607, 608; *Buxton v. Lister*, 3 Atk. 383; *Pierce v. Plumb*, 74 Ill. 326; *Collins v. Karatopsky*, 36 Ark. 316; *Bubier v. Bubier*, 24 Me. 42; *Cowles v. Whitman*, 10 Conn. 121, 124, 25 **Am. Dec.** 60; *Gram v. Stebbins*, 6 Paige, 124; *Phillips v. Berger*, 2 Barb. 608; 8 Barb. 527; *Scott v. Billgerry*, 40 Miss. 119; *McLaughlin v. Piatti*, 27 Cal. 451; *Ashe v. Johnson's Adm'r*, 2 Jones Eq. 149.

§ 1402, <sup>3</sup> This class includes,—1. Articles of special value to their owner, but of no general pecuniary value; and 2. Articles of such great rarity and value that they cannot be replaced by money,—paintings, statues, etc. The jurisdiction will be exercised to compel their delivery by one who wrongfully detains them, or to compel the specific execution of a contract for their sale or delivery. As illustrations, see *Pusey v. Pusey*, 1 Vern. 273 (an ancient horn); *Duke of Somerset v. Cookson*, 3 P. Wms. 389 (an antique silver patera); *Fells v. Read*, 3 Ves. 70; *Lloyd v. Loaring*, 6 Ves. 773; *Nutbrown v. Thornton*, 10 Ves. 159, 161, 163; *Wallwyn v. Lee*, 9 Ves. 24, 33; *Saville v. Tankred*, 1 Ves. Sr. 101; 3 Swanst. 141, note; *Wood v. Roweliffe*, 3 Hare, 304; 2 Phill. Ch. 382; *Lady Arundell v. Phipps*, 10 Ves. 139; *Lowther v. Lord Lowther*, 13 Ves. 95; *Pearne v. Lisle*, Amb. 75, 77; *Falcke v. Gray*, 4 Drew, 651 (rare works of art); *Clark v. Flint*, 22 Pick. 231, 33 **Am. Dec.** 733; *McGowin v. Remington*, 12 Pa. St. 56, 51 **Am. Dec.** 584 (valuable private maps and charts). Analogous to this jurisdiction and for the same reasons, equity will decree the delivery up to the lawful owner of deeds and other written muniments of title: *Brown v. Brown*, 1 Dick. 62;

§ 1402, (b) See, further, Pom. Equitable Remedies, §§ 748, 749.

*action*: Contracts for the sale or assignment of things in action may be enforced by the purchaser, by compelling a transfer and delivery, where the legal damages might be too uncertain and conjectural to constitute an adequate compensation. And since the remedy must be mutual, the vendor may also maintain the action in such cases.<sup>4c</sup> *Awards*: An award is treated as the continu-

Tanner v. Wise, 3 P. Wms. 294, 296; Duncombe v. Mayer, 8 Ves. 320; Freeman v. Fairlie, 3 Mer. 29, 30; Reece v. Trye, 1 De Gex & S. 273; Lady Beresford v. Driver, 14 Beav. 387; 16 Beav. 134; Turner v. Letts, 20 Beav. 185, 191; Gibson v. Ingo, 6 Hare, 112; Cowles v. Whitman, 10 Conn. 121, 25 **Am. Dec.** 60; Hill v. Rockingham Bank, 44 N. H. 567. If a trust or fiduciary relation exists in reference to the chattels, if an express trust has been created by the contract or an implied trust has arisen from the acts or omissions of the parties, then equity will exercise its jurisdiction to compel the specific performance of such contract, whether the chattels are common or special, since the court will always enforce a trust: Wood v. Roweliffe, 3 Hare, 304; 2 Phill. Ch. 382; Pooley v. Budd, 14 Beav. 34; Stanton v. Pereival, 5 H. L. Cas. 257, 268; Clark v. Flint, 22 Pick. 231; Cowles v. Whitman, 10 Conn. 121, 25 **Am. Dec.** 60; Hill v. Rockingham Bank, 44 N. H. 567; McGowin v. Remington, 12 Pa. St. 56, 51 **Am. Dec.** 584; Abbott's Ex'r v. Reeves, 49 Pa. St. 494, 88 **Am. Dec.** 510; Peer v. Kean, 14 Mich. 354.

§ 1402, 4 Assignment of debts: Adderley v. Dixon, 1 Sim. & St. 607; Cutting v. Dana, 25 N. J. Eq. 265; purchase of an annuity: Withy v. Cottle, 1 Sim. & St. 174; Clifford v. Turrell, 1 Younge & C. Ch. 138; Kenney v. Wexham, 6 Madd. 355; assignment of patent rights:<sup>d</sup> Cogent v. Gibson, 33 Beav. 557; Corbin v. Tracy, 34 Conn. 325; Somerby v. Buntin, 118 Mass. 279, 19 **Am. Rep.** 459; Binney v. Annan, 107 Mass. 94, 9 **Am. Rep.** 10. See, also, as illustrations, Wright v. Bell, 5 Price, 325; Hughes v. Piedmont etc. Ins. Co., 55 Ga. 111; Tuttle v. Moore, 16 Minn. 123; Woodward v. Harris, 3 Sand. 272. *Stocks*:<sup>e</sup> It is the settled rule in England and in the United States that contracts for public securities, government stocks, bonds, etc., will not be enforced, since they can always be bought in the market; Doloret v. Rothschild, 1 Sim. & St. 590; Shaw v. Fisher, 5 De Gex, M. & G. 596. But contracts for the sale of railway and other business corporation shares and bonds

§ 1402, (c) *Things in action*: See, further, Pom. Equitable Remedies, § 750.

§ 1402, (d) *Patents*: See, further, Pom. Equitable Remedies, § 751.

§ 1402, (e) *Shares of stock*: See, further, Pom. Equitable Remedies, § 752.

ance of the agreement to submit. If it directs acts to be done which, if stipulated for in a contract, would render such contract capable of enforcement, then the award itself may be specifically enforced.<sup>5f</sup> *Special contracts:* The jurisdiction does not depend upon the nature of the contract nor of the subject-matter, but it will be exercised wherever the legal remedy is inadequate. It has been applied to a great number of special agreements.<sup>6g</sup>

will be enforced in England: *Duncuft v. Albrecht*, 12 Sim. 189; *Shaw v. Fisher*, *supra*; *Cheale v. Kenward*, 3 De Gex & J. 27; *Hawkins v. Maltby*, L. R. 3 Ch. 188; 4 Ch. 200. The recent English reports abound in such cases. In the United States all such securities are ordinarily purchasable in the market, and the rule is settled by the weight of authority that contracts concerning stocks and bonds of corporations, like those concerning government securities, will not be specifically enforced: *Fallon v. Railroad Co.*, 1 Dill. 121; *Ross v. Union Pac. R'y*, 1 Woolw. 26, 36; *Bissell v. Farmers' and Mechanics' Bank*, 5 McLean, 495; *Cowles v. Whitman*, 10 Conn. 121, 124, 25 **Am. Dec.** 60; *Gram v. Stebbins*, 6 Paige, 124; *Carpenter v. Mutual etc. Ins. Co.*, 4 Sand. Ch. 408; *Lowry v. Muldrow*, 8 Rich. Eq. 241; *Strasburg R. R. v. Echternacht*, 21 Pa. St. 220, 60 **Am. Dec.** 49; *Sullivan v. Tuck*, 1 Md. Ch. 59; *Ferguson v. Paschall*, 11 Mo. 267. A few cases more incline towards the English rule: See *Ashe v. Johnson's Adm'r*, 2 Jones Eq. 149; *Baldwin v. Commonwealth*, 11 Bush, 417; *Treasurer v. Commercial etc. Co.*, 23 Cal. 390; *Todd v. Taft*, 7 Allen, 371.

§ 1402, <sup>5</sup> For example, awards directing the conveyance of land, etc.: *Blackett v. Bates*, L. R. 1 Ch. 117; *Norton v. Mascall*, 2 Vern. 24; *Hall v. Hardy*, 3 P. Wms. 187; *Memphis etc. R. R. v. Scruggs*, 50 Miss. 284; *Overby v. Thrasher*, 47 Ga. 10; *Story v. Norwich etc. R. R.*, 24 Conn. 94; *Kirksey v. Fike*, 27 Ala. 383, 62 **Am. Dec.** 768; *McNeil v. Magee*, 5 Mason, 244; *Jones v. Boston Mill Corp.*, 4 Pick. 507, 16 **Am. Dec.** 358; *Davis v. Havard*, 15 Serg. & R. 165, 171, 16 **Am. Dec.** 537; *Somerville v. Trueman's Devises*, 4 Har. & McH. 43, 1 **Am. Dec.** 389; *Cook v. Vick*, 2 How. (Miss.) 882; but not an award directing merely a payment of money: *Hall v. Hardy*, *supra*; *Story v. Norwich etc. R. R.*, *supra*; *Bubier v. Bubier*, 24 Me. 42.

§ 1402, <sup>6</sup> These agreements are so various that it is difficult to classify them. The following cases are cited as illustrations: *Special contracts*

§ 1402, (f) *Awards:* See, further, Pom. Equitable Remedies, § 754.

§ 1402, (g) *Miscellaneous agreements:* See, further, Pom. Equitable Remedies, § 753.



The cases of contracts for personal acts, and for building and construction, are considered in the foot-note.

*concerning chattels:* Buxton v. Lister, 3 Atk. 383; Taylor v. Neville, cited 3 Atk. 384; Duke of Buckingham v. Ward, cited 3 Atk. 385. *Agreement to pay off or discharge a mortgage:* Barkley v. Barkley, 14 Rich. Eq. 12; Bennett v. Abrams, 41 Barb. 619; Weir v. Mundell, 3 Brewst. 594; Howe v. Nickerson, 14 Allen, 400; Stark v. Wilder, 36 Vt. 752. *Contract to insure:* Tayloe v. Merchants' etc. Ins. Co., 9 How. 390; Carpenter v. Mut. etc. Ins. Co., 4 Sand. Ch. 408; Neville v. Merchants' etc. Ins. Co., 19 Ohio, 452; Wooddy v. Old Dominion Ins. Co., 31 Gratt. 362, 31 **Am. Rep.** 732. *Agreement to compromise and discharge a judgment:* Phillips v. Berger, 2 Barb. 608; 8 Barb. 527. *Agreement to indemnify:* Chamberlain v. Blue, 6 Blackf. 491; but *per contra*, Hoy v. Hansborough, Freem. (Miss.) 533. *Antenuptial contract concerning personal property:* Tarbell v. Tarbell, 10 Allen, 278; Sullings v. Sullings, 9 Allen, 234; Gough v. Crane, 3 Md. Ch. 119; 4 Md. 316. *Miscellaneous cases:* Thorn v. Comm'rs etc., 32 Beav. 490; Schotsmans v. Lancashire etc. R'y, L. R. 2 Ch. 332; Very v. Levy, 13 How. 345; Kirksey v. Fike, 27 Ala. 383, 62 **Am. Dec.** 768; McKnight v. Robbins, 5 N. J. Eq. 229, 642; Ashe v. Johnson's Adm'r, 2 Jones Eq. 149; Sullivan v. Tuck, 1 Md. Ch. 59; Hall v. Joiner, 1 S. C. 186; Starnes v. Newsom, 1 Tenn. Ch. 239; Furman v. Clark, 11 N. J. Eq. 306; Steward v. Winters, 4 Sand. Ch. 587; Stuyvesant v. Mayor etc., 11 Paige, 414; Hall v. Hiles, 2 Bush, 532; McMullen v. Vanzant, 73 Ill. 190; Watson v. Smith, 7 Or. 448 (contract of support); Shields v. Whitaker, 82 N. C. 516 (to apply land in payment of debts); Reilley v. Roberts, 34 N. J. Eq. 299 (to cancel judgment); Apperson v. Gogin, 3 Ill. App. 48 (to credit value of property on judgment); Reybold v. Herdman, 2 Del. Ch. 34 (indemnity); Williams v. Vreeland, 32 N. J. Eq. 135 (agreement to hold a legacy for benefit of a third person); Coffman v. Robbins, 8 Or. 278 (by riparian owners to divide water); Boardman v. Lake Shore etc. R'y, 84 N. Y. 157 (concerning preferred and guaranteed stock). *Contracts for personal acts:*<sup>h</sup> As an almost universal rule, these contracts will not be directly enforced. (They may sometimes be indirectly enforced by injunction: §§ 1343, 1344). There are a few special exceptions. As an illustration, agreements for separation between husband and wife will be specifically enforced, if valid: Wilson v. Wilson, 1 H. L. Cas. 538; 5 H. L. Cas. 40; 14 Sim. 405; Gibbs v. Harding, L. R. 5 Ch. 336; 8 Eq. 490; McCrocklin v. McCrocklin, 2 B.

§ 1402, (h) *Contracts for personal services:* See Pom. Equitable Remedies, § 759.

**§ 1403. The Same. Impracticability of a Legal Remedy.**—This ground of the jurisdiction includes two classes of cases: 1. Where, from the lack of some legal formality or condition in the contract, no action at law

Mon. 370. *Contracts for building and construction:*<sup>1</sup> In general, the specific performance of these contracts will not be decreed, because the court cannot, by its ordinary means and instrumentalities, enforce its decree: *Errington v. Aynesly*, 2 Brown Ch. 341; *Lucas v. Commerford*, 3 Brown Ch. 166; *Paxton v. Newton*, 2 Smale & G. 437; *Mosely v. Virgin*, 3 Ves. 184; e. g., to work a gravel pit: *Flint v. Brandon*, 8 Ves. 159; construction of a railway: *South Wales R'y v. Wythes*, 1 Kay & J. 186; 5 De Gex, M. & G. 880; *Port Clinton R. R. v. Cleveland etc. R. R.*, 13 Ohio St. 544; *Fallon v. R. R. Co.*, 1 Dill. 121; *Ross v. Union Pac. R'y*, 1 Woolw. 26; to work quarries: *Booth v. Pollard*, 4 Younge & C. 61; *Marble Co. v. Ripley*, 10 Wall. 339; or mines: *Pollard v. Clayton*, 1 Kay & J. 462. The English courts have established exceptions to this rule, and enforce such contracts in four classes of cases, viz.: 1. Where the agreement to erect a building is defined and certain: *Mosely v. Virgin*, 3 Ves. 184, 185; *Flint v. Brandon*, 8 Ves. 159, 164; *Cubitt v. Smith*, 10 Jur., N. S., 1123; *Phillips v. Soule*, 9 Gray, 233; and see *Brace v. Wehnert*, 25 Beav. 348. 2. Where the defendant has contracted to construct some defined work *on his own* land, and the plaintiff has a material interest therein not susceptible of adequate compensation in damages: *Storer v. Great W. R'y*, 2 Younge & C. Ch. 48; *Sanderson v. Cockermouth etc. R'y*, 11 Beav. 497; *Franklyn v. Tuton*, 5 Madd. 469; *Middleton v. Greenwood*, 2 De Gex, J. & S. 142; *Wilson v. West Hartlepool R'y*, 2 De Gex, J. & S. 475; *Wilson v. Northampton etc. R'y*, L. R. 9 Ch. 279; *Att'y-Gen. v. Mid-Kent R'y*, L. R. 3 Ch. 100. 3. Where defendant has contracted to construct works on land acquired by conveyance from the plaintiff, etc.: *So. Wales R'y v. Wythes*, 1 Kay & J. 186, 200; *Price v. Corpor. of Penzance*, 4 Hare, 506; *Wilson v. Furness R'y*, L. R. 9 Eq. 28; *Hood v. North East R'y*, L. R. 5 Ch. 525; 8 Eq. 666; *Firth v. Midland R'y*, L. R. 20 Eq. 100. 4. Where there has been a part performance, so that the defendant is enjoying the benefits *in specie*: *Price v. Corpor. of Penzance*, 4 Hare, 506, 509. See, also, *Stuyvesant v. Mayor etc.*, 11 Paige, 414 (constructing a drain); *Birchett v. Bolling*, 5 Munf. 442 (erecting a building); *Whitney v. New Haven*, 23 Conn. 624; *Gregory v. Ingwersen*, 32 N. J. Eq. 199 (to erect a structure).

§ 1402, (1) *Contracts for building or construction*: See Pom. *Equitable Remedies*, § 760.

can be maintained; 2. Where, from some peculiar feature of the contract, either in its subject-matter or in its terms, or in the relations of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty.<sup>1</sup> The most important instances in which the jurisdiction is referable to this ground are,—1. Contracts which the plaintiff has not fully performed, or even cannot fully perform, on his part, but which equity enforces with compensation for his partial failure; 2. Contracts invalid at law, especially verbal contracts concerning land; 3. Contracts which are incomplete in their terms.

**§ 1404. The Jurisdiction Discretionary.**—The object of the foregoing paragraphs is to formulate the general rules which determine the classes of contracts in which the equitable jurisdiction *may* be exercised. But even

**§ 1403,** <sup>1</sup> Under this head are included,—1. Contracts in which the plaintiff has not performed, or even cannot perform, all the conditions on his part, so as to maintain an action at law, but which equity still may treat as binding and enforce. In such cases, if the contract is otherwise a proper one, equity will decree a specific performance with such allowances or compensations as are just: *Mortlock v. Buller*, 10 Ves. 292, 305, 306; *Stewart v. Alliston*, 1 Mer. 26, 32. Even where the partial failure or inability results from the plaintiff's own fault: *Davis v. Hone*, 2 Schoales & L. 341, 347; *Voorhees v. De Meyer*, 2 Barb. 37; *Coale v. Barney*, 1 Gill. & J. 324; *McCorkle v. Brown*, 9 Smedes & M. 167. 2. Contracts not valid at all at law, but which equity treats as binding on the conscience. By far the most important are verbal contracts concerning land which are invalid by the statute of frauds, but which, if part performed, equity will enforce: *Kirk v. Bromley Union*, 2 Phill. Ch. 640; *Gough v. Crane*, 3 Md. Ch. 119; 4 Md. 316, see *post*, § 1409, where this subject is treated. Under this head are also included certain agreements void at the old common law, but which equity enforces; e. g., assignments of expectancies; agreements to assign things in action; contracts between a man and a woman, who afterwards marry: *Cannel v. Buckle*, 2 P. Wms. 243; *Gould v. Womack*, 2 Ala. 83. 3. Contracts incomplete in their terms: *Buxton v. Lister*, 3 Atk. 383; *Doloret v. Rothschild*, 1 Sim. & St. 590; *Phillips v. Thompson*, 1 Johns. Ch. 131.

when a particular contract belongs to such a class, the right to its specific performance is not absolute, like the right to recover a legal judgment. The granting the equitable remedy is, in the language ordinarily used, a matter of discretion, not of an arbitrary, capricious discretion, but of a sound judicial discretion, controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case. Where, however, the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach. This is the ordinary language of judges and text-writers.<sup>1</sup> The term

§ 1404, <sup>1</sup> The following are a few illustrations: *Radeliffe v. Warrington*, 12 Ves. 326, 332; *Joynes v. Statham*, 3 Atk. 388; *Underwood v. Hitchcox*, 1 Ves. Sr. 279; *Willard v. Tayloe*, 8 Wall. 557, 565; *Marble Co. v. Ripley*, 10 Wall. 339, 356; *Lowry v. Buffington*, 6 W. Va. 249, 255; *Fish v. Lightner*, 44 Mo. 268, 272; *Fish v. Leser*, 69 Ill. 394, 395; *Stone v. Pratt*, 25 Ill. 25, 34; *Quinn v. Roath*, 37 Conn. 16, 24; *McComas v. Easley*, 21 Gratt. 23, 29; *Hale v. Wilkinson*, 21 Gratt. 75, 80; *Cooper v. Pena*, 21 Cal. 403, 411; *Bruck v. Tucker*, 42 Cal. 346, 353; *Bogan v. Daughdrill*, 51 Ala. 312, 314; *Aston v. Robinson*, 49 Miss. 348, 351; *Daniel v. Frazer*, 40 Miss. 507; *Weise's Appeal*, 72 Pa. St. 351, 354; *Snell v. Mitchell*, 65 Me. 48, 50; *Blackwilder v. Loveless*, 21 Ala. 371, 374; *Port Clinton R. R. v. Cleveland etc. R. R.*, 13 Ohio St. 544, 549; *Rogers v. Saunders*, 16 Me. 92, 97, 33 Am. Dec. 635; *Seymour v. Delancey*, 6 Johns. Ch. 222, 224; 3 Cow. 445, 15 Am. Dec. 270; *Lamare v. Dixon*, L. R. 6 H. L. 414, 423; *Tilley v. Thomas*, L. R. 3 Ch. 61, 72; *Mississippi etc. R. R. v. Cromwell*, 91 U. S. 643; *Eastman v. Plumer*, 46 N. H. 464; *Sharps Rifle M. Co. v. Rowan*, 35 Conn. 127; *Sherman v. Wright*, 49 N. Y. 227; *Cuff v. Dorland*, 55 Barb. 481; *Seaman v. Van Rensselaer*, 10 Barb. 81; *Plummer v. Keppler*, 26 N. J. Eq. 481; *Crane v. Decamp*, 21 N. J. Eq. 414; *Merritt v. Brown*, 21 N. J. Eq. 401; *Smoot v. Rea*, 19 Md. 398; *Godwin v. Collins*, 4 Houst. 28; *Humbard's Heirs v. Humbard's Heirs*, 3 Head, 100; *Phillips v. Stauch*, 20 Mich. 369; *Bowman v. Cunningham*, 78 Ill. 48; *Auter v. Miller*, 18 Iowa, 405; *St.*



“discretionary” as thus used is, in my opinion, misleading and inaccurate. The remedy of specific performance is governed by the same general rules which control the administration of all other equitable remedies. The right to it depends upon elements, conditions, and incidents, which equity regards as essential to the administration of all its peculiar modes of relief. When all these elements, conditions, and incidents exist, the remedial right is perfect in equity.<sup>2</sup> So far as these essential elements and conditions do not relate to the existence of contracts binding in equity, they are nothing but expressions and applications of the fundamental principles, he who seeks equity must do equity, and he who comes into equity must come with clean hands.

**§ 1405. Essential Elements and Incidents.**—Assuming that a contract has been completely concluded, and that it belongs to a class capable of being enforced, it must still possess certain essential elements and incidents, in order that a court of equity may exercise the jurisdiction to compel its performance. Some of these elements affect its validity; others its equitable character. It must be upon a valuable consideration.<sup>1a</sup> It must be reason-

Paul Division etc. v. Brown, 9 Minn. 157; Burke v. Seely, 46 Mo. 334; Taylor v. Williams, 45 Mo. 80.

§ 1404, <sup>2</sup> These elements, conditions, and incidents, as collected from the cases, are the following: The contract must be concluded, certain, unambiguous, mutual, and upon a valuable consideration; it must be perfectly fair in all its parts; free from any misrepresentation or misapprehension, fraud or mistake, imposition or surprise; not an unconscionable or hard bargain; and its performance not oppressive upon the defendant; and finally, it must be capable of specific execution through a decree of the court.

§ 1405, <sup>1</sup> A seal does not, for this purpose, import a valuable consideration: Jefferys v. Jefferys, Craig & P. 138; Ord v. Johnston, 1 Jur., N. S., 1063, 1065; Houghton v. Lees, 1 Jur., N. S., 862, 863; Min-

§ 1405, (a) *Contract must be upon a valuable consideration: See Pom. Equitable Remedies, § 763.*

ably certain as to its subject-matter, its stipulations, its purposes, its parties, and the circumstances under which it was made.<sup>2b</sup> It must be, in general, mutual in its obligation and in its remedy.<sup>3c</sup> The contract must be free from any fraud, misrepresentation even though not

turn v. Seymour, 4 Johns. Ch. 497; Burling v. King, 66 Barb. 633; Butman v. Porter, 100 Mass. 337; Vasser v. Vasser, 23 Miss. 378; Estate of Webb, 49 Cal. 541, 545; Murphy v. Rooney, 45 Cal. 78.

§ 1405, 2 Marsh v. Milligan, 3 Jur., N. S., 979; Morrison v. Barrow, 1 De Gex, F. & J. 633; Taylor v. Portington, 7 De Gex, M. & G. 328; Pearce v. Watts, L. R. 20 Eq. 492; Tallman v. Franklin, 14 N. Y. 584; Stanton v. Miller, 58 N. Y. 192; Nichols v. Williams, 22 N. J. Eq. 63; Carr v. Passaic etc. Co., 22 N. J. Eq. 85; 19 N. J. Eq. 424; Potts v. Whitehead, 20 N. J. Eq. 55; Reese v. Reese, 41 Md. 554; Hardesty v. Richardson, 44 Md. 617, 22 **Am. Rep.** 57; Pierce's Heirs v. Catron's Heirs, 23 Gratt. 588; Allen v. Webb, 64 Ill. 342; Bowman v. Cunningham, 78 Ill. 48; Miller v. Campbell, 52 Ind. 125; Munsell v. Loree, 21 Mich. 491; McClintock v. Laing, 22 Mich. 212; Wright v. Wright, 31 Mich. 380; Tiernan v. Gibney, 24 Wis. 190; Mastin v. Halley, 61 Mo. 196; Long v. Duncan, 10 Kan. 294; Agard v. Valencia, 39 Cal. 292; Odell v. Morin, 5 Or. 96; Lynes v. Hayden, 119 Mass. 482; Hyde v. Cooper, 13 Rich. Eq. 250; McGuire v. Stevens, 42 Miss. 724, 2 **Am. Rep.** 649; Bell v. Bruen, 1 How. 169; Hopkins v. Roberts, 54 Md. 312; McCornack v. Sage, 87 Ill. 484.

§ 1405, 3 Bromley v. Jefferies, 2 Vern. 415; Rogers v. Saunders, 16 Me. 92, 33 **Am. Dec.** 635; Duvall v. Myers, 2 Md. Ch. 401; Beard v. Linthicum, 1 Md. Ch. 345; Reese v. Reese, 41 Md. 554; Benedict v. Lynch, 1 Johns. Ch. 370, 7 **Am. Dec.** 484; German v. Machin, 6 Paige, 288; Meason v. Kaine, 63 Pa. St. 335; Moore's Adm'rs v. Fitz Randolph, 6 Leigh, 175; Flight v. Bolland, 4 Russ. 298; Blanchard v. Detroit etc. R. R., 31 Mich. 43, 18 **Am. Rep.** 142; Maynard v. Brown, 41 Mich. 298; Hopkins v. Roberts, 54 Md. 312. This doctrine is constantly stated by the courts, but there are so many exceptions, especially with respect to the obligation, that the rule is far from universal: See Green v. Richards, 23 N. J. Eq. 32, 35. It may be said, however, as a general proposition, that where a contract was intended to bind *both* the parties, and for any reason one of them is not bound, he cannot compel

§ 1405, (b) *Contract must be complete, certain and definite*: See Pom. Equitable Remedies, §§ 764-768.

§ 1405, (c) *Mutuality*: For an analysis and restatement of this doctrine, see Pom. Equitable Remedies, §§ 769-776.

fraudulent, mistake, or illegality.<sup>4d</sup> The elements which peculiarly affect the *equitable* character of the agreement and of the remedy are the following: The contract must be perfectly fair, equal, and just in its terms and in its circumstances.<sup>5</sup> The contract and the situation of the

performance by the other: *Butman v. Porter*, 100 Mass. 337; *Sullings v. Sullings*, 9 Allen, 234. Unilateral contracts, in the form of bonds and the like, are constantly enforced: *Ewins v. Gordon*, 49 N. H. 444; *Jones v. Robbins*, 29 Me. 351, 50 **Am. Dec.** 593; *Barnard v. Lee*, 97 Mass. 92; *Palmer v. Scott*, 1 Russ. & M. 391.

§ 1405, <sup>4</sup> The effect of these incidents upon contracts in equity, and upon the remedy of specific performance, has been discussed in the preceding volume. As to parol evidence of mistake, fraud, or surprise, see vol. 2, §§ 857-859; defense of mistake in suits for specific performance: § 860; proof of mistake on plaintiff's part in same suits: §§ 861-863; effect of statute of frauds on the proof of mistake, fraud, or surprise: §§ 864-867.

As to misrepresentations as a defense, even when not intentional or with knowledge, see vol. 2, § 889; also § 899. Non-disclosure of facts a defense: • § 905; inadequacy of consideration as a defense §§ 925-928; *Ready v. Noakes*, 29 N. J. Eq. 497; illegal contracts, in general: §§ 929-936; 937-942.

§ 1405, <sup>5</sup> See *ante*, § 1404. If, then, the contract itself is unfair, one-sided, unjust, unconscionable, or affected by any other inequitable feature; or if its enforcement would be oppressive or hard on the defendant, or would prevent his enjoyment of his own rights, or would work any injustice; or if the plaintiff has obtained it by sharp and unscrupulous practices, by overreaching, by trickery, by taking undue advantage of his position, by non-disclosure of material facts, or by any other unconscientious means,—then a specific performance will be refused. It necessarily follows that a *less strong case* is sufficient to *defeat* a suit for a specific performance than is requisite to obtain the remedy: See *Vigers v. Pike*, 8 Clark & F. 562, 645, per Lord Cottenham. See cases in note under § 1404; *Willan v. Willan*, 16 Ves. 72, 83; *Savage v. Broeksopp*, 18 Ves. 335; *Twining v. Morrice*, 2 Brown Ch. 326; *Revell v. Hussey*, 2 Ball & B. 280, 288; *Willard v. Tayloe*, 8 Wall. 557; *Marble Co. v. Ripley*, 10 Wall. 339; *Jackson v. Ashton*, 11 Pet. 229; *McNeil*

§ 1405, (d) *Mistake as a defense*: See Pom. *Equitable Remedies*, §§ 777-783.

§ 1405, (•) *Non-disclosure of facts as a defense*: See Pom. *Equitable Remedies*, § 784.

parties must be such that the remedy of specific performance will not be harsh or oppressive.<sup>6f</sup> The vendor's title must be free from reasonable doubt. In suits by a vendor, the purchaser will not be compelled to complete the contract, unless the title is free from any reasonable

v. Magee, 5 Mason, 244; Margraf v. Muir, 57 N. Y. 155; Osgood v. Franklin, 2 Johns. Ch. 1, 23, 7 **Am. Dec.** 513; Minturn v. Seymour, 4 Johns. Ch. 497; St. John v. Benedict, 6 Johns. Ch. 111; Acker v. Phoenix, 4 Paige, 305; Howard v. Moore, 4 Sneed, 317; Bowman v. Cunningham, 78 Ill. 48; Fish v. Leser, 69 Ill. 394. The remedy will therefore be refused when the performance of the contract would work a breach of trust: Harnett v. Yielding, 2 Schoales & L. 548, 553; White v. Cuddon, 8 Clark & F. 766; or work injury to third persons: Thomas v. Dering, 1 Keen, 729; Curran v. Holyoke W. Co., 116 Mass. 90; further examples of the general rule; Shriver v. Seiss, 49 Md. 384; Abbott v. L'Homedieu, 10 W. Va. 677; White v. McGannon, 29 Gratt. 511; Shaddle v. Disborough, 30 N. J. Eq. 370; Coe v. N. J. Midland R'y, 31 N. J. Eq. 105; Tillotson v. Gesner, 33 N. J. Eq. 313; Chicago etc. R. R. v. Schoeneman, 90 Ill. 258; Tamm v. Lavalle, 92 Ill. 263; Foll's Appeal, 91 Pa. St. 434, 36 **Am. Rep.** 671; Brake v. Ballou, 19 Kan. 397; Nims v. Vaughn, 40 Mich. 356; Fitzpatrick v. Dorland, 27 Hun, 291; Schuessler v. Hatchett, 58 Ala. 181; Race v. Weston, 86 Ill. 91.

§ 1405, <sup>6</sup> This rule generally operates in favor of defendants; but may be invoked by a plaintiff when a defendant demands the remedy by counterclaim or cross-complaint. The oppression or hardship may result from unconscionable provisions of the contract itself; or it may result from the situation of the parties, unconnected with the terms of the contract or with the circumstances of its negotiation and execution; that is, from external facts or events or circumstances which control or affect the situation of the defendant: See cases cited *ante*, under § 1404; Gould v. Kemp, 2 Mylne & K. 304, 308; Kimberley v. Jennings, 6 Sim. 340; Willard v. Tayloe, 8 Wall. 557; Marble Co. v. Ripley, 10 Wall. 339; Cathcart v. Robinson, 5 Pet. 263; Tobey v. County of Bristol, 3 Story, 800; Margraf v. Muir, 57 N. Y. 155; Clarke v. Rochester etc. R. R., 18 Barb. 350; Weise's Appeal, 72 Pa. St. 351; Cannaday v. Shepard, 2 Jones Eq. 224; Barnett v. Spratt's Adm'r, 4 Ired. Eq. 171; Stone v. Pratt, 25 Ill. 25; Chicago etc. R. R. v. Schoeneman, 90 Ill. 258; Coe v. N. J. Midland R'y, 31 N. J. Eq. 105.

§ 1405, (f) *Unfairness or hardship as a defense*: See *Pom. Equitable Remedies*, §§ 785-800.



doubt.<sup>7g</sup> The remaining essential elements and incidents relate more directly to the remedy itself, to the actual performance directed by the decree, and may be briefly stated as follows: The contract must be such that its specific enforcement would not be nugatory.<sup>8h</sup> Al-

§ 1405, 7 This rule should not be misunderstood. It is wholly distinct from the objection that the vendor has no title at all, or has only a partial or defective one,—an objection which may be raised *by either* of the parties, and which, if *proved*, would either totally defeat a specific performance or render it partial. The rule of the text assumes that the question whether the vendor's title is valid or imperfect is not definitely decided by the court. But if there arises, on the pleadings or from the proofs, a reasonable doubt as to the vendor's title, the court, without deciding the question between the parties then before it, regards the doubt as a sufficient reason for not compelling the purchaser to carry out the contract and accept a conveyance. Where the purchaser is plaintiff, he *may* elect to take a defective and partial title: *Pyrke v. Waddingham*, 10 Hare, 1; *Radford v. Willis*, L. R. 7 Ch. 7; *Alexander v. Mills*, L. R. 6 Ch. 124; *Beioley v. Carter*, L. R. 4 Ch. 230; *Collier v. McBean*, L. R. 1 Ch. 81; *Rede v. Oakes*, 4 De Gex, J. & S. 505; *Bensel v. Gray*, 80 N. Y. 517; *Bates v. Delavan*, 5 Paige, 299; *Seymour v. De Lancey*, Hopk. 436, 14 Am. Dec. 552; *Jeffries v. Jeffries*, 117 Mass. 184; *Sturtevant v. Jaques*, 14 Allen, 523; *Vreeland v. Blauvelt*, 23 N. J. Eq. 483; *Dobbs v. Norcross*, 24 N. J. Eq. 327; *Kostenbader v. Spotts*, 80 Pa. St. 430; *Pratt v. Eby*, 67 Pa. St. 396; *Walsh v. Hall*, 66 N. C. 233; *Allen v. Atkinson*, 21 Mich. 351; *Powell v. Conant*, 33 Mich. 396; *Morgan's Heirs v. Morgan*, 2 Wheat. 290; *Longworth v. Taylor*, 1 McLean, 395; *Watts v. Waddle*, 1 McLean, 200; *Jenkins v. Fahey*, 73 N. Y. 355; *Cornell v. Andrews*, 35 N. J. Eq. 7; *Mitchell v. Steinmetz*, 97 Pa. St. 251; *Rader v. Neal*, 13 W. Va. 373; *Swepson v. Johnston*, 84 N. C. 449; *Hancock v. Bramlett*, 85 N. C. 393; *Lyles v. Kirkpatrick*, 9 S. C. 265; *Chrisman v. Partee*, 38 Ark. 31; *Hymers v. Branch*, 6 Mo. App. 511; *Luse v. Deitz*, 46 Iowa, 205.

§ 1405, 8 The court will not grant the remedy when by the terms of the contract itself the defendant would be entitled at any time to terminate the agreement and thus evade the decree. Illustrations: Partnership agreements will not, unless in some exceptional cases, be thus enforced:

§ 1405, (g) *Purchaser need not accept a doubtful title*: See Pom. Equitable Remedies, §§ 801–804.

§ 1405, (h) *No relief when decree would be nugatory*: See Pom. Equitable Remedies, § 755.

though the contract by its terms can be specifically enforced, the defendant must also have the capacity and ability to perform it by obeying the decree of the court.<sup>9</sup>

Scott v. Rayment, L. R. 7 Eq. 112; Hercy v. Birch, 9 Ves. 357; Sheffield etc. Co. v. Harrison, 17 Beav. 294; England v. Curling, 8 Beav. 129; Tobey v. Co. of Bristol, 3 Story, 800; Buck v. Smith, 29 Mich. 166, 18 **Am. Rep.** 84; Meason v. Kaine, 63 Pa. St. 335; Manning v. Wadsworth, 4 Md. 59; Reed v. Vidal, 5 Rich. Eq. 289; and see Rust v. Conrad, 47 Mich. 449, 41 **Am. Rep.** 720. Nor agreements to submit to arbitration: Price v. Williams, cited 6 Ves. 818; Street v. Rigby, 6 Ves. 815; Tobey v. Co. of Bristol, 3 Story, 800, 820, 823; Noyes v. Marsh, 123 Mass. 286; Conner v. Drake, 1 Ohio St. 166; King v. Howard, 27 Mo. 21.

§ 1405, <sup>9</sup> *Total inability*.—If at the time of the inability the defendant is totally unable to perform because he has no title at all, or a title completely defective, the remedy will not be granted. Mere pecuniary inability to pay the price is not, however, such an incapacity as the rule assumes. This incapacity must exist at the time of the hearing. The mere fact that the defendant did not own or possess the subject-matter at the time of making the contract does not of itself constitute the legal impossibility, if he acquired it subsequently, at, or before the hearing: Green v. Smith, 1 Atk. 572; Columbine v. Chichester, 2 Phill. Ch. 27; Hallett v. Middleton, 1 Russ. 243; Greenaway v. Adams, 12 Ves. 395, 401; Phillips v. Stauch, 20 Mich. 369; Burke v. Seely, 46 Mo. 334; Burton v. Shotwell, 13 Bush, 271. The rule applies even when the inability is caused by the defendant's own wrongful act; as where a vendor, after making the contract and before the suit, conveyed the land to a *bona fide* purchaser for value and without notice. A specific performance would be refused, although the court of equity *might* grant a decree for damages: Denton v. Stewart, 1 Cox, 258; Greenaway v. Adams, 12 Ves. 395, 400; Ferguson v. Wilson, L. R. 2 Ch. 77; Smith v. Kelley, 56 Me. 64; Little v. Thurston, 58 Me. 86; Gupton v. Gupton, 47 Mo. 37; Warren v. Richmond, 53 Ill. 52. But if a vendor, after making a contract, should enter into a second agreement to sell the land to B, or should convey it to B, under such circumstances that B is *not* a *bona fide* purchaser, etc., then the prior vendee can compel a specific performance against the vendor and B: Snowman v. Harford, 57 Me. 397; Fullerton v. McCurdy, 4 Lans. 132; Haughwout v. Murphy, 22 N. J. Eq. 531; 21 N. J. Eq. 118; Cole v. Cole, 41 Md. 301; Bryant v. Booze, 55 Ga. 438; Johnson v. Bowden, 37 Tex. 621; Bird v. Hall, 30 Mich. 374; Youell v. Allen, 18 Mich. 107; Gregg v. Hamilton, 12 Kan. 333.

Finally, the contract must be such that the court is able to make an efficient decree for its specific performance, and is able to enforce its own decree when made.<sup>10</sup>

*Partial incapacity.*—Where the defendant's title fails as to a part of the subject-matter, or is partially defective, the plaintiff *may* elect and be entitled to a specific enforcement of the contract, so far as it can be enforced; and *may* claim and receive compensation for the deficiency:<sup>1</sup> See cases cited *post*, under § 1407.

§ 1405, <sup>10</sup> Although the contract is valid, and the defendant is able to do what he has undertaken to do, if, through the want of appropriate means and instrumentalities, the court is unable, while pursuing its ordinary modes of administering justice, either to render a decree or to enforce the decree when made, then the remedy will be refused. *Cases where the court cannot render a decree:* The following species of contracts will not be thus enforced: Agreements concerning the manufacture and sale of secret medicines and other secret commodities, where the contract recognizes the secret as not to be disclosed: *Newbery v. James*, 2 Mer. 446; *Williams v. Williams*, 3 Mer. 157. Contracts for the sale or transfer of a good-will, separate from or unconnected with the business and premises of which it is an incident: *Bozon v. Farlow*, 1 Mer. 459; *Baxter v. Conolly*, 1 Jacob & W. 576; *Coslake v. Till*, 1 Russ. 376. But where the good-will is sold and transferred, *together with* the business and premises, the agreement may be directly enforced, or negatively enforced by an injunction: *Darbey v. Whitaker*, 4 Drew. 134, 139, 140; *Chisum v. Dewes*, 5 Russ. 29; *Whittaker v. Howe*, 3 Beav. 383; and see cases cited in note under § 1344. *Cases where the court cannot enforce its decree:* This class includes the following species of contracts, for which the equitable remedy is refused. *Continuing covenants:* *Collins v. Plumb*, 16 Ves. 454; *City of London v. Nash*, 3 Atk. 512, 515; *Caswell v. Gibbs*, 33 Mich. 331. Contracts for sale at a price to be fixed by valuers:<sup>1</sup> *Milnes v. Gery*, 14 Ves. 400; *Wilks v. Davis*, 3 Mer. 507; *Collins v. Collins*, 26 Beav. 306; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Richardson v. Smith*, L. R. 5 Ch. 648; *Earl of Darnley v. London etc. R'y*, 3 De Gex, J. & S. 24; L. R. 2 H. L. 43; *Hopkins v. Gilman*, 22 Wis. 476; for limitations of the rule, see *Dinham v. Bradford*, L. R. 5 Ch. 519; *Smith v. Peters*, L. R. 20 Eq. 511; *Jackson v. Jackson*, 1 Smale & G. 184. Contracts for personal services, where the

§ 1405, (1) See, further, Pom. Equitable Remedies, §§ 833-836.

§ 1405, (1) *Arbitration agreements, etc.:* See Pom. Equitable Remedies, § 758.

**§ 1406. Rights Under the Contract—Effect of Events Without the Agency of the Parties.<sup>a</sup>**—The effect of an executory contract for the sale of land, in working an equitable conversion, and in clothing the purchaser with an equitable estate in the land, and the vendor with an equitable ownership of the purchase price, has already been described.<sup>1</sup> As soon as the contract is finally *concluded*, although it is wholly executory in form, these rights and estates become fixed and vested. It follows,

full performance rests upon the personal *will* of the contracting party:<sup>k</sup> *Palmer v. Scott*, 1 Russ. & M. 391; *Mair v. Himalaya Tea Co.*, L. R. 1 Eq. 411; *Marble Co. v. Ripley*, 10 Wall. 339; *Ford v. Jermon*, 6 Phila. 6; *Cooper v. Pena*, 21 Cal. 403, 411; *Randall v. Latham*, 36 Conn. 48; *Richmond v. Dubuque etc. R. R.*, 33 Iowa, 422; *De Rivafrinoli v. Corsetti*, 4 Paige, 264, 25 **Am. Dec.** 532; *Hamblin v. Dinneford*, 2 Edw. Ch. 529; *Haight v. Badgeley*, 15 Barb. 499. How far and when such contracts may be negatively enforced by injunction has been considered *ante*, in § 1343. Contracts whose performance would be continuous, and would require protracted supervision and direction;<sup>1</sup> e. g., contracts for building; for construction of works, railroads, and the like; for working mines, quarries, etc.: See *ante*, § 1402, and cases in the note. The English decisions on this subject are very numerous. The following are a few illustrations of American decisions: *Beck v. Allison*, 56 N. Y. 366, 15 **Am. Rep.** 430; *Mastin v. Halley*, 61 Mo. 196; *Randall v. Latham*, 36 Conn. 48; *Starnes v. Newsom*, 1 Tenn. Ch. 239; *Columbia W. Co. v. Columbia*, 5 S. C. 225; *Atlanta etc. R. R. v. Speer*, 32 Ga. 550, 79 **Am. Dec.** 305; *Cincinnati etc. R. R. v. Washburn*, 25 Ind. 259; *Columbus etc. R. R. v. Watson*, 26 Ind. 50; *Gregory v. Ingwersen*, 32 N. J. Eq. 199; *Danforth v. Philadelphia etc. R'y*, 30 N. J. Eq. 12; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Roberts v. Kelsey*, 38 Mich. 602. The tendency of the recent cases, especially in England, is to narrow and limit the operation of this rule.

§ 1406, 1 See *ante*, §§ 368, 372, 1161; *Coman v. Lakey*, 80 N. Y. 345, 350; *Pelton v. Westchester F. Ins. Co.*, 77 N. Y. 605, 607.

§ 1405, (<sup>k</sup>) *Contracts for personal services*: See Pom. Equitable Remedies, § 759.

§ 1405, (1) Other contracts requiring continuous acts: See Pom. Equitable Remedies, § 761.

§ 1406, (a) The subject of this paragraph is treated in detail in Pom. Equitable Remedies, chap. XLII, §§ 838-863.



therefore, that the purchaser, being the equitable owner, is entitled to all the benefits and assumes all the risks of ownership.<sup>2</sup>

**§ 1407. Performance by Plaintiff a Condition Precedent.**<sup>a</sup>—The doctrine is fundamental that either of the parties seeking a specific performance against the other must show, as a condition precedent to his obtaining the remedy, that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms.<sup>1</sup>

**§ 1406, 2** From that time he takes the benefit of all *subsequent* improvements, increases, gains, rises in value, and other advantages happening to the property. Conversely, the subject-matter is at his risk, and he must bear all total or partial losses, from fire or other accidental cause, or from trespassers, and all depreciations in value, and other disadvantages; *res perit domino*. This *liability* is, however, subject to the important limitation that the loss or depreciation does not arise from the neglect, default, or unwarrantable delay of the vendor in carrying out the contract: *Paine v. Meller*, 6 Ves. 349; *Cass v. Rudele*, 2 Vern. 280; *Mortimer v. Capper*, 1 Brown Ch. 156; *Jackson v. Lever*, 3 Brown Ch. 605; *Richter v. Selin*, 8 Serg. & R. 425, 440; *Brewer v. Herbert*, 30 Md. 301, 96 **Am. Dec.** 582; *Robb v. Mann*, 11 Pa. St. 300, 51 **Am. Dec.** 551; *Andrews v. Bell*, 56 Pa. St. 343; *Lee v. Kirby*, 104 Mass. 420, 428; *Ewing v. Beauchamp*, 6 B. Mon. 422; *Cooper v. Pena*, 21 Cal. 403; *Willard v. Tayloe*, 8 Wall. 558, 571; *Marble Co. v. Ripley*, 10 Wall. 339; *Hale v. Wilkinson*, 21 Gratt. 75; *Ambrouse's Heirs v. Keller*, 22 Gratt. 769. Vendor's delay or default: *Wyvill v. Bishop of Exeter*, 1 Price, 292; *Paine v. Meller*, 6 Ves. 349; *Christian v. Cabell*, 22 Gratt. 82; *Griffin's Ex'r v. Cunningham*, 19 Gratt. 571; *Booten v. Scheffer*, 21 Gratt. 474; *Merritt v. Brown*, 19 N. J. Eq. 286; *Kirby v. Harrison*, 2 Ohio St. 326, 59 **Am. Dec.** 677.

**§ 1407, 1** In the language often used, he must show himself "ready, willing, desirous, prompt, and eager." There are two *apparent* exceptions, depending upon strictly equitable considerations: 1. A strict per-

**§ 1407, (a)** For a more detailed treatment of this subject, see *Pom. Equitable Remedies*, §§ 805-809.

With respect to the necessity of an actual tender and a demand of performance before suit brought, the American decisions are somewhat conflicting, and different rules seem to prevail in different states. The most important of these rules are given in the foot-note.

formance at the very stipulated *time* is not always necessary; and 2. Partial and immaterial failures of title or defects of the subject-matter, if admitting of compensation, *may* not prevent the vendor from enforcing the remainder of the agreement: *Lloyd v. Collett*, 4 Brown Ch. 469; 4 Ves. 690, note; *Harrington v. Wheeler*, 4 Ves. 686; *Guest v. Homfray*, 5 Ves. 818; *Walker v. Jeffreys*, 1 Hare, 341, 352; *Southcomb v. Bishop of Exeter*, 6 Hare, 213, 218; *Dorin v. Harvey*, 15 Sim. 49; *Sharp v. Wright*, 28 Beav. 150; *Earl of Darnley v. London etc. R'y*, 3 De Gex, J. & S. 24; *McMurray v. Spicer*, L. R. 5 Eq. 527, 537; *Colson v. Thompson*, 2 Wheat. 336; *Watts v. Waddle*, 6 Pet. 389; *Boone v. Mo. Iron Co.*, 17 How. 340; *McNeil v. Magee*, 5 Mason, 244; *Longworth v. Taylor*, 1 McLean, 395; *Sullings v. Sullings*, 9 Allen, 234; *Wood v. Perry*, 1 Barb. 114; *Burling v. King*, 66 Barb. 633; *Van Campen v. Knight*, 63 Barb. 205; *Reeves v. Kimball*, 40 N. Y. 299; *King v. Ruckman*, 21 N. J. Eq. 599; *Thorp v. Pettit*, 16 N. J. Eq. 488; *Crane v. Decamp*, 21 N. J. Eq. 414; *Merritt v. Brown*, 21 N. J. Eq. 401; *Earl v. Halsey*, 14 Pa. St. 332; *Buchanan v. Lorman*, 3 Gill, 51, 77; *McComas v. Easley*, 21 Gratt. 23; *Vail v. Nelson*, 4 Rand. 478; *Blackmer v. Phillips*, 67 N. C. 340; *Secrest v. McKenna*, 1 Strob. Eq. 356; *Brown v. Hayes*, 33 Ga. Supp. 136; *Tyler v. McCardle*, 9 Smedes & M. 230; *Richardson v. Linney*, 7 B. Mon. 571; *O'Kane v. Kiser*, 25 Ind. 168; *Allen v. Atkinson*, 21 Mich. 351; *Rogers v. Taylor*, 40 Iowa, 193; *Wass v. Mugridge*, 128 Mass. 394; *Jenkins v. Harrison*, 66 Ala. 345; *Selleck v. Tallman*, 87 N. Y. 106; *McHugh v. Wells*, 39 Mich. 175; *Russell v. Nester*, 46 Mich. 290; *Ludlum v. Buckingham*, 35 N. J. Eq. 71; *Kinney v. Redden*, 2 Del. Ch. 46.

*Vendor's failure of title.*—It is therefore a familiar rule that the vendor cannot force performance upon the purchaser, unless he is able to give a good title to the subject-matter: *King v. Knapp*, 59 N. Y. 462; *Hepburn v. Auld*, 5 Cranch. 262; *Hoover v. Calhoun*, 16 Gratt. 109; *Jackson v. Ligon*, 3 Leigh, 160; *Bryan v. Read*, 1 Dev. & B. Eq. 78; *Cunningham v. Sharp*, 11 Humph. 116, 121; *Jeffries v. Jeffries*, 117 Mass. 184; *Dobbs v. Norcross*, 24 N. J. Eq. 327; *Vreeland v. Blauvelt*, 23 N. J. Eq. 483; *Cornell v. Andrews*, 35 N. J. Eq. 7; *Jenkins v. Fahey*, 73 N. Y. 355; *Bensel v. Gray*, 80 N. Y. 517; *Swepton v. Johnston*, 84 N. C. 449; *Hancock v. Bramlett*, 85 N. C. 393; *Lyles v. Kirkpatrick*, 9

**§ 1408. Time as Affecting the Right to a Performance.**<sup>a</sup>—The stipulations concerning time of performance in a contract are regarded by equity either as immaterial, or as essential, or as material. In all ordinary cases of

S. C. 265; Rader v. Neal, 13 W. Va. 373; Hymers v. Branch, 6 Mo. App. 511; Chrisman v. Partee, 38 Ark. 31; Mitchell v. Steinmetz, 97 Pa. St. 251.

*His partial defect or failure.*—But where the defect or failure is partial and immaterial, so that he can give substantially what he contracted to give, the court may grant the remedy, with compensation to the purchaser:<sup>b</sup> Halsey v. Grant, 13 Ves. 73, 77; Guest v. Homfray, 5 Ves. 818; Mortlock v. Buller, 10 Ves. 292, 306; McQueen v. Farquhar, 11 Ves. 467; Foley v. Crow, 37 Md. 51; but the defect or failure must be *immaterial*: Peers v. Lambert, 7 Beav. 546; Howard v. Kimball, 65 N. C. 175, 6 **Am. Rep.** 739; Griffin's Ex'r v. Cunningham, 19 Gratt. 571; Smith v. Turner, 50 Ind. 367; Havens v. Bliss, 26 N. J. Eq. 363; Gregory v. Perkins, 40 Iowa, 82; Walsh v. Barton, 24 Ohio St. 28; Bogan v. Daughdrill, 51 Ala. 312.

*Tender, when necessary.*—In general, the rules of equity concerning the necessity of an *actual* tender are not so stringent as those of the law. The following special rules seem to be settled: 1. An actual tender by the plaintiff is unnecessary when, from the acts of the defendant or from the situation of the property it would be wholly nugatory. Thus if defendant has openly refused to perform, the plaintiff need not make a tender or demand; it is enough that he is ready and willing, and offers to perform in his pleading: Hunter v. Daniel, 4 Hare, 420, 433; Matlocks v. Young, 66 Me. 459, 467; Crary v. Smith, 2 N. Y. 60, 65; Kerr v. Purdy, 50 Barb. 24; Maxwell v. Pittenger, 3 N. J. Eq. 156; White v. Dobson, 17 Gratt. 262; Brock v. Hidy, 13 Ohio St. 306, 310; Brown v. Eaton, 21 Minn. 409, 411; Gill v. Newell, 13 Minn. 462, 472; Deichmann v. Deichmann, 49 Mo. 107; Gray v. Dougherty, 25 Cal. 266, 280, 281. Also, if at the time fixed the vendor is unable to convey, by reason of a defect in his title, etc.: Karker v. Haverly, 50 Barb. 79; Delavan v. Duncan, 49 N. Y. 485, 487; Hall v. Whittier, 10 R. I. 530; Young v. Daniels, 2 Iowa, 126, 63 **Am. Dec.** 477; Gray v. Dougherty, 25 Cal. 266, 280; unless time was made essential: Kimball v. Tooke, 70 Ill. 553. 2. Where the stipulations are mutual and dependent,—that is, where the deed is to be delivered upon payment of the price,—an actual

**§ 1407, (b)** See Pom. Equitable Remedies, §§ 831, 832.

**§ 1408, (a)** On the subject of this paragraph, see further, Pom. Equitable Remedies, §§ 810-816.

contract, equity does not regard time as of the essence of the agreement. In all ordinary cases of contract for the sale of land, if there is nothing special in its objects, subject-matter, or terms, although a certain period of time

tender and demand by one party is necessary to put the other in default, and to cut off *his* right to treat the contract as still subsisting: *Hubbell v. Von Schoening*, 49 N. Y. 326, 331; *Leaird v. Smith*, 44 N. Y. 618; *Van Campen v. Knight*, 63 Barb. 205; *Irvin v. Bleakley*, 67 Pa. St. 24, 28; *Crabtree v. Levings*, 53 Ill. 526. 3. *Time essential*: Where the time of payment by the vendee is made *essential*, and *a fortiori* where, if his payments are not made on the exact day named, the vendor may treat the contract as at an end, the vendee must make an actual tender of the price and a demand of the deed at a specified time. The same is true of the vendor when the time of conveying is made essential. This is the very meaning of time being of the essence of the contract: *Duffy v. O'Donovan*, 46 N. Y. 223; *Gale v. Archer*, 42 Barb. 320; *Wells v. Smith*, 2 Edw. Ch. 78; *Kimball v. Tooke*, 70 Ill. 553; *Phelps v. Illinois Cent. R. R.*, 63 Ill. 468; *Heuer v. Rutkowski*, 18 Mo. 216; but the necessity may be waived by conduct of the other party: *Duffy v. O'Donovan*; *Kimball v. Tooke*, *supra*; *Tobey v. Foreman*, 79 Ill. 489. *Time not essential*: Concerning the necessity of actual tender in contracts in which time is not essential, the American decisions are directly conflicting. According to one group of cases, the strict legal rule is enforced. Where the stipulations are mutually dependent, the plaintiff must make an actual tender, and must demand performance before bringing his suit. Some of these cases, however, dispense with the demand, and only require a tender. *Suits by the vendee*: *Klyce v. Broyles*, 37 Miss. 524; *Mhoon v. Wilkerson*, 47 Miss. 633; *Gray v. Dougherty*, 25 Cal. 266, 278, 282; *Jones v. Petaluma*, 36 Cal. 230, 232; *Marshall v. Caldwell*, 41 Cal. 611, 615; *Duff v. Fisher*, 15 Cal. 375, 381; *Mather v. Scoles*, 35 Ind. 1; *Fall v. Hazelrigg*, 45 Ind. 576, 15 *Am. Rep.* 278; *Lynch v. Jennings*, 43 Ind. 276, 286; *Hart v. McClellan*, 41 Ala. 251; *Bell v. Thompson*, 34 Ala. 633; *Deichmann v. Deichmann*, 49 Mo. 107; *Broek v. Hidy*, 13 Ohio St. 306, 310; *Rogers v. Taylor*, 40 Iowa, 193; *Bearden v. Wood*, 1 A. K. Marsh. 450; *Hall v. Whittier*, 10 R. I. 530. *Suits by vendor*: *Klyce v. Broyles*, 37 Miss. 524; *Ex parte Hodges*, 24 Ark. 197; *Corbas v. Teed*, 69 Ill. 205; and see *Thomson v. Smith*, 63 N. Y. 301. Another group of decisions adopts a rule more in accordance with the principles of equity, viz., that in such contracts an actual tender or demand by the plaintiff prior to the suit is not essential. It is enough that he was ready and willing, and offered, at the time specified, and even that he is ready and willing at the time of bringing the suit, unless:



is stipulated for its completion, or for the execution of any of its terms, equity treats the provision as formal rather than essential, and permits a party who has suffered the period to elapse to perform such acts after the prescribed date, and to compel a performance by the other party notwithstanding his own delay.<sup>1b</sup> *Time*

his rights have been lost by laches, and that he offers to perform in his pleading. The plaintiff's performance will be provided for in the decree, and his previous neglect will only affect his right to costs. *Suits by vendee*: Irvin v. Gregory, 13 Gray, 215, 218; Park v. Johnson, 4 Allen, 259; Stevenson v. Maxwell, 2 N. Y. 408, 415; Bruce v. Tilson, 25 N. Y. 194, 197, 203 (see comments of Allen, J., upon Wells v. Smith, 2 Edw. Ch. 78, 7 Paige, 22, 31 **Am. Dec.** 274; confining it to contracts in which time is made essential); Freeson v. Bissell, 63 N. Y. 168, 170; Chess's Appeal, 4 Pa. St. 52, 45 **Am. Dec.** 668; Smoot v. Rea, 19 Md. 398, 410; Maughlin v. Perry, 35 Md. 352; Morris v. Hoyt, 11 Mich. 9, 18; Seeley v. Howard, 13 Wis. 336; St. Paul Division etc. v. Brown, 9 Minn. 157. *Suits by vendor*: Stevenson v. Maxwell, Bruce v. Tilson, Freeson v. Bissell, *supra*; Hawk v. Greensweig, 2 Pa. St. 295; Winton v. Sherman, 20 Iowa, 295; Seeley v. Howard, 13 Wis. 336; Woodson's Adm'rs v. Scott, 1 Dana, 470. This is unquestionably the true *equitable* doctrine. For further illustrations, see Wass v. Mugridge, 128 Mass. 394; Selleck v. Tallman, 87 N. Y. 106; Jenkins v. Harrison, 66 Ala. 345; McHugh v. Wells, 39 Mich. 175.

§ 1408, 1 This general doctrine is established by an unbroken line of decisions; but it is subject to various exceptions and limitations, one of the most important being that the delay must not be willful and intentional, and must not have worked any harm to the other party. My limits do not permit me to enter upon a full discussion of these questions; for their solution the reader must be referred to special works on this subject: Seton v. Slade, 7 Ves. 265, per Lord Eldon; Decamp v. Feay, 5 Serg. & R. 323, 9 **Am. Dec.** 372; per Gibson, J.; Vyse v. Foster, L. R. 7 H. L. 318; McMurray v. Spicer, L. R. 5 Eq. 527; Tilley v. Thomas, L. R. 3 Ch. 61, 67, 69; Parkin v. Thorold, 2 Sim., N. S., 1; 16 Beav. 59; Hull v. Sturdivant, 46 Me. 34; Dresel v. Jordan, 104 Mass. 407; Quinn v. Roath, 37 Conn. 16; Edgerton v. Peckham, 11 Paige, 352; Hubbell v. Von Schoening, 49 N. Y. 326; Van Campen v. Knight, 63 Barb. 205; Sharp v. Trimmer, 24 N. J. Eq. 422; King v. Ruckman,

§ 1408, (b) *Time not essential*.—For further annotations, see Pom. *Equitable Remedies*, § 810.

*essential*: Time may be essential. It is so whenever the intention of the parties is clear that the performance of its terms shall be accomplished exactly at the stipulated day. The intention must then govern. A delay cannot be excused. A performance at the time is essential; any default will defeat the right to a specific enforcement.<sup>2c</sup> *Time material*: Although

20 N. J. Eq. 316; *Smoot v. Rea*, 19 Md. 399; *Scarlett v. Stein*, 40 Md. 512; *Brook v. Hidy*, 13 Ohio St. 305; *Keller v. Fisher*, 7 Ind. 718; *Shafer v. Niver*, 9 Mich. 253; *Snyder v. Spaulding*, 57 Ill. 480; *Spalding v. Alexander*, 6 Bush, 160; *Walton v. Wilson*, 30 Miss. 576; *Morgan v. Bergen*, 3 Neb. 209; *Prince v. Griffin*, 27 Iowa, 514; *Knott v. Stephens*, 5 Or. 235; *Steele v. Branch*, 40 Cal. 3. A delay in payment at the day appointed, unless intentional and willful, or unreasonably long, will not preclude the vendee from enforcing the contract. Of course, the delay must be explained and accounted for, and it must not be prejudicial to the other party beyond the means of reparation: See *Longworth v. Taylor*, 1 McLean, 395; 14 Pet. 172, per Story, J., and cases cited; *Moote v. Scriven*, 33 Mich. 500; *Brassell v. McLemore*, 50 Ala. 476; *Sharp v. Trimmer*, 24 N. J. Eq. 422; *Pritchard v. Todd*, 38 Conn. 413; *Converse v. Blumrich*, 14 Mich. 109, 114, 90 *Am. Dec.* 230; *Shortall v. Mitchell*, 57 Ill. 161; *Decamp v. Feay*, 5 Serg. & R. 323, 327, 9 *Am. Dec.* 372; *Edgerton v. Peckham*, 11 Paige, 352, 359; *McClartey v. Gokey*, 31 Iowa, 505; and see further, in this connection, *Grey v. Tubbs*, 43 Cal. 359; *Snider v. Lehnherr*, 5 Or. 385; *Peck v. Brighton Co.*, 69 Ill. 200; *Beach v. Dyer*, 93 Ill. 295; *Tilton v. Stein*, 87 Ill. 122; *Jones v. Jones*, 11 Phila. 559; *Russell v. Baughman*, 94 Pa. St. 400; *Parsons v. Gilbert*, 45 Iowa, 33; *Chadwell v. Winston*, 3 Tenn. Ch. 110; *Henderson v. Hicks*, 58 Cal. 364; *Burton v. Adkins*, 2 Del. Ch. 125; *Davison v. Jersey Co. Ass'n*, 71 N. Y. 333; *Wonson v. Fenno*, 129 Mass. 405.

§ 1408, 2 *Hipwell v. Knight*, 1 *Younge & C.* 401; *Quinn v. Roath*, 37 Conn. 16; *Miller's Adm'r v. Miller*, 25 N. J. Eq. 354; *King v. Ruckman*, 20 N. J. Eq. 316; *Prince v. Griffin*, 27 Iowa, 514; *Knott v. Stephens*, 5 Or. 235; *Grey v. Tubbs*, 43 Cal. 359. Time may become essential from the subject-matter, or object of the contract; e. g., where the value of the subject-matter necessarily fluctuates and changes with the mere lapse of time: *Hipwell v. Knight*, 1 *Younge & C.* 401, 416; *Doloret*

§ 1408, (c) *When time is essential*.—For further annotations and additions, see *Pom. Equitable Remedies*, §§ 811, 813, 815, 816.

time is not ordinarily essential, yet it is, as a general rule, material. In order that a default may not defeat a party's remedy, the delay which occasioned it must be explained and accounted for. The doctrine is fundamental that a party seeking the remedy of specific performance, and also the party who desires to maintain an objection founded upon the other's laches, must show

v. Rothschild, 1 Sim. & St. 590 (stocks); see McKay v. Carrington, 1 McLean, 50; Holt v. Rogers, 8 Pet. 420; Brashier v. Gratz, 6 Wheat. 528; Hepburn v. Auld, 5 Cranch, 262; Jennisons v. Leonard, 21 Wall. 302; Jones v. Robbins, 29 Me. 351, 50 **Am. Dec.** 593; Goldsmith v. Guild, 10 Allen, 239; Hoyt v. Tuxbury, 70 Ill. 331. Also in unilateral contracts: Brooke v. Garrod, 3 Kay & J. 608; 2 De Gex & J. 62; Austin v. Tawney, L. R. 2 Ch. 143; Kerr v. Purdy, 51 N. Y. 629; 50 Barb. 24; Karker v. Haverly, 50 Barb. 79; Potts v. Whitehead, 20 N. J. Eq. 55; Fessler's Appeal, 75 Pa. St. 483; Maughlin v. Perry, 35 Md. 352, 360; White v. Dobson, 17 Gratt. 262; Jones v. Noble, 3 Bush, 694; Mason v. Payne, 47 Mo. 517; Estes v. Furlong, 59 Ill. 298, 300. Time may be made essential by express stipulation. No particular form is necessary, but any clause will have the effect which clearly provides that the contract is to be null, if the fulfillment is not within the prescribed time: Hudson v. Bartram, 3 Madd. 440; Benediet v. Lynch, 1 Johns. Ch. 370, 7 **Am. Dec.** 484; Wells v. Smith, 2 Edw. Ch. 78; 7 Paige, 22, 31 **Am. Dec.** 274; Barnard v. Lee, 97 Mass. 92; Goldsmith v. Guild, 10 Allen, 239; Quinn v. Roath, 37 Conn. 16; Baldwin v. Van Horst, 9 N. J. Eq. 577; Bullock v. Adams's Ex'rs, 20 N. J. Eq. 367, 371; Reed v. Breeden, 61 Pa. St. 460; Jackson v. Ligon, 3 Leigh, 160, 187; Kirby v. Harrison, 2 Ohio St. 326, 332, 59 **Am. Dec.** 677; Scott v. Fields, 7 Ohio, 424; Phelps v. Ill. Cent. R. R., 63 Ill. 468; Peek v. Brighton Co., 69 Ill. 200; Kimball v. Tooke, 70 Ill. 553; Davis v. Stevens, 3 Iowa, 158; O'Fallon v. Kennerly, 45 Mo. 124; Morgan v. Bergen, 3 Neb. 209; Snider v. Lehnherr, 5 Or. 385; Grey v. Tubbs, 43 Cal. 359. Time may also be made essential, where one of the parties delays in fulfilling, and the other party by a notice prescribes a period within which the contract must be completed, or else be abandoned: Reynolds v. Nelson, 6 Madd. 18; Eads v. Williams, 4 De Gex, M. & G. 674; Rogers v. Saunders, 16 Me. 92, 33 **Am. Dec.** 635; Wiswall v. McGowan, Hoff. Ch. 125; Thompson v. Dulles, 5 Rich. Eq. 370; Smith v. Lawrence, 15 Mich. 499; Reed v. Breeden, 61 Pa. St. 460.

himself to have been "ready, desirous, prompt, and eager."<sup>3d</sup>

**§ 1409. Enforcement of Verbal Contracts Part Performed.**<sup>a</sup>—The doctrine was settled at an early day in England, and has been fully adopted in nearly all the American states, that a verbal contract for the sale or leasing of land, or for a settlement made upon consideration of marriage, if part performed by the party seeking the remedy, may be specifically enforced by courts of equity, notwithstanding the statute of frauds.<sup>1</sup> The

**§ 1408, 3** The following are a few out of the great number of cases illustrating this doctrine: *Lloyd v. Collett*, 4 Brown Ch. 469; *Alley v. Deschamps*, 13 Ves. 225; *McMurray v. Spicer*, L. R. 5 Eq. 527, 537; *Hubbell v. Von Schoening*, 58 Barb. 498; 49 N. Y. 326; *Eppinger v. McGreal*, 31 Tex. 147; *Campbell v. Hicks*, 19 Ohio St. 433; *Mix v. Balduce*, 78 Ill. 215; *Peck v. Brighton Co.*, 69 Ill. 200; *McDermid v. McGregor*, 21 Minn. 111; *Ritson v. Dodge*, 33 Mich. 463; *Delavan v. Duncan*, 49 N. Y. 485; *Finch v. Parker*, 49 N. Y. 1; *Hawley v. Jelly*, 25 Mich. 94; *McLaurie v. Barnes*, 72 Ill. 73; *Roby v. Cossitt*, 78 Ill. 638; *Green v. Covillaud*, 10 Cal. 317, 70 Am. Dec. 725; *Steele v. Branch*, 40 Cal. 3; *Williams v. Hart*, 116 Mass. 513; *Boyd v. Schlessinger*, 59 N. Y. 301, 305; *Davison v. Jersey Co. Ass'n*, 6 Hun, 470, 71 N. Y. 333; *Ludlum v. Buckingham*, 35 N. J. Eq. 71; *Kinney v. Redden*, 2 Del. Ch. 46; *Russell v. Nester*, 46 Mich. 290; *Beach v. Dyer*, 93 Ill. 295; *Tilton v. Stein*, 87 Ill. 122; *Parsons v. Gilbert*, 45 Iowa, 33; *Chadwell v. Winston*, 3 Tenn. Ch. 110; *Henderson v. Hicks*, 58 Cal. 364; *Burton v. Adkins*, 2 Del. Ch. 125; *Wonson v. Fenno*, 129 Mass. 405; *Russell v. Baughman*, 94 Pa. St. 400; *Jones v. Jones*, 11 Phila. 559.

**§ 1409, 1** The contract must possess all the elements and features necessary to the specific enforcement of any agreement, except the written memorandum required by the statute. My limits only permit me to state the most general rules on this subject. Out of the vast number of decisions, I shall cite only a comparatively few by way of illustration: *Lester v. Foxcroft*, Colles, 108; cited 2 Vern. 456; 1 Lead. Cas. Eq., 4th Am. ed., 1027, 1038, 1042; *Clinan v. Cooke*, 1 Schoales & L.

**§ 1408, (d) Time material; laches:** See, further, Pom. *Equitable Remedies*, §§ 812, 814.

**§ 1409, (a)** This subject is treated in detail in Pom. *Equitable Remedies*, chap. XL, §§ 817-830.



ground upon which the remedy in such cases rests is that of equitable fraud. It would be a virtual fraud for the defendant, after permitting the acts of part performance, to interpose the statute as a bar to the plaintiff's remedial right. The acts of part performance, therefore, in order to satisfy this principle, must be done in pursu-

22; *Newton v. Swazey*, 8 N. H. 9; *Tilton v. Tilton*, 9 N. H. 385; *Eaton v. Whitaker*, 18 Conn. 222, 44 **Am. Dec.** 586; *Hall v. Whittier*, 10 R. I. 530; *Freeman v. Freeman*, 43 N. Y. 34, 3 **Am. Rep.** 657; *Welsh v. Bayaud*, 21 N. J. Eq. 186; *Greenlee v. Greenlee*, 22 Pa. St. 225; *Cole v. Cole*, 41 Md. 301; *Semmes v. Worthington*, 38 Md. 298; *Pierce's Heirs v. Catron's Heirs*, 23 Gratt. 483; *Lowry v. Buffington*, 6 W. Va. 249; *Church of the Advent v. Farrow*, 7 Rich. Eq. 378; *Ford v. Finney*, 35 Ga. 258; *Johnson v. Bowden*, 37 Tex. 621; *Farrar v. Patton*, 20 Mo. 81; *Feusier v. Sneath*, 3 Nev. 120; *Morgan v. Bergen*, 3 Neb. 209; *Gregg v. Hamilton*, 12 Kan. 333; *Northrop v. Boone*, 66 Ill. 368; *Fall v. Hazelrigg*, 45 Ind. 576, 15 **Am. Rep.** 278; *Grant v. Ramsey*, 7 Ohio St. 157; *Armes v. Bigelow*, 3 McAr. 442; *Hiatt v. Williams*, 72 Mo. 214, 37 **Am. Rep.** 438; *Bohanan v. Bohanan*, 96 Ill. 591; *McDowell v. Lucas*, 97 Ill. 489; *Jefferson v. Jefferson*, 96 Ill. 551; *Marshall v. Peck*, 91 Ill. 187; *Laird v. Allen*, 82 Ill. 43; *Wallace v. Rappleye*, 103 Ill. 229; *Littlefield v. Littlefield*, 51 Wis. 23; *Seaman v. Aschermann*, 51 Wis. 678, 37 **Am. Rep.** 849; *Manly v. Howlett*, 55 Cal. 94; *Hanlon v. Wilson*, 10 Neb. 138; *Hibbert v. Aylott*, 52 Tex. 530; *Judy v. Gilbert*, 77 Ind. 96, 40 **Am. Rep.** 289; *Lamb v. Hinman*, 46 Mich. 112; *Jamison v. Dimock*, 95 Pa. St. 52; *Newkumet v. Kraft*, 10 Phila. 127; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Sherman v. Scott*, 27 Hun, 331; *Barnes v. Boston etc. R. R.*, 130 Mass. 388. In a very few states the remedy seems to be either wholly denied, or else admitted only under very special circumstances: North Carolina, Tennessee, Kentucky; while in Massachusetts and Maine, it did not exist until the very recent legislation.

*Fundamental ground of the jurisdiction.*<sup>b</sup>—The ground is equitable fraud; not an antecedent fraud in entering into the contract, but a fraud inhering in the consequence of setting up the statute as a defense. If the defendant knowingly permits the plaintiff to do acts in part performance of the verbal agreement, acts done in reliance on the agreement, which change the relations of the parties and prevent a restoration to their former condition, it would be a virtual fraud for

§ 1409, (b) See *Pom. Equitable Remedies*, §§ 817, 826.

ance of the contract, and must alter the relations of the parties. The most important acts which constitute a sufficient part performance are actual possession, permanent and valuable improvements, and these two combined.

the defendant to interpose the statute as a defense, and thus to secure for himself the benefit of the acts of part performance, while the plaintiff would be left not only without adequate remedy at law, but also liable for damages as a trespasser: See vol. 2, §§ 864-867, 921, where this principle is discussed. See, also, *Lester v. Foxcroft*, *supra*; *McCormick v. Gegan*, L. R. 4 H. L. 82, 97; *Haigh v. Kaye*, L. R. 7 Ch. 469; *Caton v. Caton*, L. R. 1 Ch. 137, 147; *Bond v. Hopkins*, 1 Schoales & L. 413, 433; *Clinan v. Cooke*, 1 Schoales & L. 22, 41; *Mundy v. Jolliffe*, 5 Mylne & C. 167, 177; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; *Wright v. Pucket*, 22 Gratt. 370, 374; *Pierce's Heirs v. Catron's Heirs*, 23 Gratt. 588; *Semmes v. Worthington*, 38 Md. 298; *Horn v. Ludington*, 32 Wis. 73; *Morgan v. Bergen*, 3 Neb. 209; and cases cited above, in this note. It follows from this principle that the acts of part performance must be done by the party seeking to enforce the contract; and must be done in pursuance of the contract, and with the design of carrying the same into execution; and must be done with the consent, express or implied, or knowledge, of the other party: *Id.*

*Acts of part performance.*—The following acts do *not* constitute a part performance within the doctrine: Acts done prior to the contract; acts merely preparatory or ancillary to the agreement, such as delivering abstract of title, measuring the land, drawing up deeds, etc.; marriage alone; payment of the price in whole or in part (otherwise in Iowa, by statute).<sup>c</sup> The important acts which *do* constitute a sufficient part performance are<sup>a</sup> actual, open *possession* of the land; or permanent and valuable *improvements* made on the land; or these two combined. In addition to the cases cited at the commencement of this note, see *Possession*: *Pain v. Coombs*, 1 De Gex & J. 34; *Shillibeer v. Jarvis*, 8 De Gex, M. & G. 79; *Coles v. Pilkington*, L. R. 19 Eq. 174; *Clinan v. Cooke*, 1 Schoales & L. 22; *Gregory v. Mighell*, 18 Ves. 328; *Tilton v. Tilton*, 9 N. H. 385, 390; *Malins v. Brown*, 4 N. Y. 403; *Reed v. Reed*, 12 Pa. St. 117; *Danforth v. Laney*, 28 Ala. 274; *Catlett v. Bacon*, 33 Miss. 269; *White v. Watkins*, 23 Mo. 423; *Anderson v. Simpson*,

§ 1409, (c) *Acts not constituting part performance*: See Pom. *Equitable Remedies*, §§ 820, 823, 824, 825, 829.

§ 1409, (a) *Acts constituting part performance*: See Pom. *Equitable Remedies*, §§ 819, 821, 822, 826, 827, 828.

### § 1410. Damages in Place of a Specific Performance.—

When the impossibility of a specific performance is disclosed at the hearing, and the suit was brought by the plaintiff in ignorance of such fact, the court will award the remedy of damages.<sup>1</sup>

21 Iowa, 399. *Improvements*: Wills v. Stradling, 3 Ves. 378; Stockley v. Stockley, 1 Ves. & B. 23; Mundy v. Jolliffe, 5 Mylne & C. 167; Surcome v. Penniger, 3 De Gex, M. & G. 571; Crook v. Corpor. of Seaford, L. R. 6 Ch. 551; 10 Eq. 678; Williams v. Evans, L. R. 19 Eq. 547; Miller v. Tobie, 41 N. H. 84; Potter v. Jacobs, 111 Mass. 32; Freeman v. Freeman, 43 N. Y. 34, 3 **Am. Rep.** 657; Cagger v. Lansing, 43 N. Y. 550; Adams v. Fullam, 43 Vt. 592; Peckham v. Barker, 8 R. I. 17; Green v. Finin, 35 Conn. 178; Mims v. Lockett, 33 Ga. 9; Wimberly v. Bryan, 55 Ga. 198; Sackett v. Spencer, 65 Pa. St. 89; Moss v. Culver, 64 Pa. St. 414, 3 **Am. Rep.** 601; Ingles v. Patterson, 36 Wis. 373; Gregg v. Hamilton, 12 Kan. 333; Poland v. O'Connor, 1 Neb. 50, 93 **Am. Dec.** 327; Hoffman v. Fett, 39 Cal. 109; McCarger v. Rood, 47 Cal. 138; Neale v. Neale, 9 Wall. 1. *Special acts, personal services, etc.*: See Rhodes v. Rhodes, 3 Sand. Ch. 279, 284; Davison v. Davison, 13 N. J. Eq. 246; Vanduyne v. Vreeland, 12 N. J. Eq. 142, 151; Twiss v. George, 33 Mich. 253; Johnson v. Hubbell, 10 N. J. Eq. 332, 66 **Am. Dec.** 773; Cronk v. Trumble, 66 Ill. 482; Edwards v. Estell, 48 Cal. 194.

§ 1410, 1 If the vendor has disabled himself from performance after making the contract, and if the disability existed at the time of making the contract from a defect in his title, a court of equity will, in either of these cases, award damages to the vendee-plaintiff, provided he commenced his suit in good faith, without any knowledge of the disability: See Milkman v. Ordway, 106 Mass. 232, 253; Chartier v. Marshall, 56 N. H. 478; Wiswall v. McGowan, Hoff. Ch. 125; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273; Morss v. Elmendorf, 11 Paige, 277; Berry v. Van Winkle, 2 N. J. Eq. 269; Hopkins v. Gilman, 22 Wis. 476; Tenney v. State Bank, 20 Wis. 152; McQueen v. Chouteau's Heirs, 20 Mo. 222, 64 **Am. Dec.** 178; Hamilton v. Hamilton, 59 Mo. 232; Gupton v. Gupton, 47 Mo. 37, 47; Harrison v. Deramus, 33 Ala. 463; Carroll v. Wilson, 22 Ark. 32; Foley v. Crow, 37 Md. 51; but will not, in general, grant damages if the plaintiff was aware of the disability at the time of bringing his suit: Ibid., Hatch v. Cobb, 4 Johns. Ch. 559; Kempshall v. Stone, 5 Johns. Ch. 193; Smith v. Kelley, 56 Me. 64; Sternberger v. McGovern, 56 N. Y. 12, 20. For a full and able discussion of the rules as to damages in equity, see Woodman v. Freeman, 25 Me. 531, 532, 543.

## CHAPTER SECOND.

SPECIFIC ENFORCEMENT OF OBLIGATIONS  
ARISING FROM TRUSTS AND FIDUCIARY  
RELATIONS.

## ANALYSIS.

§ 1411. General nature, kinds, and classes.

§ 1412. Suits against corporations to compel the transfer or issue of stock.

**§ 1411. General Nature, Kinds, and Classes.**—The nature and objects of the various remedies included in this division are sufficiently indicated by the title, and need no further description. The remedies belonging to the class are suits to enforce express trusts, either private or charitable; suits to enforce resulting or constructive trusts by compelling a conveyance of the legal title; suits against persons in fiduciary relations; suits against administrators or executors; and suits against corporations and their managing officers. The jurisdiction to entertain these suits and to grant these remedies has been described in previous chapters.<sup>1</sup> There remains one particular remedy to be briefly considered,—the suit by a stockholder against a corporation to compel the transfer or issue of stock.

**§ 1412. Suits Against Corporations to Compel the Transfer or Issue of Stock.**<sup>a</sup>—Cases frequently arise

§ 1411, <sup>1</sup> See *ante*, concerning charitable trusts, §§ 1018–1029; express private trusts: §§ 1059–1087; resulting and constructive trusts: §§ 1030–1058; fiduciary persons, guardians, etc.: §§ 1088, 1097; administration suits: §§ 1152–1154; and see *Peyser v. Wendt*, 87 N. Y. 322; suits against corporations and their managing officers: §§ 1089–1096; and see *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Van Dyck v. McQuade*, 86 N. Y. 38, 45, 46.

§ 1412, (a) For additions and annotations to this paragraph, see *Pom. Equitable Remedies*, § 864.



where corporations or joint-stock companies refuse to recognize the rights of assignees of stock, and make the transfers on their books and issue new certificates in place of the old ones presented, or where certificates have been presented to the company without the owner's consent and negligence, and new certificates have been issued instead thereof to others purporting to be entitled thereto. In such cases it is well settled that although the law may give some remedy, as that of damages, for the refusal, equity has jurisdiction to compel the corporation to make the transfer and issue new certificates in the one case, to the lawful assignee;<sup>1</sup> and in the other, to decree that the corporation replace the stock upon its books, and issue new certificates to the original owner, or if it is unable to do this by reason of its not having or being able to procure any shares, to pay the value of the stock.<sup>2</sup>

§ 1412, <sup>1</sup> *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365, 32 **Am. Rep.** 315; *Middlebrook v. Merchants' Bank*, 41 Barb. 481; 3 Abb. App. 295; *Purchase v. N. Y. Exch. Bank*, 3 Rob. (N. Y.) 164. It has been said, in analogy to suits for specific performance of sales of stock, that the action is proper, in this case, where a recovery of damages would furnish inadequate compensation; *Cushman v. Thayer Mfg. Co.*, *supra*. In *Burrall v. Bushwick R. R.*, 75 N. Y. 211, an action was brought to obtain the issue and delivery of a certain number of *shares* of capital stock, in accordance with what purported to be the terms of a certificate. Held, that a subscriber may become the owner of shares, but not in the sense that he can take them away out of the corporate fund. The corporation has no power, and cannot be compelled while continuing its legal existence and carrying on its affairs, to issue and deliver such shares; it can only be compelled to issue their legal evidence, in the shape, generally, of stock certificates.

§ 1412, <sup>2</sup> *Hildyard v. South Sea Co.*, 2 P. Wms. 77; *Ashby v. Blackwell*, 2 Eden, 299; *Sloman v. Bank of England*, 14 Sim. 475; *Taylor v. Midland R'y Co.*, 28 Beav. 287; 8 H. L. Cas. 751; *Pollock v. National Bank*, 7 N. Y. 274, 57 **Am. Dec.** 520; *Chew v. Bank of Baltimore*, 14 Md. 299 (sale of stock by lunatic); *Sewall v. Boston etc. Co.*, 4 Allen, 277, 81 **Am. Dec.** 701; *Pratt v. Taunton Copper Co.*, 123 Mass. 110, 25 **Am. Rep.** 37; *Pratt v. Boston etc. R. R.*, 126 Mass. 443; *Telegraph Co. v. Davenport*, 97 U. S. 369.

The cases under this head almost invariably arise where the owner's name has been forged. It is no answer that the officers of the company have been without blame in allowing the unauthorized transfer, or that the certificate was obtained by a purchaser in good faith: See *Telegraph Co. v. Davenport*, *supra*. Dividends received on the stock after the unauthorized transfer will be ordered by the decree to be paid by the corporation: See the cases above cited.

## SIXTH GROUP.

REMEDIES IN WHICH THE FINAL RELIEF IS  
PECUNIARY, BUT IS OBTAINED BY THE  
ENFORCEMENT OF A LIEN OR CHARGE  
UPON SOME SPECIFIC PROPERTY OR  
FUND.

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### CHAPTER FIRST.

#### FORECLOSURE SUITS — MARSHALING SECURITIES—CREDITORS' SUITS.

##### ANALYSIS.

§ 1413. Nature, kinds, and classes.

§ 1414. Suits for marshaling of securities.

§ 1415. Creditors' suits.

§ 1413. **Nature, Kinds, and Classes.**—The title of this group plainly indicates the nature and object of the remedies composing it. They are all purely equitable, and therefore belong to the exclusive jurisdiction; because, although the *final* relief is pecuniary, and so resembles the ordinary relief at law, it is obtained through preliminary proceedings, forming a part of the judgment, which belong solely to the procedure and jurisdiction of equity. The group contains the following species of remedies: Suits for the foreclosure by judicial sale of mortgages of real property; suits for the similar foreclosure of mortgages of personal property; suits for the similar foreclosure of pledges; suits to enforce the various equitable liens; suits to enforce the equitable contracts of married women upon their separate property; suits to marshal securities; and creditors' suits. The

jurisdiction to entertain most of these suits—when and between what parties most of these remedies will be granted—has already been discussed as fully as my limits will permit.<sup>1</sup> I shall briefly consider in the present chapter marshaling of securities and creditors' suits.

§ 1414. **Marshaling of Securities.**<sup>a</sup>—The equitable remedy of marshaling securities, with that of marshaling assets, depends upon the principle that a person having two funds to satisfy his demands shall not, by his election, disappoint a party having but one fund. The general rule is, that if one creditor, by virtue of a lien or interest, can resort to two funds, and another to one of them only,—as, for example, where a mortgagee holds a prior mortgage on two parcels of land, and a subsequent mortgage on but one of the parcels is given to another,—the former must seek satisfaction out of that fund which the latter cannot touch.<sup>1</sup> If, therefore, the prior creditor

§ 1413, <sup>1</sup> See *ante*, foreclosure of mortgages of land: § 1228; of mortgages of chattels: § 1230; of pledges: § 1231. The enforcement of equitable liens; arising from express contract: §§ 1235–37; from implied contract: §§ 1239–1243; from charges by will or deed: §§ 1245–1247; grantor's lien: §§ 1249–1258; vendor's lien: § 1262; vendee's lien: § 1263; deposit of title deeds: § 1267; statutory liens: § 1269. Suits to enforce the equitable contracts of married women upon their separate property: §§ 1121–1126. Although the late English cases hold that these contracts of married women do *not* create any lien, yet the whole remedy in form and substance is exactly the same as though there *was* a lien, and as though its object was to enforce that lien. Furthermore, the American courts generally hold that a lien *is* created. "Creditors' suits" belong to this group, because they are based upon the conception that an equitable lien is created upon the judgment debtor's property, by means of the judgment and execution returned unsatisfied; and this lien is in reality enforced, although the enforcement may, perhaps, require the ancillary remedies of cancellation, a receiver, etc.

§ 1414, <sup>1</sup> *Lanoy v. Duke of Athol*, 2 Atk. 444, 446; *Aldrich v. Cooper*, 8 Ves. 382, 395; 2 Lead. Cas. Eq., 4th Am. ed., 2280; notes; *Ex parte*

§ 1414, (a) For a treatment in detail of this subject, see *Pom. Equitable Remedies*, chap. XLIV, §§ 865–870.



resorts to the doubly charged fund, the subsequent creditor will be substituted, as far as possible, to his rights.<sup>2</sup> These rules must be taken with the modifications and exceptions that in their application the paramount encumbrancer shall not be delayed or inconvenienced in the collection of his debt, for it would be unreasonable that he should suffer because some one else has taken imperfect security;<sup>3</sup> that the rights of third parties shall not be prejudiced;<sup>4</sup> and that the parties themselves are creditors of the same debtor.<sup>5</sup> The rules of marshaling securities are applied under a variety of

Kendall, 17 Ves. 514, 520; Baldwin v. Belcher, 3 Dru. & War. 173, 176; Hughes v. Williams, 3 Macn. & G. 683; Tidd v. Lister, 10 Hare, 140, 157, 3 De Gex, M. & G. 857; Averall v. Wade, Lloyd & G. 252; Gibson v. Seagrims, 20 Beav. 614; Hales v. Cox, 32 Beav. 118; Ex parte Alston, L. R. 4 Ch. 168; Heyman v. Dubois, L. R. 13 Eq. 158; Cheesebrough v. Millard, 1 Johns. Ch. 409, 7 **Am. Dec.** 494; Hawley v. Mancius, 7 Johns. Ch. 174, 184; Evertson v. Booth, 19 Johns. 486, 492; Besley v. Lawrence, 11 Paige, 581; York etc. Ferry Co. v. Jersey Co., Hopk. Ch. 460; Ziegler v. Long, 2 Watts, 205; Pallen v. Agricultural Bank, Freem. (Miss.) 419; Glass v. Pullen, 6 Bush, 346; Russell v. Howard, 2 McLean, 489; Ross v. Duggan, 5 Col. 85; Terry v. Rosell, 32 Ark. 478.

§ 1414, <sup>2</sup> Cheesebrough v. Millard, 1 Johns. Ch. 409; Hunt v. Townsend, 4 Sand. Ch. 519; Herriman v. Skillman, 33 Barb. 378; Bank of Kentucky v. Vance's Adm'rs, 4 Litt. 168; Ramsey's Appeal, 2 Watts, 228, 27 **Am. Dec.** 301.

§ 1414, <sup>3</sup> Evertson v. Booth, 19 Johns. 486, 493; Woolcocks v. Hart, 1 Paige, 185; Jervis v. Smith, 7 Abb. Pr., N. S., 217; Briggs v. Planters' Bank, Freem. (Miss.) 574; Denham v. Williams, 39 Ga. 312; Callo-way v. People's Bank, 54 Ga. 572; Walker v. Covar, 2 S. C. 16; Coker v. Shropshire, 59 Ala. 542; Sweet v. Redhead, 76 Ill. 374; Wolf v. Smith, 36 Iowa, 454.

§ 1414, <sup>4</sup> Barnes v. Raester, 1 Younge & C. Ch. 401; Averall v. Wade, Lloyd & G. 252; Cannon v. Kreipe, 14 Kan. 324; Leib v. Stribling, 51 Md. 285; McArthur v. Martin, 23 Minn. 74 (homestead right); Marr v. Lewis, 31 Ark. 203, 25 **Am. Rep.** 553 (ditto).

§ 1414, <sup>5</sup> Ex parte Kendall, 17 Ves. 514, 520; Dorr v. Shaw, 4 Johns. Ch. 17; Stevens v. Church, 41 Conn. 369. The rule, also, does not apply between a debtor and his creditor, but only between different creditors: Rogers v. Meyers, 68 Ill. 92.

circumstances; but generally, in this country, between mortgagees, mortgagees and judgment creditors, and between judgment creditors.<sup>6</sup>

§ 1415. **Creditors' Suits.**<sup>a</sup>—The jurisdiction of equity to entertain suits in aid of creditors<sup>1</sup> undoubtedly had its origin in the narrowness of the common-law remedies by writs of execution. These writs, issued by courts of common law, besides being otherwise limited in their operation, were, of course, confined to those estates and interests recognized by the law, and did not extend to estates and interests equitable in their nature. Creditors' suits were therefore permitted to be brought in those instances where the relief by execution at common law was ineffectual; as for a discovery of assets;<sup>2</sup> to reach equitable

§ 1414, <sup>6</sup> When creditor No. 1 has a lien upon two funds, A and B, and creditor No. 2 has a subsequent lien upon fund B alone, the theory of the remedy is, that the lien of creditor No. 2 is transferred to and enforced against fund A. It is possible that some cases may have carried the principle to the extent of permitting creditor No. 2 to maintain an equitable suit for the purpose of compelling creditor No. 1 to enforce his security, in the first place, out of fund A, so as to leave fund B, if possible, subject to the plaintiff's subsequent lien. This form of the relief is not, in my opinion, warranted by the principle; it was not allowed in the analogous remedy of marshaling assets; and it seems to interfere with the prior vested rights of creditor No. 1.

§ 1415, <sup>1</sup> Creditors' suits may be brought either while the debtor is living, or after his death against his estate. In the latter case, the suit ends in administration, if the executor or administrator does not admit assets. If assets are admitted, a decree is simply made for payment of the debt. The jurisdiction of equity to entertain suits of this latter class has been considered under the head of Administration: See *ante*, § 1154. The present discussion will be confined to suits of the first class.

§ 1415, <sup>2</sup> *Hadden v. Spader*, 20 Johns. 554; 5 Johns. Ch. 280; *Hendricks v. Robinson*, 2 Johns. Ch. 283; *Gordon v. Lowell*, 21 Me. 251; *Bay State Iron Co. v. Goodall*, 30 N. H. 223; *Miers v. Zanesville etc.*

§ 1415, (a) The subject of this paragraph is treated in detail in *Pom. Equitable Remedies*, chap. XLV, §§ 871-895.

and other interests not subject to levy and sale at law;<sup>3</sup> and to set aside fraudulent conveyances and obstructions.<sup>4</sup> Statutes in England and in certain American states have greatly extended the scope of writs of execution, thereby providing for adequate legal relief in cases where formerly resort to equity was necessary, and even extending the relief to instances where, perhaps, a creditor's bill would not lie.<sup>5</sup> In other states, statutes have increased the efficiency of creditors' suits by dealing with the subject directly. It is a necessary result from the whole theory of the creditors' suits that jurisdiction in equity will not be entertained where there is a

Co., 11 Ohio, 273; *Cadwallader v. Granville etc. Soc.*, 11 Ohio, 292; *Thomas v. Adams*, 30 Ill. 37; *Clarke v. Webb*, 2 Hen. & M. 8; *Le Roy v. Rogers*, 3 Paige, 234; *Trego v. Skinner*, 42 Md. 426.

§ 1415, 3 *Halsted v. Davison*, 10 N. J. Eq. 290; *Montgomery v. McGee*, 7 Humph. 234; *Wallace v. Smith*, 2 Handy, 78; *Galveston etc. R'y v. McDonald*, 53 Tex. 510; *Lackland v. Garesche*, 56 Mo. 267; *Harris v. Alcock*, 10 Gill. & J. 226, 32 **Am. Dec.** 158; *Rose v. Bevan*, 10 Md. 466, 69 **Am. Dec.** 170; *Hadden v. Spader*, 20 Johns. 554; 5 Johns. Ch. 280; *Bayard v. Hoffman*, 4 Johns. Ch. 450; *Tompkins v. Fonda*, 4 Paige, 448.

§ 1415, 4 *Beck v. Burdett*, 1 Paige, 305, 19 **Am. Dec.** 436; *Gates v. Boomer*, 17 Wis. 455; *Hagan v. Walker*, 14 How. 29; *Hammond v. Hudson River etc. Co.*, 20 Barb. 378; *McCaffrey v. Hickey*, 66 Barb. 489; *Tantum v. Green*, 21 N. J. Eq. 364; *Pullian v. Taylor*, 50 Miss. 551; *Trego v. Skinner*, 42 Md. 426.

§ 1415, 5 In England, by the statute of frauds, 29 Car. II., c. 3, sec. 10, legal execution was given against the lands, tenements, and hereditaments of a person seised in trust for the debtor at the time of execution sued out. This exception to the property capable of being reached by the ordinary writs was obviously very narrow,—extending only to real estate *seised* in trust at the *time* of execution sued out, and not embracing chattels real, trusts under which the debtor had not the whole interest, equities of redemption, or any equitable interest parted with before execution sued out: See *Forth v. Duke of Norfolk*, 4 Madd. 503. By statute 1 & 2, Vict., c. 110, the remedies of creditors by ordinary writs of execution are very complete. As an example of the legislation in American states of the first type referred to in the text, see *Cal. Code, Civ. Proc.*, sec. 638.

remedy at law.<sup>6</sup> The general rule is, therefore, that a judgment must be obtained, and certain steps taken towards enforcing or perfecting such judgment, before a party is entitled to institute a suit of this character.<sup>7</sup> In this there is a uniformity of opinion, but the difficulty arises in determining exactly how far a plaintiff should proceed after he has obtained his judgment.<sup>8</sup> It is, of

§ 1415, <sup>6</sup> See the cases cited in the next note but one.

§ 1415, <sup>7</sup> It is impossible to state a more definite rule than this, as will subsequently appear.

§ 1415, <sup>8</sup> *When an execution returned unsatisfied is or is not an essential preliminary.*—Much of the conflict doubtless results from the effect judgments and writs of execution have in different states. The rule seems to be sustained by the weight of authority, that before a creditor's suit can be brought to reach choses in action and personal property in such a shape or form or under such conditions that no levy can be made at law, execution must have been issued and a return of *nulla bona* made: *Beck v. Burdett*, 1 Paige, 305, 309; *Willis v. Moore*, Clarke Ch. 150; *Spader v. Davis*, 5 Johns. Ch. 280; 20 Johns. 554; *Brinkerhoff v. Brown*, 4 Johns. Ch. 671; *McElwain v. Willis*, 9 Wend. 548, 562, 565, 569; *Beardsley Seythe Co. v. Foster*, 36 N. Y. 561; *Dunlevy v. Tallmadge*, 32 N. Y. 457; *Crippen v. Hudson*, 13 N. Y. 161; *Parshall v. Tillon*, 13 How. Pr. 7; *Scott v. Wallace*, 4 J. J. Marsh. 654; *Wooley v. Stone*, 7 J. J. Marsh. 302; *Morgan v. Crabb*, 3 Port. 470; *Brown v. Bank of Mississippi*, 31 Miss. 454; *Suydam v. North West Ins. Co.*, 51 Pa. St. 394. On the other hand, where it is sought to reach equitable interests of a debtor in, or to remove fraudulent obstructions from, real property, judicial opinion inclines in favor of the rule that execution must have been issued, but a return is unnecessary: *Neate v. Duke of Marlborough*, 3 Mylne & C. 407; *Shirley v. Watts*, 3 Atk. 200; *North American F. Ins. Co. v. Graham*, 5 Sand. 197; *McCullough v. Colby*, 5 Bosw. 477; *Hendricks v. Robinson*, 2 Johns. Ch. 283, 296; *Beck v. Burdett*, 1 Paige, 305, 308, 19 **Am. Dec.** 436; *McElwain v. Willis*, 9 Wend. 548, 568; *Buswell v. Lineks*, 8 Daly, 518; *Geery v. Geery*, 63 N. Y. 252; *Jones v. Green*, 1 Wall. 330; *Manchester v. McKee*, 4 Gilm. 511; *Thurmond v. Reese*, 3 Ga. 449, 46 **Am. Dec.** 440; *Newman v. Willetts*, 52 Ill. 98; *Loving v. Pairo*, 10 Iowa, 282, 77 **Am. Dec.** 108; *Miller v. Dayton*, 47 Iowa, 312. The equitable relief in this case rests on the fact that the judgment is or is in the nature of a lien, which should be perfected by an execution taken out, in which stage of the proceedings a creditor will be assisted. As regards choses in action and per-



course, necessary for the creditor to allege and prove that he has taken the necessary proceedings at law before he can show a case requiring the interposition of equity. Whether an equitable suit, analogous to the creditor's

sonal property, however, under the above circumstances, no specific lien is created until proceedings are taken in equity. It therefore follows from the proceeding that if the judgment itself constitutes, or is held to constitute, a specific lien, execution is unnecessary: *Cornell v. Radway*, 22 Wis. 260; *Fleming v. Grafton*, 54 Miss. 79; *McNairy v. Eastland*, 10 Yerg. 310; *Montgomery v. McGee*, 7 Humph. 234; and where the judgment constitutes no lien on real estate, the creditor must make a levy, if the debtor has the legal title, and if he has but an equitable title, execution must be returned, as in the case of personal property, before a suit in equity can be maintained: *Webster v. Clark*, 25 Me. 313; *Dana v. Haskell*, 41 Me. 25; *Hartshorn v. Eames*, 31 Me. 93; *Corey v. Greene*, 51 Me. 115; *Dockray v. Mason*, 48 Me. 178; *Griffin v. Nitcher*, 57 Me. 270, 272.

*Special exceptions.*—The circumstances constituting exceptions to the general rule as stated in the text are not numerous; and as to what will excuse issuing of an execution, or issuing of an execution and a return unsatisfied, the cases are not unanimous. In *Shaw v. Dwight*, 27 N. Y. 244, 84 Am. Dec. 275, where it was sought to set aside fraudulent obstructions, issuing of execution in counties where the lands were situated was held unnecessary, an execution having been issued in the county where the debtor resided, and returned unsatisfied. And see *Payne v. Sheldon*, 63 Barb. 169. Where a judgment was obtained against one of two persons sued as joint debtors, and an execution thereon was returned unsatisfied, a creditor's suit may be begun without proceeding to judgment and execution against the other joint debtor: *Hiler v. Hetterick*, 5 Daly, 33; see *Voorhees v. Howard*, 4 Abb. App. 503. Whether the debtor's insolvency will obviate the necessity of proceeding at law in the same manner as if he were solvent is unsettled; it has been held on the one side that insolvency is an excuse: *Tabb v. Williams*, 4 Jones Eq. 352; *Turner v. Adams*, 46 Mo. 95; and on the other, that it is not: *Mixon v. Dunklin*, 48 Ala. 455; *Parish v. Lewis*, Freem. (Miss.) 299.

There are exceptions to the rule even that a judgment is required. Thus it is held that under certain circumstances equity will lend its aid to set aside fraudulent conveyances of property and apply it to a creditor's demands, by a proceeding that may be called "equitable attachment," without a judgment having been obtained, where the debtor

suit, will be allowed in aid of the lien created by an attachment, before the recovery of judgment, is a question to which the American courts have given directly conflicting answers.

has absconded, or removed from or resides out of the state: *Scott v. McMillen*, 1 Litt. 302, 13 **Am. Dec.** 239; *Kipper v. Glancey*, 2 Blackf. 356; *Peay v. Morrison's Ex'rs*, 10 Gratt. 149; *Pope v. Solomon*, 36 Ga. 541; and to reach money of an absconding debtor not subject to garnishment at law: *Pendleton v. Perkins*, 49 Mo. 565.

*In aid of attachments.*—An exception has been sought to be made in the case of attaching creditors, and the question has been presented whether equity will ever assist an attachment at law. It has been held, in accordance with the prevailing theory, that a creditor's suit may be maintained to reach real estate when a specific lien is created, that an attachment constitutes such a lien as to furnish ground for equitable interference to remove fraudulent obstructions or impediments on the property, real or personal, attached, without the requirement of a judgment obtained, or the steps subsequent thereto, necessary in ordinary creditors' suits: *Falconer v. Freeman*, 4 Sand. Ch. 565; *Greenleaf v. Mumford*, 19 Abb. Pr. 469; *Skinner v. Stuart*, 15 Abb. Pr. 391; *Bates v. Plonsky*, 62 How. Pr. 429; *Kelly v. Lane*, 42 Barb. 594; *Mechanics' etc. Bank v. Dakin*, 51 N. Y. 519; *Heyneman v. Dannenberg*, 6 Cal. 376, 65 **Am. Dec.** 519; *Scales v. Scott*, 13 Cal. 76; *Robert v. Hodges*, 16 N. J. Eq. 299; *Curry v. Glass*, 25 N. J. Eq. 108; *Hunt v. Field*, 9 N. J. Eq. 36, 57 **Am. Dec.** 365; *Williams v. Michenor*, 11 N. J. Eq. 520; *Ward v. McKenzie*, 33 Tex. 297, 7 **Am. Rep.** 261; *Tappan v. Evans*, 11 N. H. 311; *Dodge v. Griswold*, 8 N. H. 425; *Stone v. Anderson*, 26 N. H. 506; *Sheafe v. Sheafe*, 40 N. H. 516; see *Castle v. Bader*, 23 Cal. 76. In pursuance of this doctrine, when the attaching creditor or officer is sued for taking the property, it may be shown as a good defense that the plaintiff's title is fraudulent: *Hall v. Stryker*, 27 N. Y. 596; *Rinehey v. Stryker*, 28 N. Y. 45, 84 **Am. Dec.** 324; 31 N. Y. 140. Other decisions hold that such a suit cannot be maintained: *Thurber v. Blanck*, 50 N. Y. 80; *Lawrence v. Bank of Republic*, 35 N. Y. 320; *Greenleaf v. Mumford*, 50 Barb. 543; *Griffin v. Nitcher*, 57 Me. 270; *Tennent v. Battey*, 18 Kan. 324; *Weil v. Lankins*, 3 Neb. 384; *Bigelow v. Andress*, 31 Ill. 322; *Martin v. Michael*, 23 Mo. 50, 66 **Am. Dec.** 656; *McMinn v. Whelan*, 27 Cal. 300.

## SEVENTH GROUP.

REMEDIES IN WHICH THE FINAL RELIEF IS  
WHOLLY PECUNIARY, AND IS OBTAINED  
IN THE FORM OF A GENERAL PECUNIARY  
RECOVERY.

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### CHAPTER FIRST.

#### SUITS FOR CONTRIBUTION, EXONERATION, AND SUBROGATION.

##### ANALYSIS.

§ 1416. General nature, kinds, and classes.

§ 1417. Exoneration; rights of surety against the principal debtor.

§ 1418. Contribution.

§ 1419. Subrogation.

§ 1416. **General Nature, Kinds, and Classes.**—The remedies composing this group belong to the concurrent jurisdiction of equity, since the final reliefs are the same in form and substance as that granted under like circumstances by a judgment at law,—a general pecuniary recovery,—and since the primary rights and interests of the parties are generally recognized and protected by the law. Within the group are included suits by assignees of things in action; suits by equitable assignees of a fund;<sup>1</sup> suits for contribution in general; suits for contribution, exoneration, and subrogation, growing out of suretyship; suits for an accounting in general; and suits under various circumstances, and between particu-

§ 1416, <sup>1</sup> As to suits by assignees of things in action, see *ante*, §§ 1277, 1278; by equitable assignees of a fund: §§ 1280–1284.

lar parties, in which an accounting is a necessary element of the relief,—as, for example, between partners.

**§ 1417. Exoneration—Rights of Surety Against the Principal Debtor.**<sup>a</sup>—When a surety has actually paid or satisfied the principal's obligation, or any part thereof, he is entitled to be reimbursed by the principal debtor, and can maintain an equitable action for that purpose.<sup>1</sup> He may also maintain a *quia timet* suit in equity before any payment.

**§ 1417, 1** The right of recovery being based upon an implied contract of the principal, a jurisdiction at law to give the same relief has become established, and is ordinarily resorted to in this country. The equitable jurisdiction, however, still exists. The surety is entitled to exoneration, whether his payment was voluntary or compulsory; if compulsory, he can recover back his reasonably necessary costs and expenses. The jurisdiction extends to all those who in reality stand in a position of suretyship towards principal debtors; e. g., to a surety *for a prior surety*: *Dering v. Earl of Winchelsea*, 1 Cox, 318; 1 Lead. Cas. Eq., 4th Am. ed., 120, 124, 134; *Craythorne v. Swinburne*, 14 Ves. 160; *Hazelton v. Valentine*, 113 Mass. 472, 479; *Savage v. Winchester*, 15 Gray, 453; *Konitzky v. Meyer*, 49 N. Y. 571; *Townsend v. Whitney*, 75 N. Y. 425; *Harris v. Warner*, 13 Wend. 400; *Neimcewicz v. Gahn*, 3 Paige, 614; 11 Wend. 312; *Wesley Church v. Moore*, 10 Pa. St. 273; *Baxter v. Moore*, 5 Leigh, 219; *Butler v. Butler's Adm'r*, 8 W. Va. 677; *Hare v. Grant*, 77 N. C. 203; *Moore v. Young*, 1 Dana, 516; *Hamilton v. Johnston*, 82 Ill. 39; *Hearne v. Keath*, 63 Mo. 84. If the surety satisfies the obligation at less than its full amount, he can only recover from the principal debtor what he has actually paid, or the value of the property given up: *Reed v. Norris*, 2 Mylne & C. 361, 375; *Bonney v. Seely*, 2 Wend. 481; *Blow v. Maynard*, 2 Leigh, 30.

*Suit before payment.*—After the obligation becomes payable, the surety, before he has paid it, and whether he has been sued by the creditor or not, may maintain a suit in equity against the debtor—in the nature of a bill *quia timet*—to compel *him* to pay the debt or perform the obligation; provided the creditor can himself enforce payment or performance, and neglects or refuses to do so. The creditor is, of course, made a co-defendant: Cal. Civ. Code, sec. 2846; *Dering v. Earl of*

**§ 1417, (a)** On the subject of this paragraph, see Pom. Equitable Remedies, chap. XLVII, §§ 912-914, 919.



§ 1418. **Contribution.**<sup>a</sup>—Where there are two or more sureties for the same principal debtor, and for the same debt or obligation, whether on the same or on different instruments, and one of them has actually paid or satisfied more than his proportionate share of the debt or obligation, he is entitled to a contribution from each and all of his co-sureties, in order to reimburse him for the excess paid over his share, and thus to equalize their common burdens. The same doctrine applies, and the same remedy is given, between all those who are jointly, or jointly and severally, liable on contract or obligation in the nature of contract.<sup>1</sup> The right, however, may be controlled or modified by express agreement among the co-sureties or debtors.

Winchelsea, *supra*; notes in 2 Lead. Cas. Eq., 4th Am. ed., 278, 280, 283, 306, 1896; Nisbet v. Smith, 2 Brown Ch. 579, 582; Comes Ranelagh v. Hayes, 1 Vern. 189; Antrobus v. Davidson, 3 Mer. 569; Padwick v. Stanley, 9 Hare, 627; Wooldridge v. Norris, L. R. 9 Eq. 410; Beaver v. Beaver, 23 Pa. St. 167; Ardesco Oil Co. v. N. A. Oil etc. Co., 66 Pa. St. 375, 381; Bishop v. Day, 13 Vt. 81, 37 Am. Dec. 582; Hayes v. Ward, 4 Johns. Ch. 123, 131, 8 Am. Dec. 554; King v. Baldwin, 2 Johns. Ch. 554; 17 Johns. 384; Norton v. Reid, 11 S. C. 593; White v. Schurer, 4 Baxt. 23; Gilliam v. Esselman, 5 Sneed, 86; Irick v. Black, 17 N. J. Eq. 189; Stephenson v. Taverners, 9 Gratt. 389; Rice v. Downing, 12 B. Mon. 44; Dempsey v. Bush, 18 Ohio St. 376; Fame Ins. Co.'s Appeal, 83 Pa. St. 396, 405. Conversely, when the surety has been discharged by the acts of the creditor in dealing with the principal debtor, he may maintain a suit in equity for a decree declaring his liability at an end, and restraining the creditor if necessary: See Morley v. Dickinson, 12 Cal. 561.

§ 1418, <sup>1</sup> The doctrine of contribution rests upon the maxim, Equality is equity: See vol. 1, §§ 405–412. Although contribution is based upon general considerations of justice, and not upon any notion of an implied promise, a jurisdiction at law has become well settled which is sufficient in all ordinary cases of suretyship or joint liability. The equitable jurisdiction still remains, and has some most important advantages. All the co-sureties and the principal debtor being parties to the equity suit, the liabilities of each and their exoneration by the prin-

§ 1418, (a) On this subject, see Pom. Equitable Remedies, §§ 915–918.

**§ 1419. Subrogation.**<sup>a</sup>—The surety who has paid or satisfied the principal's debt or obligation is entitled to be subrogated to and to have the benefit of all securities

principal debtor can be adjusted and established by a single decree. If one or more of the co-sureties are insolvent, the plaintiff can in equity obtain a proportionate increase of contribution from the others who are solvent. It seems, however, that the surety must first resort to the principal debtor; and that he can only compel contribution in equity when he has failed to obtain exoneration from the principal. Of course, there can be no such limitation to a contribution among joint debtors not sureties. There is no contribution among tort-feasors. As to contribution among co-trustees, see *ante*, § 1081; among owners of lands subject to encumbrance: §§ 1221–1226. As illustrations of the general doctrine, see *Dering v. Earl of Winchelsea*, 1 Cox, 318; 1 *Lead. Cas. Eq.* 120, 124, 134; *Craythorne v. Swinburne*, 14 Ves. 160; *Primrose v. Bromley*, 1 Atk. 89; *Stirling v. Forrester*, 3 Bligh. 575; *Yonge v. Reynell*, 9 Hare, 809; *Hitchman v. Stewart*, 3 Drew. 271; *Mayor of Berwick v. Murray*, 7 De Gex, M. & G. 497; *Whiting v. Burke*, L. R. 6 Ch. 342; *Highborn v. Fletcher*, 66 Me. 209, 22 *Am. Rep.* 562; *Morgan v. Smith*, 70 N. Y. 537; *Wells v. Miller*, 66 N. Y. 255; *Johnson v. Harvey*, 84 N. Y. 363, 38 *Am. Rep.* 515; *Smith v. State*, 46 Md. 617; *Nally v. Long*, 56 Md. 567; *Bright v. Lennon*, 83 N. C. 183; *Scofield v. Gaskill*, 60 Ga. 277; *Owen v. McGehee*, 61 Ala. 440; *Broughton v. Wimberly*, 65 Ala. 549; *Jenkins v. Lockard's Adm'r*, 66 Ala. 377; *Magruder v. Admire*, 4 Mo. App. 133; *Stephens v. Meek*, 6 Lea, 226; *Oldham v. Broom*, 28 Ohio St. 41; *Camp v. Bostwick*, 20 Ohio St. 337, 5 *Am. Rep.* 669; *Robertson v. Deatherage*, 82 Ill. 511; *Conover v. Hill*, 76 Ill. 342; *Wagenseller v. Prettyman*, 7 Ill. App. 192; *Curtis v. Parks*, 55 Cal. 106; *Taylor v. Reynolds*, 53 Cal. 686; *Powell v. Powell*, 48 Cal. 234; *Dussol v. Bruguiere*, 50 Cal. 456; *Black v. Shreeve*, 7 N. J. Eq. 440; *Bowen v. Hoskins*, 45 Miss. 183, 7 *Am. Rep.* 728; *Mills v. Hyde*, 19 Vt. 59, 46 *Am. Dec.* 177; *Strong v. Mitchell*, 19 Vt. 644; *Wayland v. Tucker*, 4 Gratt. 267, 50 *Am. Dec.* 76; *Campbell v. Mesier*, 4 Johns. Ch. 334, 8 *Am. Dec.* 570; 6 Johns. Ch. 21. *Where one or more co-sureties are insolvent*: *Hitchman v. Stewart*, 3 Drew. 271; *Mayor etc. v. Murray*, 7 De Gex, M. & G. 497; *Magruder v. Admire*, 4 Mo. App. 133; *Burrows v. McWhann*, 1 Desaus. Eq. 409; *Breckinridge v. Taylor*, 5 Dana, 110. On death of a co-surety, his estate is liable to contribute: *Primrose v. Bromley*, 1 Atk. 89; *Dussol v. Bruguiere*, 50 Cal. 456; *Johnson v. Harvey*, 84 N. Y. 363, 38 *Am. Rep.* 515; *Stephens v. Meek*, 6 Lea, 226.

§ 1419, (a) This subject is treated in detail in *Pom. Equitable Remedies*, §§ 920–925.

which may at any time have been put into the creditor's hands by the principal debtor, or which the creditor may have obtained from the principal debtor. By the fact of payment, the surety becomes an equitable assignee of all such securities, and is entitled to have them assigned and delivered up to him by the creditor, in order that he may enforce them for his own reimbursement and exoneration. If, therefore, the creditor refuses to surrender up such securities, the surety may maintain an equitable suit to compel their assignment and surrender. The doctrine and remedy of subrogation are extended also to the creditor, who is subrogated to and entitled to the benefit of all securities given to a surety for purposes of *his* indemnification by the principal debtor; and also between co-sureties, so that one surety, in enforcing his rights of exoneration and of contribution, is subrogated to securities given to his co-surety.<sup>1</sup> It necessarily

§ 1419, <sup>1</sup> The doctrine of subrogation is of wide extent and operation in various departments of equity jurisprudence. The grounds and reasons upon which it depends have already been explained. Being a doctrine of purely equitable origin and nature, its operation is always controlled by equitable principles. It is, therefore, never enforced so as to defeat or interfere with the superior or equal equities of third persons, or with the legal right of third persons growing out of express contract. As to subrogation among encumbrancers, see *ante*, §§ 1211-1214. The remedy of subrogation has been granted to sureties much more favorably and extensively by the American equity jurisprudence than by the English. In England, prior to modern legislation, if a surety paid a contract which he executed jointly with his principal debtor, or paid a judgment recovered against him and his principal jointly, the contract or judgment was thereby ended and discharged, and could not itself be enforced by the surety. The courts of all the American states, with very few exceptions, have extended the remedy of subrogation to such cases; they enable the surety to enforce such bond, or contract, or judgment immediately against the principal debtor, although the surety was himself directly liable. In other words, by the English doctrine, the surety became equitable assignee only of collateral securities; by the American doctrine he becomes equitable assignee, not only of collateral securities, but of the principal undertaking. As illustrations of the doctrine, see

follows from the surety's right of subrogation that the creditor cannot, without the surety's assent, surrender, give up, release, or discharge any such securities, or render them in any way unavailable to the surety, either by his own acts or omissions. If he does so, the surety's liability is thereby discharged, wholly or partially, as the case may be.

Dering v. Earl of Winchelsea, *supra*; 2 Lead. Cas. Eq. 277-291; notes to Aldrich v. Cooper, 8 Ves. 282; Mayhew v. Crikett, 2 Swanst. 185; Law v. East I. Co., 4 Ves. 824; Hodgson v. Shaw, 3 Mylne & K. 183, 190; Pearl v. Deacon, 24 Beav. 186; 1 De Gex & J. 461; Lake v. Bruton, 18 Beav. 34; 8 De Gex, M. & G. 440; Strange v. Fooks, 4 Giff. 408; Drew v. Lockett, 32 Beav. 499; Capel v. Butler, 2 Sim. & St. 457; Scribner v. Adams, 73 Me. 541; Kelly v. Herrick, 131 Mass. 373; Thompson v. White, 48 Conn. 509; Townsend v. Whitney, 75 N. Y. 425; 15 Hun, 93; Van Santen v. Standard Oil Co., 81 N. Y. 171; Cole v. Malcolm, 66 N. Y. 363; Lewis v. Palmer, 28 N. Y. 271; Steele's Appeal, 72 Pa. St. 101; Bleakley's Appeal, 66 Pa. St. 187, 191; Price v. Trusdell, 28 N. J. Eq. 200; Receivers of N. J. etc. R'y v. Wortendyke, 27 N. J. Eq. 658; Irick v. Black, 17 N. J. Eq. 189; Dent v. Wait's Adm'r, 9 W. Va. 41; Hevener v. Berry, 17 W. Va. 474; York v. Landis, 65 N. C. 535; Saffold v. Wade's Ex'r, 51 Ala. 214; Knighton v. Curry, 62 Ala. 404; Osborn v. Noble, 46 Miss. 449; Davis v. Walker, 51 Miss. 659; Talbot v. Wilkins, 31 Ark. 411; Fishback v. Weaver, 34 Ark. 569; Farmers' etc. Bank v. Sherley, 12 Bush, 304; Storms v. Storms, 3 Bush, 77; Allen v. Henley, 2 Lea, 141; Harlan v. Sweeny, 1 Lea, 682; Kirkman v. Bank of America, 2 Cold. 397; Smith v. Rumsey, 33 Mich. 183; Keith v. Hudson, 74 Ind. 333; Prout v. Lomer, 79 Ill. 331; Hollingsworth v. Pearson, 53 Iowa, 53; McArthur v. Martin, 23 Minn. 74; Eaton v. Hasty, 6 Neb. 419, 29 **Am. Rep.** 265; Van Orden v. Durham, 35 Cal. 136; Lidderdale's Ex'rs v. Executor of Robinson, 12 Wheat. 594; Norwood v. Norwood, 2 Har. & J. 238; Wright v. Grover, 82 Pa. St. 80; Marsh v. Pike, 10 Paige, 595; McDougald v. Dougherty, 14 Ga. 674; Neilson v. Fry, 16 Ohio St. 552, 91 **Am. Dec.** 110; Dearborn v. Taylor, 18 N. H. 153; Pierson v. Catlin, 18 Vt. 77; Hayes v. Ward, 4 Johns. Ch. 123, 8 **Am. Rep.** 554. *By surety against a co-surety*: Copis v. Middleton, Turn. & R. 224, 231; Fishback v. Weaver, 34 Ark. 569; Brown v. Ray, 18 N. H. 102, 45 **Am. Dec.** 361; Administrator of Aldrich v. Hapgood, 39 Vt. 617; Elwood v. Deifendorf, 5 Barb. 398; Parham v. Green, 64 N. C. 436; McCune v. Belt, 45 Mo. 174. *By the creditor against a surety*: Moses v. Murgatroyd, 1 Johns. Ch. 119, 7



**Am. Dec.** 478; *Phillips v. Thompson*, 2 Johns. Ch. 418, 421; *Rice's Appeal*, 79 Pa. St. 168; *Wallace's Appeal*, 5 Pa. St. 103; *Burwell's Adm'rs v. Fauber*, 21 Gratt. 446; *Osborn v. Noble*, 46 Miss. 449; *Rardin v. Walpole*, 38 Ind. 146. As the rules concerning the discharge of the surety's liability by the conduct of the creditor are generally enforced at law as well as in equity, I do not enter upon their discussion.

## CHAPTER SECOND.

### SUITS FOR AN ACCOUNTING.

#### ANALYSIS.

§ 1420. Origin of the equitable jurisdiction.

§ 1421. Extent of the equitable jurisdiction; when exercised.

**§ 1420. Origin of the Equitable Jurisdiction.**—The action of account-render was one of the most ancient actions known to the common law.<sup>1</sup> From the narrow scope and technical rules of this action, the inability of common-law courts to obtain a discovery from the defendant on his oath, the difficulty met with in cases of

§ 1420, <sup>1</sup> This action was exceedingly narrow in its operation; for it lay only in cases where there was either a privity in deed, as against a bailiff or receiver appointed by the party, or a privity in law, *ex provisione legis*, as against guardians in socage: Co. Lit. 90 b. By the law merchant, also, the action could be brought by a person, naming himself a merchant, against another, naming him a merchant, and charging him as a receiver: Co. Lit. 172 a. Statutes afterwards extended the action, which was strictly confined to these parties, to their executors and administrators: 3 & 4 Anne, c. 16; 13 Edw. I., c. 23; 31 Edw. III., c. 11. The method of procedure was, first, to obtain a preliminary judgment that the defendant do account, *quod computet*, before auditors, and then a second judgment that he pay the plaintiff the balance found to be due him: 3 Black. Com. 163. But if the balance was in favor of the defendant, the plaintiff could not be compelled to pay it: 1 Spence's Eq. Jur. 650. Besides this defect in the common-law procedure, the auditors had no power, prior to statute, of examining the parties on oath; and any disputes which arose before them on the items of account could only be settled by as many issues in court: Jeremy's Eq. Jur. 504. This action of account-render was the only means which the common law furnished of obtaining a settlement of an account, except that assumpsit might be brought for a determinate balance: 3 Black. Com. 162. But if the balance was disputed, it was necessary for the jury to investigate the items one by one, a task which was practically impossible.

mutual and complicated accounts, and the impossibility of otherwise doing complete justice, it is easy to understand why the action of account-render fell into disuse, and a jurisdiction in equity to entertain suits for an accounting grew up.<sup>2</sup> The jurisdiction exists, therefore, and is well established; but the question arises, since there is a similar jurisdiction at law, When may a suit in equity for an accounting be brought? This question, of course, does not arise in those cases where an accounting is decreed as an incident to other equitable relief; nor should it arise where the subject-matter is an equitable interest or estate, for here the jurisdiction should be exercised as a necessary consequence, without regard to legal remedies.<sup>3</sup> It is not in every matter of account cognizable at law that the equitable jurisdiction will be exercised, the general rule being that a proper case is presented when the remedies at law are inadequate.<sup>4</sup>

**§ 1421. Extent of the Equitable Jurisdiction — When Exercised.**<sup>a</sup>—The instances in which the legal remedies are held to be inadequate, and therefore a suit in equity for an accounting proper, are: 1. Where there are mutual accounts between the plaintiff and the defendant, —that is, where each of the two parties has received and paid on account of the other;<sup>1</sup> 2. Where the accounts are

§ 1420, 2 1 Spence's Eq. Jur. 649; Mitford's Eq. Pl. 120, 123; Bacon Abr., tit. Accompt. The action of account-render is perfected in several states by statute.

§ 1420, 3 Vol. 1, §§ 218, 219.

§ 1420, 4 Vol. 1, §§ 176, 178.

§ 1421, 1 The accounts must be mutual, as distinguished from matters of set-off, and accounts on one side only: *Dinwiddie v. Bailey*, 6 Ves. 136; *Wells v. Cooper*, cited 6 Ves. 139; *Allison v. Herring*, 9 Sim. 583; *Phillips v. Phillips*, 9 Hare, 471; *Padwick v. Hurst*, 18 Beav. 575; *Fluker v. Taylor*, 3 Drew. 183; *North-eastern R'y v. Martin*, 2 Phill.

§ 1421, (a) See, further, Pom. *Equitable Remedies*, chap. XLVIII, §§ 929-935.

all on one side, but there are circumstances of great complication, or difficulties in the way of adequate relief at law;<sup>2</sup> 3. Where a fiduciary relation exists between the

Ch. 758; *Kennington v. Houghton*, 2 *Younge & C.* Ch. 620, 627; *Porter v. Spencer*, 2 *Johns.* Ch. 169; *Smith v. Marks*, 2 *Rand.* 449; *Hickman v. Stout*, 2 *Leigh*, 6; *McLin v. McNamara*, 2 *Dev. & B. Eq.* 82; *Hay v. Marshall*, 3 *Humph.* 623; *Wilson v. Mallett*, 4 *Sand.* 112; *Durant v. Einstein*, 5 *Rob. (N. Y.)* 423; *Salter v. Ham*, 31 *N. Y.* 321; *Walker v. Cheever*, 35 *N. H.* 339; *Gloninger v. Hazard*, 42 *Pa. St.* 389; *Passyunk Building Ass'n's Appeal*, 83 *Pa. St.* 441; *Carter v. Bailey*, 64 *Me.* 458, 18 *Am. Rep.* 273; *Dickinson v. Lewis*, 34 *Ala.* 638; *Avery v. Ware*, 58 *Ala.* 475; *Garner v. Reis*, 25 *Minn.* 475; *Haywood v. Hutchins*, 65 *N. C.* 574 (accounts on both sides, but having no connection with each other). For a definition of a mutual account, see *Phillips v. Phillips*, 9 *Hare* 471.

§ 1421, 2 *O'Connor v. Spaight*, 1 *Schoales & L.* 305; *O'Mahony v. Dickson*, 2 *Schoales & L.* 400; *Bliss v. Smith*, 34 *Beav.* 508; *South Eastern R'y v. Brogden*, 3 *Maen. & G.* 8; *Kennington v. Houghton*, 2 *Younge & C.* Ch. 620, 627; *Frietas v. Dos Santos*, 1 *Younge & J.* 574; *Taff Vale R'y v. Nixon*, 1 *H. L. Cas.* 110; *Mitchell v. Great Works etc. Co.*, 2 *Story*, 648; *Governor v. McEwen*, 5 *Humph.* 241; *Watt v. Conger*, 13 *Smedes & M.* 412; *Kirkman v. Vanlier*, 7 *Ala.* 217; *Printup v. Mitchell*, 17 *Ga.* 558, 63 *Am. Dec.* 258; *Wilson v. Riddle*, 48 *Ga.* 609; *Lafever v. Billmyer*, 5 *W. Va.* 33; *Blood v. Blood*, 110 *Mass.* 545; *Frue v. Loring*, 120 *Mass.* 507; *Ward v. Peck*, 114 *Mass.* 121; *Farmers' etc. Bank v. Polk*, 1 *Del. Ch.* 167; *Trapnall v. Hill*, 31 *Ark.* 345; *Nesbit v. St. Patrick's Church*, 9 *N. J. Eq.* 76; *Seymour v. Long Dock Co.*, 29 *N. J. Eq.* 396; *contra*, *Norwich etc. R. R. v. Storey*, 17 *Conn.* 364. For cases furnishing peculiar illustrations of the latter branch of the rule, see *Dabbs v. Nugent*, 11 *Jur., N. S.*, 943; *Coffman v. Sangston*, 21 *Gratt.* 263. To determine what degree of complication is required before a court of equity will entertain jurisdiction for that reason, independent of other circumstances, the rule was established in England that the account should be so complicated that a court of law would be incompetent to examine it at *nisi prius* with the necessary accuracy: *O'Connor v. Spaight*, 1 *Schoales & L.* 305, per Lord Redesdale; *South Eastern R'y v. Brogden*, 3 *Maen. & G.* 8; *Kennington v. Houghton*, 2 *Younge & C.* Ch. 620, 627; *Taff Vale R'y v. Nixon*, 1 *H. L. Cas.* 110; *Foley v. Hill*, 2 *H. L. Cas.* 28, 46. But under the present practice in England, matters of account may now be referred to officers or referees, so that the rule as above stated can now hardly be followed. The facts of each



parties, and a duty rests upon the defendant to render an account.<sup>3</sup> A plea of stated account obviously consti-

particular case should govern, and if it is doubtful whether adequate relief could be obtained at law, equity should entertain jurisdiction.

§ 1421, 3 This will embrace suits against trustees—including directors of corporations—which, as before stated, are particularly of equitable cognizance. Also suits for an accounting between partners: this relation necessarily giving rise to the right of an accounting in equity: *Parsons on Partnership*, 508. The jurisdiction of equity to compel guardians and executors and administrators to account is governed to a great extent in the United States by the powers given to courts of probate: Vol. 1, §§ 77, 78, 347–350; vol. 3, § 1154. See further, *Davis v. Davis*, 1 Del. Ch. 256, and *State v. Quinn*, 74 N. C. 359, on the accounting of guardians in equity. The principal difficulty is as to when equity will take jurisdiction of an accounting between principal and agent. The mere relation of principal and agent, without more,—the relation not being really fiduciary in its nature, and no obstacle intervening to a recovery at law,—is insufficient to enable a principal to maintain the action against his agent: *King v. Rossett*, 2 Younge & J. 33; *Navulshaw v. Brownrigg*, 1 Sim., N. S., 573; 2 De Gex, M. & G. 441; *Hemings v. Pugh*, 4 Giff. 456; *Moxon v. Bright*, L. R. 4 Ch. 292; *Crothers v. Lee*, 29 Ala. 337 (attorney and client); *Knotts v. Tarver*, 8 Ala. 743 (agency for a single transaction); *Coquillard v. Suydam*, 8 Blackf. 24 (ditto); *Blakeley v. Biscoe*, 1 Hemp. 114; *Powers v. Cray*, 7 Ga. 206 (attorney and client); *Long v. Cochran*, 9 Phila. 267; *County of Clinton v. Schuster*, 82 Ill. 137 (not maintainable against a treasurer and assessor, as everything was a matter of record). But where the relation is such that a confidence is reposed by the principal in his agent, and the matters for which an accounting is sought are peculiarly within the knowledge of the latter, equity will assume jurisdiction: *Makepiece v. Rogers*, 11 Jur., N. S., 215; *Hemings v. Pugh*, 4 Giff. 456; *Mackenzie v. Johnston*, 4 Madd. 373; *Moxon v. Bright*, L. R. 4 Ch. 292; *Southampton Dock Co. v. Southampton etc. Board*, L. R. 11 Eq. 254; *Thornton v. Thornton*, 31 Gratt. 212; *Taylor v. Tompkins*, 2 Heisk. 89; *Kerr v. Camden Steamboat Co.*, Cheves Eq. 189; *Halsted v. Rabb*, 8 Port. 63; *Hale v. Hale*, 4 Humph. 183. Other circumstances, as complication and mutuality of accounts, make a stronger case: *Walker v. Spencer*, 13 Jones & S. 71; *Halsted v. Rabb*, 8 Port. 63; *Taylor v. Tompkins*, 2 Heisk. 89. While the rules are thus settled in favor of a principal, it does not follow that the reverse is true, and that an agent may come into equity for an accounting against his principal, since generally there is no trust or confidence reposed in the latter, and no duty on his

tutes a bar to a suit in equity for an accounting, since in

part to account: *Padwick v. Stanley*, 9 Hare, 627; *Smith v. Leveaux*, 2 De Gex, J. & S. 1. But there are cases where an agent may maintain the action against his principal; as, for example, where his salary depends on the profits made by his employer: *Harrington v. Churchward*, 6 Jur., N. S., 576; *Shepard v. Brown*, 4 Giff. 208; *Buel v. Selz*, 5 Ill. App. 116; and persons, although not technically partners, who are to receive a certain share of the profits of an undertaking, may likewise maintain the action: *Bentley v. Harris*, 10 R. I. 434, 14 Am. Rep. 695; *Garr v. Redman*, 6 Cal. 574; *Ferry v. Henry*, 4 Pick. 75; *Hallett v. Cumston*, 110 Mass. 32. The foregoing rules are applicable, for similar reasons, to part owners: *Strelly v. Winson*, 1 Vern. 297; *McLellan v. Osborne*, 51 Me. 118; *Dyckman v. Valiente*, 42 N. Y. 549, 563; and to tenants in common and joint tenants taking more than their share of rents and profits: *Early v. Friend*, 16 Gratt. 21; *Leach v. Beattie*, 33 Vt. 195; *Wiswell v. Wilkins*, 4 Vt. 137 (where there are more than two tenants concerned); *Darden v. Cowper*, 7 Jones, 210, 75 Am. Dec. 461; *Wright v. Wright*, 59 How. Pr. 176; *Hodges v. Pingree*, 10 Gray, 14; *Blood v. Blood*, 110 Mass. 545; *Gates v. Frazer*, 9 Ill. App. 624 (no legal liability on one joint owner to account to another with respect to the use of a patent right, but the action maintained under an agreement). An action by one tenant in common against another in exclusive possession to recover a share of rents, profits, and issues, amounting in the aggregate to a certain sum, cannot be maintained in equity: *Pico v. Columbet*, 12 Cal. 414, 73 Am. Dec. 550. At the common law, no action of account for taking rents and profits lay against a joint tenant or tenant in common by another, unless the defendant was constituted bailiff: Co. Lit. 200 b; but this was remedied by the statute of 4 Anne, c. 16, sec. 27, and the action could be brought against the defendant as bailiff for receiving more than his share or proportion. This statute has been substantially re-enacted in many of the American states, but the equity jurisdiction exists notwithstanding: *Leach v. Beattie*, 33 Vt. 195; *Wright v. Wright*, 59 How. Pr. 176. An accounting is often an incident to a suit for partition between joint tenants and tenants in common: See *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Jones v. Massey*, 14 S. C. 292; *Tyner v. Fenner*, 4 Lea, 469; *Scott v. Guernsey*, 48 N. Y. 106. The relation of banker and customer is not fiduciary in its character, and unless there are other circumstances, there can be no accounting between them in equity: *Foley v. Hill*, 2 H. L. Cas. 28.

The rule is sometimes laid down by text-writers and judges, that where accounts are all on one side, but a discovery is necessary, a proper

that case the remedy at law is entirely adequate;<sup>4</sup> but of course a stated account may be opened for fraud or error.<sup>5</sup> The remedy of accounting is in most instances a necessary incident and part of the relief granted in suits brought by those beneficially interested, against trustees, either express or implied, and persons standing in fiduciary relations, such as administrators, executors, guardians, directors, and the like. The equitable jurisdiction is also practically exclusive in proceedings for an account and settlement of partnership affairs, including suits for an accounting and settlement of the firm affairs between the copartners themselves; suits for a settlement of the firm affairs between the survivors and the executors or administrators of the deceased, when a partner has died; and suits to settle the affairs of an insolvent firm, and to adjust the demands of the firm creditors and the creditors of the individual partners. The equitable jurisdiction over partnerships is a necessary outgrowth of the jurisdiction over accounting, and the remedies of dissolution, injunction, and receivership are incidents necessary to a final and complete relief.<sup>6b</sup>

case is presented for equitable interference, but such a rule seems to be only applicable to cases partaking of a fiduciary character: See cases, *ante*, in this note. As to discovery enlarging the equitable jurisdiction over accounting, see vol. 1, §§ 223 *et seq.*

§ 1421, 4 *Weed v. Small*, 7 Paige, 573; *Bullock v. Boyd*, 2 Edw. Ch. 293; *Dial's Ex'r's v. Rogers*, 4 Desaus. Eq. 175; *Craig v. McKinney*, 72 Ill. 305.

§ 1421, 5 *Slee v. Bloom*, 5 Johns. Ch. 366; 20 Johns. 669; *Barrow v. Rhineland*, 1 Johns. Ch. 550.

§ 1421, 6 The subject of partnership is so broad, requiring so much discussion for its adequate treatment, that I shall not attempt to consider it. The reader is referred to the special treatises which deal with the law of partnership.

§ 1421, (b) *Partnership bills*: See Pom. *Equitable Remedies*, chap. XLIX, §§ 936-945.







A TREATISE  
ON  
EQUITABLE REMEDIES;

SUPPLEMENTARY TO

POMEROY'S EQUITY JURISPRUDENCE

(INTERPLEADER; RECEIVERS; INJUNCTIONS; REFORMATION  
AND CANCELLATION; PARTITION; QUIETING TITLE;  
SPECIFIC PERFORMANCE; CREDITORS' SUITS;  
SUBROGATION; ACCOUNTING; ETC.)

SECOND EDITION

BY

JOHN NORTON POMEROY, JR., A.M., LL.B.

IN TWO VOLUMES

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THE FILMER BROTHERS ELECTROTYPE COMPANY  
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TO THE MEMORY OF  
MY FATHER





## PREFACE.

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THE present treatise is the outgrowth of a desire to annotate the brief Part Fourth of Pomeroy's Equity Jurisprudence in a way that should secure to the important topics therein contained a treatment as ample as is accorded, in that work, to other parts of Equity. It was my father's purpose—prevented by his untimely death—to supplement his work by the addition of one or more volumes on Equitable Remedies. In choosing the present form of carrying out this design, rather than that of extensive annotation of a brief text, I have had in mind, solely, the consideration of the reader's convenience. It is hardly necessary to state, that no pretension is made to those high qualities, both of style and of original thought, which have given to my father's book its important place in our legal literature. My point of view has been that of the annotator. Thus, I have used to a rather unusual degree, at some sacrifice of brevity, the exact language of the courts, rather than my own; and have retained nearly all the language of my father's brief text pertinent to the subjects treated. All the authorities cited in his Part Fourth have been re-examined; but, as is appropriate to the newness of many of the subjects, the great bulk of the citations is made up of very recent cases.

In the arrangement of the chapters, the order of chapters and sections of the older book has been followed, with but few variations. The paragraphs relating to the division of the equitable remedies into logical groups have been brought together, in the introductory chapter; I have also attempted, in that chapter, to present

some of the more striking results of the great mass of confused and conflicting *dicta* on the subject of Laches. The two remedies of Receivers and Injunctions have allotted to them more than half the space at my command, as is due to the vast importance which they have assumed in very recent years. In the chapters on Receivers, the grounds of the receiver's appointment, and the general principles relating to his possession, etc., have been treated with some fullness; while only an outline is attempted of the more technical matters concerning his duties in the management of the estate. In the chapters on Injunctions it has been the constant aim to discriminate between questions of the propriety of the equitable remedy, and questions of substantive or primary rights,—an effort, at times, by no means easy; indeed, as many of these substantive rights are, in practice, secured by the remedy of injunction only, and are comparatively novel as subjects for judicial discussion, it has sometimes been found necessary to examine and state them at considerable length; see, *e. g.*, Chapter XXVIII, as to injunctions in labor controversies.

The freshness of most of the material relied upon has prevented much assistance from existing text-books; indeed, the collection of this material has been an enormous labor, involving the study of at least twice the number of cases finally selected for citation. I am greatly indebted to my assistant, Mr. E. S. Page, of Oakland, Cal., without whose help the task of surveying so wide a field would have been impossible.

In conclusion, I cannot refrain, as a student of modern Equity, from adding my testimony of admiration to the great ability of many of our contemporary American judges in dealing with the momentous and novel questions which form much of the subject-matter of these volumes. That nearly sixty independent juris-

dictions, largely within the life of one generation, should have built up a legal structure so sound, so original, and, in the main, so harmonious in all its parts, as that of our distinctively American Equity, is surely one of the greatest achievements in all legal history. The author may be pardoned if he here repeats the conviction, that his father's labors, and the true spirit of equity and liberality with which they were animated, have become a chief source of inspiration to the builders of this splendid structure.

J. N. P., JR.

SAN FRANCISCO, September, 1905.





## PREFACE TO THE SECOND EDITION.

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The many thousands of cases within the scope of these volumes, decided in the last thirteen years, have resulted in a great enlargement of the notes in nearly all parts of the book; the editor's labors, however, have by no means been confined to the citation of recent authorities. Important changes have been made in the text, in certain particulars. The chapters on Specific Performance and the companion subject, Injunction Against Breach of Contract, are much expanded, and to a considerable extent rewritten. The chapter on Injunction Against Taxation has been entirely rearranged, and in its present form is virtually new. The same may be said of the chapter on Injunctions Concerning Patents, Copyrights, Trade-marks, and Unfair Competition, to which many new sections have been added. For the former chapter on Injunctions Against Combinations of Labor or Capital has been substituted a wholly new treatment of the subject, for the substance of which the author is indebted to his colleague, Professor William G. Hale.

The consolidation of the indexes and tables of cases of Equity Jurisprudence and this supplement has necessitated a consecutive numbering of pages and sections through the five volumes; but for convenience of reference, the old section numbers are retained, in parentheses. The desire to maintain a fairly even division into volumes has resulted in the placing of Part IV of Equity Jurisprudence at the beginning of the present volume; it is hoped that this inclusion, within two volumes instead of three, of the whole treatment of Equitable Remedies, both by the present writer and his father, may be found a distinct convenience.

The reader should be reminded that, while the text and notes of my father's Part IV have been scrupulously preserved, exactly as he wrote them, all the editorial annotations to that text made during the last thirty-six years are to be found in corresponding sections of the present supplementary treatise. The reader is thus spared the labor of searching in two places for information on a given topic.

Some criticism has been made of the author's plan of repeating, in this supplement, many of the definitions and statements of general principles contained in his father's Part IV. These repetitions amount, all told, to about one per cent of the present combined treatises. The editorial problem presented to the writer—the enlargement, twenty-fold, of a text much of which had become a classic—was a novel one, and by no means so simple as his critics seem to suppose; he doubts, indeed, if they properly weighed the merits of the alternatives that were open to him. To have annotated Part IV in the usual way, with additions of twenty times the amount of the original text, would have made much of that text exceedingly difficult for reference or consecutive reading; hence the design of this supplementary treatise. On the other hand, a restatement, in this treatise, of the general definitions in his own language instead of his father's would have been a sacrifice with no corresponding gain in point of brevity; while an omission of these definitions would have involved for the reader the constant annoyance of a reference to the preceding volumes. The writer has anxiously considered the criticisms of his plan, but is still of the opinion that, upon the whole, its practical advantages greatly outweigh the inherent and perfectly obvious defect.

J. N. P., JR.

URBANA, ILL., April, 1919.

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TREATISE  
ON  
EQUITABLE REMEDIES  
(xlvii)





# EQUITABLE REMEDIES.

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### I.

§ 1422. (§ 1.) **Classification and Definitions of Equitable Remedies.**—It is the chief purpose of this introductory chapter to treat, somewhat briefly, of the maxim, "Equity acts *in personam*," and of the effect of decrees in equity; and to present the more important results of the recent cases on the doctrine of Laches. Other gen-

eral principles and maxims which affect the whole range of equitable remedies have either been sufficiently treated in the work to which the present volumes are a supplement, or may be more appropriately taken up in their application to the individual remedies. But before taking up these matters, the author conceives that it may serve the convenience of many readers to collect and compare Professor Pomeroy's classification and definitions of the various equitable remedies, as set forth in Part IV of his work, with the several tentative classifications of the same subject-matter made in the earlier chapters of that work.<sup>1</sup>

§ 1423. (§ 2.) **First Group: Ancillary and Provisional Remedies.**—"The first class embraces those remedies which are wholly ancillary and provisional." "The distinguishing characteristic of the remedies belonging to this group is, that they determine no primary rights, and grant no final reliefs, either directly or indirectly. They are, in fact, instruments and means by which the court is enabled more conveniently and perfectly to adjudicate upon the *ultimate* rights and interests of the parties, and to award the *final* reliefs, in the further judicial proceedings to which they are auxiliary, and of which they are really the preliminary stage." This class includes interpleader and receivers.<sup>2</sup>

§ 1424. (§ 3.) **Second Group: Preventive Remedies.** "Preventive remedies, or those by which a violation of a primary right is prevented before the threatened injury is done, or by which the further violation is prevented after the injury has been partially effected, so that some other relief for the wrong actually accomplished can be granted. The ordinary injunction, whether final or pre-

<sup>1</sup> Pom. Eq. Jur., §§ 110, 112, 171, 185-189.

<sup>2</sup> Pom. Eq. Jur., §§ 171, 1316, 1319. Section 171 includes in this group, also "the ordinary preventive injunction."



liminary, is the familiar example of this class; the mandatory injunction is essentially a restorative remedy.”<sup>3</sup>

§ 1425. (§ 4.) **Third Group: Reformation and Cancellation.**—“The ultimate object of the remedies belonging to this group is the establishment or protection of interests, estates, and primary rights; but this object is accomplished *indirectly*. While these remedies are not so completely ancillary as interpleader and receivership, yet they are to a certain extent auxiliary. They do not, like a specific performance, or the execution of a trust, or an assignment of dower, or partition of land, operate directly and immediately to establish the plaintiff’s title, and to confer upon him the complete dominion over his estate—the ultimate relief which he seeks. Their effect in establishing his ultimate dominion is indirect. They are often used as the preparatory step which enables him to obtain, sometimes in the same action, and sometimes in a subsequent suit, the ultimate remedy which finally establishes his rights or obligations, or restores him to the full enjoyment of his estate. The reformation of a policy of insurance is not a final remedy; but it establishes the real contract, and thus enables the assured to recover the amount actually due according to the terms of that contract. The reformation of a deed does not directly restore the grantee to the dominion and possession of the land which had been omitted; but it places him in a position which enables him, if necessary, to assert his dominion and recover the possession. The cancellation of a deed does not of itself *directly* establish the plaintiff’s title and put him in possession of the land, but it enables him, if necessary, to assert his title and obtain the possession. These remedies may be obtained on behalf of either a legal or an equitable interest, by either a legal or an equitable

<sup>3</sup> Pom. Eq. Jur., §§ 112, 1316.

owner. The remedies constituting this group are the two following: Reformation or re-execution of instruments, and rescission, cancellation, surrender up, or discharge of instruments.”<sup>4</sup>

<sup>4</sup> 4 Pom. Eq. Jur., § 1375. To the same effect, 1 Pom. Eq. Jur., § 171 (“second class”); 4 Pom. Eq. Jur., § 1316. The classification, *Ibid.*, § 112, contains these definitions: “5. *Remedies of Reformation, Correction, or Re-execution*, by means of which a written instrument, contract, deed, or other muniment of title, which for some reason does not conform to the actual rights and duties of the parties thereto, is reformed, corrected, or re-executed. Sometimes this remedy is asked for and obtained simply on its own account, merely for purpose of correcting the instrument; but it is often, and perhaps generally, obtained as a necessary step to the granting of a further and more substantial relief needed by the plaintiff, such as a restoration to full rights of property, or the specific performance of the contract after it has been corrected. 6. *Remedies of Rescission or Cancellation*, or those by which an instrument, contract, deed, judgment, and even sometimes a legal relation itself subsisting between two parties, is, for some cause, set aside, avoided, rescinded, or annulled. This remedy, like the preceding, is sometimes conferred as the sole and final relief needed by the plaintiff, but is often the preliminary step to a more effective remedy by which his primary right is declared or restored.” In Professor Pomeroy’s arrangement of equitable remedies in three classes (Pom. Eq. Jur., § 110), viz., “those which are entirely different from any kind of reliefs known and granted by the law” (*e. g.*, injunction, reformation, specific performance, etc.), “those which are substantially the same both in equity and at the law” (*e. g.*, partition of land, admeasurement of dower, accounting, etc.), and “those which the legal procedure recognizes, but does not *directly* confer, and the beneficial results of which it obtains in an indirect manner,” the remedy of rescission or cancellation is given as typical of this last class, and the distinction pointed out between this equitable relief and the analogous legal method, an action for the recovery of chattels, land or damages, based on the assumption of a rescission by the act of a party to the contract or conveyance; for further explanation and illustration of this distinction, and observations on the frequent confusion as to the requisites of legal and of equitable rescission, see *post*, chapter on Cancellation.

§ 1426. (§ 5.) **Fourth Group: Remedies by Which Estates, Interests, and Primary Rights, Either Legal or Equitable, are Directly Declared, Established, or Recovered, or the Enjoyment Thereof Fully Restored.**—"All the remedies belonging to this group have one most important distinctive feature in common, which is apparent upon even a slight examination. In all of them the estate or interest of the complaining party, whether it be legal or equitable, is *directly* established or recovered, or the enjoyment thereof is *directly* restored. These remedies are not, therefore, provisional or auxiliary, but they are, for the purposes of the complaining party, as truly final or ultimate reliefs as is the judgment in an action of ejectment or of replevin.<sup>5</sup> The estate, interest, or primary right to be established or recovered, or fully enjoyed by their means, may be either legal or equitable; and when it is equitable, the establishment may consist in clothing the plaintiff with the legal

<sup>5</sup> 4 Pom. Eq. Jur., § 1378. "This is manifestly so in 'assignment of dower,' 'settlement of disputed boundaries,' and 'partition of land,' since in each of these instances the plaintiff establishes his individual right to and obtains sole possession of a specific tract of land, and in 'partition of personal property,' he procures the same with respect to specific chattels. The statement is no less true of the other suits included within this group. In a suit to construe a will, estates in specific property are directly established; in suits to quiet title, the very object of the judgment is to declare and establish the plaintiff's legal or equitable estate in some specific property, and perhaps to convert his equitable estate into a legal one. Even in suits to remove a cloud from title, although the relief is often obtained by means of a cancellation, yet, from the nature of the whole proceeding, the plaintiff's estate is thereby established, and he is left in its full enjoyment. In strict foreclosures of mortgages or pledges, and in redemptions of mortgages or pledges, the plaintiff plainly establishes his estate in, and secures his possession of, the specific land or chattels, free from any claim of the defendant. However much these remedies may differ in appearance, they all have this same *essential* element which brings them within the same group": Pom. Eq. Jur., § 1378, note.

estate.<sup>6</sup> The remedies composing this group are separated, by a natural line of division, into *three* general classes, namely: 1. Suits by which purely legal estates are established, and the enjoyment thereof recovered;

6 "As in some statutory suits to quiet title, and some suits to remove a cloud from title": Pom. Eq. Jur., § 1378, and note.

This group corresponds, in the main, with classes "1. *Declarative Remedies*," and "2. *Restorative Remedies*," of Pom. Eq. Jur., § 112, and with the "third class" of Pom. Eq. Jur., § 171 (which, however, is made to embrace remedies of *specific performance* also); compare the following description in § 171: "3. The third class embraces those remedies by which a primary right of property, estate, or interest is *directly* declared, established, acquired, or enforced; and they often consist in the conveyance by defendant of a *legal* estate, corresponding to the complainant's equitable title. These remedies deal directly with the plaintiff's right of property, and grant to him the *final* relief which he needs, by establishing and enforcing such right. The particular remedies properly belonging to this class may assume an almost unlimited variety of forms, since form depends upon and corresponds to the nature of the primary right to be established, and of the subject-matter over which that right extends; it is chiefly in its relation with this class that the peculiarly *elastic* quality of the equity remedial system is found. The remedies belonging to this class may, for purposes of clearer description, be again subdivided into three principal groups. Some are simply *declarative*, that is, their main and direct object is to declare, confirm, and establish the right, title, interest, or estate of the plaintiff, whether legal or equitable; they are usually granted in combination with others, and often need other kinds of relief as a preliminary step to making them efficient; as, for example, a preliminary reformation, re-execution, or cancellation. Others are *restorative*, or those by which the plaintiff is restored to the full enjoyment of the right, interest, or estate to which he is entitled, but the use and enjoyment of which has been hindered, interfered with, prevented, or withheld by the wrong-doer. These also are often granted in combination with other kinds of relief, and frequently need some other preliminary equitable remedy, such as cancellation or reformation, to remove a legal obstacle to the full enjoyment of the plaintiff's right, and to render them efficient in restoring him to that enjoyment. Others are remedies of *specific performance*," etc., enumerating examples of remedies belonging to this class.



2. Suits by which some general right, either legal or equitable, is established; and 3. Suits by which some particular estate or interest, either legal or equitable, is established.”<sup>7</sup>

§ 1427. (§ 6.) **Fourth Group: First Class.**—“Since the particular cases belonging to this class are primarily adapted to purely legal interests, the common law gives similar relief by means of appropriate legal actions. The jurisdiction of equity was based wholly upon the superiority of the equitable methods and procedure; and while the equitable jurisdiction in cases of dower and partition has become so established that it has almost displaced the legal remedies, that of settling disputed boundaries still requires the presence of some special equitable incident or circumstance.”<sup>8</sup> These remedies all belong to the “concurrent jurisdiction,” in the strict definition of that term.

§ 1428. (§ 7.) **Fourth Group: Second Class.**—“In all the remedies belonging to this class, some *general* right, which may be either legal or equitable, is declared and established. The class includes suits to establish a will, suits to construe a will, and the bills of peace and bills *quia timet* for the purpose of quieting title, which belong to the original general jurisdiction of equity.”

<sup>7</sup> Pom. Eq. Jur., § 1378.

<sup>8</sup> Pom. Eq. Jur., § 1379. See, also, § 185, relating to the “ordinary and well-settled instances” of the “concurrent” jurisdiction: “1. Under the first of these classes, where the final relief is substantially a recovery or obtaining possession of specific portions of land, the concurrent jurisdiction is clearly established, and its exercise is a matter of ordinary occurrence, in suits for the partition of land among joint owners or owners in common; in suits for the assignment or admeasurement of dower; and in suits for the adjustment of disputed boundaries, where some equitable incident or feature is involved, and the dispute is not wholly confined to an assertion of mere conflicting legal titles or possessory rights.”

“Some of the remedies of this class undoubtedly depend upon what the early chancellors called the ‘jurisdiction *quia timet*.’ Since the conception of a *quia timet* jurisdiction is so broad, and runs through so many different branches of the remedial jurisprudence, I have not adopted it as a basis of classification. The object of suits to establish and to construe wills is plainly the establishment of a general right;<sup>9</sup> and the same is no less true of those suits to quiet title, bills of peace, and the like, which belong to the original jurisdiction of equity.”<sup>10</sup>

§ 1429. (§ 8.) **Fourth Group: Third Class.**—“In all the instances of this class, as distinguished from those of the preceding one, the direct object of the remedy is to declare and establish some particular estate, interest, or right, either legal or equitable, in the property which is the subject-matter. The class as a whole embraces suits for the strict foreclosure of a mortgage or a pledge, suits for the redemption of a mortgage, suits for the redemption of a pledge, statutory suits to quiet title, and suits to remove a cloud from title.” “Some of these remedies, also, have been said to depend upon the *quia timet* jurisdiction.”<sup>11</sup>

§ 1430. (§ 9.) **Fifth Group: Remedies by Which Equitable Obligations are Specifically and Directly Enforced.**—“The remedies embraced in this group are all purely equitable, and the rights of the complainant and obligations of the defendant which are enforced by their

<sup>9</sup> Section 7 of the text is cited to this effect in *Knox v. Knox*, 87 Kan. 381, 124 Pac. 409.

<sup>10</sup> Pom. Eq. Jur., § 1393, and note. For suits to construe a will, see 3 Pom. Eq. Jur., §§ 1155-1157; for suits to establish a will, see 3 Pom. Eq. Jur., § 1158.

<sup>11</sup> Pom. Eq. Jur., § 1395, and note.

means are also equitable.<sup>12</sup> They belong, therefore, to the exclusive jurisdiction of equity. Their distinctive object is to specifically enforce the complainant's equitable right, and to compel the defendant to specifically perform the actual equitable obligation which rests upon him. This group, as a whole, contains the specific performance of contracts, including the performance of verbal contracts for the sale of land which have been part performed, and the delivery up of specific chattels; the specific enforcement of trusts, express and implied; and the specific enforcement of obligations arising from fiduciary relations analogous to trusts,"<sup>13</sup> the last-named class including the important sub-classes, "suits against administrators or executors, and suits against corporations and their managing officers."<sup>14</sup> The broad scope of this class of remedies, perhaps the most characteristic of the whole equity system, is thus described in another place: "4. *Remedies of Specific Performance*, or those by which the party violating his primary duty is compelled to do the very acts which his duty and the plaintiff's primary right<sup>15</sup> require from him. The remedies of this class are very numerous in their special forms and in respect to the juridical relations in which they are applicable. 'Specific performance' is

12 "Although contracts may also give rise to a legal right, yet when equity compels their specific performance, it enforces the equitable obligation arising from them, and not the legal duty. In most cases, it turns the vendee's equitable *estate* into a legal one": Pom. Eq. Jur., § 1400, note.

13 Pom. Eq. Jur., § 1400. As to suits for the delivery of specific chattels, written instruments, etc. (an instance of the "concurrent" jurisdiction), see 1 Pom. Eq. Jur., § 185.

14 Pom. Eq. Jur., § 1411.

15 For definitions of the terms "primary right" and "remedial right," see 1 Pom. Eq. Jur., §§ 90, 91. The remedial right, or right to a remedy, is that which arises on the breach of a "primary" or (as it is perhaps more frequently and familiarly called) "substantive" right.

often spoken of as though it was confined to the case of executory contracts; but in reality it is constantly employed in the enforcement of rights and duties arising from relations between specific persons which do not result from contracts, as, for example, between *cestuis que trustent* and their trustees, wards and their guardians, legatees, distributees, or creditors and executors or administrators, and the like. In these latter cases, however, as well as in that of the specific performance of an executory contract at the suit of a vendor, the form and nature of the final relief is often the same as that of accounting, pecuniary compensation, or restoration.”<sup>16</sup>

§ 1431. (§ 10.) **Sixth Group: Remedies in Which the Final Relief is Pecuniary, but is Obtained by the Enforcement of a Lien or Charge upon Some Specific Property or Fund.**—“The title of this group plainly indicates the nature and object of the remedies composing it. They are all purely equitable, and therefore belong to the exclusive jurisdiction; because, although the *final* relief is pecuniary, and so resembles the ordinary relief at law, it is obtained through preliminary proceedings, forming a part of the judgment, which belong solely to the procedure and jurisdiction of equity.”<sup>17</sup> This group is elsewhere described as follows: “Those remedies which establish and enforce liens and charges *on* property, rather than rights and interests *in* property, either by means of a judicial sale of the property itself which is affected by the lien and a distribution of its proceeds, or by means of a sequestration of the property, and an appropriation of its rents, profits, and income, until they satisfy the claim secured by the lien.”<sup>18</sup> “Those cases in which the relief is not a *general* pecuniary judgment, but is a decree of money to be

<sup>16</sup> 1 Pom. Eq. Jur., § 112.

<sup>17</sup> 4 Pom. Eq. Jur., § 1413.

<sup>18</sup> 1 Pom. Eq. Jur., § 171.



obtained and paid out of some particular fund or funds. The equitable remedies of this species are many in number and various in their external forms and incidents. They assume that the creditor has, either by operation of law, or from contract, or from some acts or omissions of the debtor, a lien, charge, or encumbrance upon some fund or funds belonging to the latter, either land, chattels, things in action, or even money; and the *form* of the remedy requires that this lien or charge should be established, and then enforced, and the amount due obtained by a sale total or partial of the fund, or by a sequestration of its rents, profits, and proceeds. These preliminary steps may, on a casual view, be misleading as to the nature of the remedy, and may cause it to appear to be something more than compensatory; but a closer view shows that all these steps are merely auxiliary, and that the *real* remedy, the final object of the proceeding, is the pecuniary recovery. . . . There is also another species of pecuniary remedies, closely analogous to the last, and differing from it only in the additional element of a distribution of the final pecuniary awards among two or more parties having claims either upon one common fund or upon several funds. The final relief in all these cases is simply pecuniary; the amounts to which the different parties are entitled are ascertained, and are obtained by a distribution of the fund or funds upon which they are chargeable.”<sup>19</sup> “The group contains the following species of remedies: Suits for the foreclosure by judicial sale of mortgages of real property; suits for the similar foreclosure of mortgages of personal property; suits for the similar foreclosure of

<sup>19</sup> 1 Pom. Eq. Jur., § 112. “Of this species are suits to wind up partnerships and distribute partnership assets; to settle and distribute the personal estate of decedents; to marshal assets; and the statutory proceeding to wind up the affairs of insolvent corporations”: *Id.* Probably some of these last-named remedies are preferably classed in the next group.

pledges; suits to enforce the various equitable liens; suits to enforce the equitable contracts of married women upon their separate property;<sup>20</sup> suits to marshal securities; and creditors' suits."<sup>21</sup>

§ 1432. (§ 11.) **Seventh Group: Remedies in Which the Final Relief is Wholly Pecuniary, and is Obtained in the Form of a General Pecuniary Recovery.**—"The remedies composing this group belong to the concurrent jurisdiction of equity, since the final reliefs are the same in form and substance as that granted under like circumstances by a judgment at law,—a general pecuniary recovery,—and since the primary rights and interests of the parties are generally recognized and protected by the law."<sup>22</sup> "This group contains the following particular suits: By assignees of things in action, equitable assignees of a fund, etc.; by persons entitled to participate in a common fund; for contribution in general; suits growing out of suretyship, for exoneration, contribution, or subrogation; suits growing out of partnership; suits for an accounting in general; recovery of damages, etc."<sup>23</sup> Elsewhere, the following are enumerated as the most important and frequent instances of the "concur-

20 "Although the late English cases hold that these contracts of married women do *not* create any lien, yet the whole remedy in form and substance is exactly the same as though there *was* a lien, and as though its object was to enforce that lien. Furthermore, the American courts generally hold that a lien *is* created": Pom. Eq. Jur., § 1413, note.

21 Pom. Eq. Jur., § 1413. "'Creditors' suits' belong to this group, because they are based upon the conception that an equitable lien is created upon the judgment debtor's property by means of the judgment and execution returned unsatisfied; and this lien is in reality enforced, although the enforcement may, perhaps, require the ancillary remedies of cancellation, a receiver, etc.": Pom. Eq. Jur., § 1413, note.

22 Pom. Eq. Jur., § 1416.

23 Pom. Eq. Jur., § 1316, note.

rent" jurisdiction, when the relief is pecuniary:<sup>24</sup> Suits growing out of the contract of suretyship; suits growing out of the contract of partnership; contribution, in general; accounting, especially as between principal and agent, and other persons standing in fiduciary relations to each other; "the ascertaining and adjustment of the respective amounts of persons entitled to participate in the same fund, and of the respective shares of persons subjected to some common liability; the ascertaining and adjustment of the shares of persons liable to contribute to a general average; the ascertaining and adjustment of the shares of persons liable to contribute with respect to charges of any kind upon land or other property; the appropriation of payments; the apportionment of rents; and numerous other instances where a number of persons are differently interested in the same subject-matter, or are differently liable with respect to some common object." Other important instances are suits for the recovery of legacies and of gifts *causa mortis*, and other suits connected with the administration of the estates of decedents; pecuniary relief occasioned by or growing out of fraud, mistake, or accident (rarely an independent ground of jurisdiction in this country); the recovery of damages by way of compensation in addition to or (occasionally) in place of other equitable relief; and certain suits—as, to compel a set-off—depending on imperfections of the legal procedure.<sup>25</sup>

## II.

§ 1433. (§ 12.) **Equitable Remedies Acted in Personam.**—"In the infancy of the court of chancery while

<sup>24</sup> Pom. Eq. Jur., §§ 186-189.

<sup>25</sup> See 1 Pom. Eq. Jur., § 189. Suits for specific performance brought by the vendor, where the recovery is pecuniary, seem, in strict logic, to belong in this group: See 1 Pom. Eq. Jur., § 112, note 1.

the chancellors were developing their system in the face of a strong opposition, in order to avoid a direct collision with the law and with the judgments of law courts, they adopted the principle that their own remedies and decrees should operate *in personam* upon defendants, and not *in rem*. The meaning of this simply is, that a decree of a court of equity, while declaring the equitable estate, interest, or right of the plaintiff to exist, did not operate by its own intrinsic force to vest the plaintiff with the legal estate, interest or right to which he was pronounced entitled; it was not itself a legal title, nor could it either directly or indirectly transfer the title from the defendant to the plaintiff. A decree of chancery spoke in terms of personal command to the defendant, but its directions could only be carried into effect by his personal act. It declared, for example, that the plaintiff was equitable owner of certain land, the legal title of which was held by the defendant, and ordered the defendant to execute a conveyance of the estate; his own voluntary act was necessary to carry the decree into execution; if he refused to convey, the court could endeavor to compel his obedience by fine and imprisonment. The decree never stood as a title in the place of an actual conveyance by the defendant; nor was it ever carried into effect by any officer acting in the defendant's name."<sup>26</sup> Thus, on a bill for the removal of a

<sup>26</sup> 1 Pom. Eq. Jur., § 428. See, also, *Id.*, §§ 134, 135, 170, 1317; *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, 2 Lead. Cas. Eq., 4th Am. ed., 1806, and notes; *Proctor v. Ferebee*, 1 Ired. Eq. (36 N. C.) 143, 36 Am. Dec. 34, and note. Pom. Eq. Jur., § 1317, is cited, as to the effect of decrees, in *Fall v. Eastin*, 215 U. S. 1, 17 Ann. Cas. 853, 23 L. R. A. (N. S.) 924, 54 L. Ed. 65, 30 Sup. Ct. 3 (decree does not transfer title in foreign state); *Lamkin v. Lovell*, 176 Ala. 334, 58 South. 258; *Powell v. Campbell*, 20 Nev. 232, 19 Am. St. Rep. 350, 2 L. R. A. 615, 20 Pac. 156; *Fire Ass'n (Burton-Lingo Co.) v. Patton*, 15 N. M. 304, 27 L. R. A. (N. S.) 420, 107 Pac. 679; *Sharp v. Sharp (Okl.)*, 166 Pac. 175. Sections 12-15 of the text are cited in *Clem v. Given's Ex'r*, 106 Va. 145, 55 S. E. 567.



cloud upon title, the decree operated *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be canceled, or to execute a release to the plaintiff.<sup>27</sup> When the chancellor directed the sale of property, "it was by his control over the person of the owner that he made the sale effective, i. e., when the sale had been made he compelled the owner to execute a deed, pursuant to the sale; and hence when the owner was out of the jurisdiction the chancellor was powerless."<sup>28</sup> And a decree in partition "did not transfer or convey title even after the allotment of the respective shares of each of the parties to the proceeding, but the legal title remained as it was before. . . . This difficulty was remedied by a decree that the parties should make the necessary conveyances to each other, which, if they refused, they could be compelled to do by attachment, imprisonment and other powers of the court over them in person."<sup>29</sup>

<sup>27</sup> *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101, 3 Sup. Ct. 586 (citing *Langdell's Eq. Pl.* (2d ed.), §§ 43, 184; *Massie v. Watts*, 6 Cranch, 148, 3 L. Ed. 181; *Orton v. Smith*, 18 How. 263, 15 L. Ed. 263; *Vandever v. Freeman*, 20 Tex. 334, 70 Am. Dec. 391). Likewise, a decree ordering a bond to be surrendered for cancellation did not avoid the bond: *J. R. v. M. P.*, Year Book, 37 Henry VI, fol. 13, pl. 3, 1 Ames's Cas. Eq. Jur. 1; and an injunction against the transfer of a negotiable instrument does not destroy its negotiability; *Winston v. Westfeldt*, 22 Ala. 760, 58 Am. Dec. 278; 1 Ames's Cas. Eq. Jur. 3; *Carroll County Sup'rs. v. Smith*, 111 U. S. 556, 28 L. Ed. 517, 4 Sup. Ct. 539 (negotiable municipal bonds). As to the difficulties presented by the situation where a conveyance was called for, but the defendant was a lunatic or an infant, see *Hall v. Warren*, 9 Ves. 605, 612; *Pegge v. Skynner*, 1 Cox Eq. Cas. 23, 1 Ames's Cas. Eq. Jur. 6, and note, outlining the remedial legislation.

<sup>28</sup> *McCann v. Randall*, 147 Mass. 81, 99, 9 Am. St. Rep. 666, 17 N. E. 75, 88 (citing *Langdell's Eq. Pl.* (2d ed.), § 43, note 4; *Pom. Eq. Jur.*, § 1317; *Hart v. Sansom*, *supra*).

<sup>29</sup> *Gay v. Parpart*, 106 U. S. 679, 690, 27 L. Ed. 256, 1 Sup. Ct. 456, 465, per Miller, J. (quoting from *Waley v. Dawson*, 2 Schoales & L. 366, per Lord Redesdale; *Mitford's Eq. Pl.* (Jeremy's ed.), 120; *Adams's Eq.* 231).

§ 1434. (§ 13.) **Same—Modern Legislation—Decree may Transfer Title.**—“This original doctrine has been abrogated, for all classes of remedies to which it could apply, by statutory legislation in a large number of the states. This legislation may be reduced to two general types: (1) That by which the decree itself without any act of the defendant or of an officer on his behalf becomes a title, and vests a legal estate in the subject-matter in the plaintiff; (2) That by which a commissioner, master, or other officer of the court executes the decree, and through his conveyance or other official act transfers the legal estate from the defendant to the plaintiff, or otherwise vests the plaintiff with title. Both these types are often found in the statutes of the same state. In all cases where an instrument is directed to be executed by an officer, the statutes provide that it shall have exactly the same effect as if executed by the party himself.”<sup>30</sup> “In some statutes of the first type the language is positive and peremptory, that the decree shall operate to transfer the title, etc.; in others it

<sup>30</sup> Pom. Eq. Jur., § 1317. As illustrations of the first type of statute, where the decree itself operates as a title, see *Title & Document Restoration Co. v. Kerrigan*, 150 Cal. 289, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682, 88 Pac. 356 (quieting title); *King v. Bill*, 28 Conn. 593; *Hoffman v. Stigers*, 28 Iowa, 302 (partition); *Young v. Frost*, 1 Md. 377, 403 (partition); *Gitt v. Watson*, 18 Mo. 274; *Senderfer v. Kemp*, 83 Mo. 581 (decree divesting title of constructive trustee, a purchaser with notice of equitable title); *Bohart v. Chamberlain*, 99 Mo. 622, 13 S. W. 85 (re-execution of a lost instrument; instead of ordering its re-execution court may make a declaratory decree, establishing the existence of the deed in question; citing Pom. Eq. Jur., §§ 171, 429, 827; *Garrett v. Lynch*, 45 Ala. 204); *Macklin v. Allenberg*, 100 Mo. 337, 13 S. W. 350 (setting aside deed as fraud on creditors); *Price v. Sisson*, 13 N. J. Eq. 168 (reformation of deed); *Skinner v. Terry*, 134 N. C. 305, 46 S. E. 517; *Taylor v. Boyd*, 3 Ohio, 337, 17 Am. Dec. 603; *Jelke v. Goldsmith*, 52 Ohio St. 499, 49 Am. St. Rep. 730, 40 N. E. 167 (statute of Ohio does not apply to decrees concerning *personal* property); *Griffiths v. Phillips*, 3 Grant Cas. (Pa.) 381 (partition).

is permissive,—the court may provide in the decree that it shall operate to transfer the title in case the defendant neglects or refuses to obey its mandates. Similar variations are found in the statutes of the second type.”<sup>31</sup>

It has been held that “the rights of the parties in case of a variance between the terms of the decree and of the conveyance must depend upon the former rather than upon the latter”: Price v. Sisson, 13 N. J. Eq. 168, 172, *supra*; and that “the terms of the decree must be construed precisely as the conveyance itself would be if executed within the time appointed for its execution”: Id., Hoffman v. Stigers, 28 Iowa, 302, *supra*.

“Whenever the decree itself thus operates to transfer title, a reversal of the decree upon appeal necessarily destroys this effect *as between the parties themselves*, divests the title from the party to whom it had been transferred, and reverts it in the party from whom it had passed. But if the decree had been executed by means of a conveyance, and the title had thus passed to a *bona fide* purchaser, before the appeal, a reversal may not divest him of the title or compel him to reconvey: See Stats. of Delaware; Taylor v. Boyd, 3 Ohio, 337, 17 Am. Dec. 603”; Pom. Eq. Jur., § 1317, note; see, also, McCormick v. McClure, 6 Blackf. (Ind.) 466, 39 Am. Dec. 441; Macklin v. Allenberg, 100 Mo. 337, 13 S. W. 350 (*bona fide* purchaser not affected by reversal on a writ of error, that being in effect a new suit). The question in such cases is largely one of the continuance of the *lis pendens* of the original suit: See 2 Pom. Eq. Jur. (3d ed.), § 634, and notes.

As to the time when title passes under these statutes, there is some dispute. Compare Shotwell v. Lawson, 30 Miss. 27, 64 Am. Dec. 145 (deed executed by commissioner under decree vacating title to real estate relates back to commencement of suit, as against defendant in such suit and those subsequently claiming title under him), with King v. Bill, 28 Conn. 593 (third person to whom defendant conveyed after filing of the bill but before decree not divested of his title by the decree).

<sup>31</sup> Pom. Eq. Jur., § 1317, note 2. The following are the most important of these statutes:

Alabama.—Civ. Code, 1896, § 849: “When a decree is made for a conveyance, release, or acquittance, and the party against whom the decree is made does not execute the same by the time specified in the decree, such decree operates in all respects as fully as if the

conveyance, release or acquittance was made; or the court may decree, in default of the execution of such conveyance, release or acquittance, the same to be executed by the register or a commissioner in the name of the party; and the conveyance, release or acquittance, when so executed, is as valid in all respects as if executed by the party; or the court may directly divest title out of one party and vest it in another."

**Arizona.**—Rev. Stats. 1901, § 1430: "When the judgment is for the conveyance of real estate, or for the delivery of personal property, the decree may pass the title to such property without any act to be done on the part of the party against whom the judgment is rendered."

**Arkansas.**—Sandel & Hill's Dig. of Stat., § 4241: "In all cases where the court may decree the conveyance of real estate, or the delivery of personal property, they may, by decree, pass the title of such property without any act to be done on the part of the defendant, where it shall be proper, and may issue a writ of possession if necessary, to put the party in possession of such real or personal property, or may proceed by attachment or sequestration."

§ 4242: "When an unconditional decree shall be made for a conveyance, release or acquittance, and the party required to execute the same shall not comply therewith, the decree shall be considered and taken to have the same operation and effect, and be as available as if the conveyance, release or acquittance had been executed conformably to the decree."

**Connecticut.**—Gen. Stats. 1902, § 555: "Courts of equitable jurisdiction may pass the title to real estate by decree, without any act on the part of the defendant, when, in their judgment, it shall be the proper mode to carry the decree into effect; and such decree, having been recorded in the records of lands in the town where such real estate is situated, shall, while in force, be as effectual to transfer the same as the deed of the defendant."

**Delaware.**—Rev. Stats., c. 95, § 12: "All real estate, within this state, shall be liable to be sold, by order of the chancellor, on such terms and in such manner as he shall direct, by the sheriff, or by any party to a suit in chancery, when such sale shall be necessary to give effect to, and carry into execution a decree of the court of chancery. And when any such real estate shall be so sold, and there shall be a surplus of money, arising from the sale, above what is sufficient for the purposes of the sale, such surplus shall be paid over, or applied as the chancellor shall order. Such sales shall be as available in law to the vendees as sales of land seized and sold upon



judgment and execution are by virtue of any law of this state; *provided*, that if any such decree, under which any real estate shall be so sold, shall be reversed by the court of errors and appeals, none of the real estate, so sold, shall be restored, nor shall the sale thereof be avoided, but restitution shall be made, in such cases, of the money for which such real estate was sold; *and provided also*, that no sale shall be valid until return thereof shall be made to the court of chancery, and it shall be approved and confirmed by the chancellor."

**Florida.**—Rev. Stats. 1892, § 1451: "Where a decree in chancery shall be made for a conveyance, release or acquittance of land, or any interest therein, and the party against whom the said decree shall pass shall not comply therewith by the time appointed, then such decree shall be considered and taken in all courts of law and equity to have the same operation and effect and to be as available as if the conveyance and release or acquittance had been executed conformably to such decree, and this, notwithstanding any disability of such parties by infancy, lunacy, coverture or otherwise."

**Georgia.**—Code 1895, § 4852: "A decree for specific performance shall operate as a deed to convey land or other property without any conveyance being executed by the vendor. Such decree certified by the clerk shall be recorded in the registry of deeds in the county where the land lies, and shall stand in the place of a deed."

**Illinois.**—Hurd's Rev. Stats. 1899, p. 225, § 46: "Whenever a decree shall be made in a suit in equity, directing the execution of any deed or other writing, it shall be lawful for the court to appoint a commissioner, or direct the master in chancery to execute the same, in case the parties under no disability fail to execute the same, in a time to be named in the decree, or on behalf of minors or persons having conservators." Such conveyance shall have the same effect "as if executed by the right party in proper person, and he or she were under no disability."

**Indiana.**—Burns' Ann. Stats. 1901, § 1027: "Real property may be conveyed by a commissioner appointed by the court:

"First, where, by the judgment in an action, a party is ordered to convey real property to another or any interest therein."

**Iowa.**—Code 1897, § 3805: Same as Indiana, but omitting "or any interest therein."

**Kansas.**—Rev. Stats. 1901, § 4849; Code, § 400: Similar to Alabama, except that conveyance may be executed by the sheriff instead of by a register or commissioner, and that the provision that the court may directly divest title is omitted.

**Kentucky.**—Codes 1900, § 394: Same as Iowa.

**Maine.**—Rev. Stats. 1903, p. 873, c. 114, § 10: In certain actions for specific performance of contracts to convey land, "if the defendant neglects or refuses to convey according to the decree, the court may render judgment for the plaintiff for possession of the land, to hold according to the terms of the intended conveyance, and may issue a writ of seizin as in a real action, under which the plaintiff, having obtained possession, shall hold the premises as effectually as if conveyed in pursuance of the decree; or the court may enforce its decree by any other process according to chancery proceedings."

**Maryland.**—Pub. Gen. Laws, § 91: "In all cases where the court shall decree that a deed of any kind shall be executed, a trustee to execute such deed may be appointed, and until such trustee shall execute a deed, the decree itself, if passed in the county where the land lies, shall have the same effect that the deed would if executed; but if passed in another county, the decree shall have that effect if recorded in the county where the land lies within six months from the date thereof."

**Michigan.**—Howell's Ann. Stats., § 6650: "And if such decree shall direct the execution of a conveyance or other instrument affecting the title to real estate, the record of such certified copy shall have the same effect as the record of such conveyance or other instrument affecting the title to real estate would have if duly executed pursuant to said decree."

**Minnesota.**—Gen. Stats. 1894, c. 75, § 14: "The district court has power to pass the title to real estate by a judgment, without any other act to be done on the part of the defendant, when such appears to be the proper mode to carry its judgments into effect; and such judgment being recorded in the registry of deeds of the county where such real estate is situated, shall, while in force, be as effectual to transfer the same as the deed of the defendant."

**Mississippi.**—Annotated Code 1892, § 594: "The decree of a court of chancery shall have the force, operation and effect of a judgment at law in the circuit court."

§ 595: "When a decree shall be made for a conveyance, release, or acquittance, or other writing, and the party against whom the decree is made shall not comply therewith, then such decree shall be considered and taken in all courts of law and equity to have the same operation and effect, and shall be as available, as if the conveyance, release, or acquittance, or other writing had been executed

in conformity to the decree; or the court may appoint a commissioner to execute such writing, which shall have the same effect as if executed by the party."

**Missouri.**—Rev. Stats. 1889, § 6041: "In all cases where any court of record shall judge or decree a conveyance of real estate, or that any real estate shall pass, the party in whose favor the judgment or decree is rendered shall cause a copy thereof to be recorded in the office of the recorder of the county wherein the lands passed or to be conveyed lie, within eight months after such judgment or decree is entered."

**Nebraska.**—Cobbey's Statutes 1903, § 1416: "That when any judgment or decree shall be rendered for a conveyance, release, or acquittance, in any court of this state, and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect, and be as available as if the conveyance, release, or acquittance had been executed conformable to such judgment or decree."

§ 1441: "Real property may be conveyed by master commissioners as hereinafter provided: *First*. When by an order or judgment in an action or proceeding, a party is ordered to convey such property to another, and he shall neglect or refuse to comply with such order or judgment. *Second*. When specific real property is required to be sold under an order or judgment of the court."

**New Jersey.**—Gen. Stats. 1895, p. 383: "That where a decree of the court of chancery shall be made for a conveyance, release, or acquittance of lands or any interest therein, and the party against whom the said decree shall pass shall not comply therewith by the time appointed, then such decree shall be considered and taken, in all courts of law and equity, to have the same operation and effect, and be as available as if the conveyance, release, or acquittance had been executed conformably to such decree, and this, notwithstanding any disability of such party by infancy, lunacy, coverture, or otherwise."

**New York.**—Code Civ. Proc. 1896, § 718: "Where a judgment directs a party to . . . convey real property; if the direction is disobeyed, the courts, besides punishing the disobedience as a contempt, may, by order, require the sheriff . . . to convey the real property, in conformity with the direction of the court."

**North Carolina.**—Clark's Code of Civ. Proc., § 426: "In any action, wherein the court shall declare that a party is entitled to the possession of property, real or personal, the legal title whereof may

be in another or others, parties to the suit, and the court shall order a conveyance of such legal title to him so declared to be entitled, or where, for any cause, the court shall order that one of the parties holding property in trust shall convey the legal title therein to be held in trust to another person, although not a party, the court, after declaring the right and ordering the conveyance, shall have power, also, to be used in its discretion, to declare in the order then made, or in any made in the progress of the cause, that the effect thereof shall be to transfer to the party to whom the conveyance is directed to be made the legal title of the said property, to be held in the same plight, condition and estate as though the conveyance ordered was in fact executed."

§ 427: "Every judgment, in which the transfer of title shall be so declared, shall be regarded as a deed of conveyance, executed in due form and by capable persons, notwithstanding the want of capacity in any person ordered to convey."

**North Dakota.**—Revised Code 1899, § 5486: "In all actions arising under chapter 30 of this code and in actions commenced for the satisfaction of record of mortgages or other liens upon real property or for the specific performance of contracts relating to real property, the court may by its judgment without any act on the part of the defendant transfer the title to real property and remove or discharge a cloud or encumbrance thereon, and a certified copy of such judgment may be recorded in the office of the register of deeds of the county in which the property affected is situated."

**Ohio.**—Bates' Ann. Code, 4th ed., § 5318: "When the party against whom a judgment for a conveyance, release, or acquittance is rendered, does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available, as if conveyance, release, or acquittance had been executed conformably to such judgment."

**Oklahoma.**—Rev. Stats. 1903, § 4589: Similar to Kansas.

**Oregon.**—Bellinger & Cotton's Codes and Stats., § 415: "A decree requiring a party to make a conveyance, transfer, release, acquittance, or other like act within a period therein specified shall, if such party do not comply therewith, be deemed and taken to be equivalent thereto."

**Tennessee.**—Code, 1896: "The decree may divest the title to property, real or personal, out of any of the parties, and vest it in others, and such decree shall have all the force and effect of a conveyance by such parties, executed in due form of law."



**Texas.**—Sayles' Stats., art. 1338: "Where the judgment is for the conveyance of real estate, or for the delivery of personal property, the decree may pass title to such property without any act to be done on the part of the party against whom the judgment is rendered."

**Utah.**—Rev. Stats. 1898, § 3279: "When the judgment requires the person against whom it is rendered to execute and deliver to any other person a conveyance of any specific real property, and the person against whom it is rendered shall refuse or neglect to execute and deliver said conveyance for five days after the service upon him of a certified copy of such judgment, or if he is absent or concealed, so that service of such certified copy cannot be had, upon proof satisfactory to the court that such service has been made, or that it cannot be made by reason of such absence or concealment, the person entitled to the conveyance may obtain from the court an order that the certified copy of the judgment, together with the order, be recorded by the recorder of deeds of the county where the real property is situated; and when recorded, it shall give to the person entitled to such conveyance a right to the possession of the real property described in the judgment, and to hold the same according to the terms of the conveyance ordered, in like manner as if it had been conveyed in pursuance of the judgment. The recording of any judgment as above provided shall not prevent the court rendering the judgment from enforcing the same by any proper process, according to the course of proceedings therein."

**Vermont.**—Stats. 1894, § 980: "When a decree is made by a court of chancery for a conveyance, release, or acquittance, and the party against whom the decree is made does not comply therewith by the time appointed, the decree shall be held to have the same effect as if the conveyance, release, or acquittance had been executed agreeably to such decree. But such decree shall not be deemed a conveyance of real estate, unless a copy of the same, certified by the clerk of the court, is recorded in the office in which a deed of such real estate is required by law to be recorded."

**Virginia.**—Pollard's Ann. Code 1904, § 3418: "A court of equity, in a suit wherein it is proper to decree or order the execution of any deed or writing, may appoint a commissioner to execute the same; and the execution thereof shall be as valid to pass, release, or extinguish the right, title, and interest of the party on whose behalf it is executed, as if such party had been at the time capable in law of executing the same, and had executed it." See *Clem v. Given's Ex'r*, 106 Va. 145, 55 S. E. 567, citing this note.

§ 1435. (§ 14.) **Same—Limitations on Effect of This Legislation.**—"These statutes do not generally interfere with the original power of courts of equity to enforce obedience to their decrees by the parties themselves, and to punish such parties for their disobedience by attachment, fine, imprisonment, or sequestration.<sup>32</sup> The operation of these statutes is confined to the territorial limits and jurisdiction of the states in which they are respectively enacted."<sup>33</sup> It is impossible for a decree of a

**West Virginia.**—Code 1899, c. 132: "A court of law or equity, in a suit in which it is proper to decree or order the execution of any deed or writing, may appoint a commissioner to execute the same; and the execution thereof shall be as valid to pass, release or extinguish the right, title, and interest of the party on whose behalf it is executed, as if such party had been at the time capable in law of executing the same and had executed it."

**Wisconsin.**—Stats. 1898, § 2236: "All judgments, decrees and orders rendered or made by any court in cases where the title to land shall have been in controversy may be recorded in the office of the register of deeds of every county where any part of the lands are situate, in the same manner and with like effect as conveyances. Such recording may be done from a duly certified copy thereof."

**Wyoming.**—Rev. Stats. 1899, § 3759: Same as Ohio.

<sup>32</sup> Pom. Eq. Jur., § 1317; so held in *Randall v. Pryor*, 4 Ohio 424; *Penn v. Hayward*, 14 Ohio St. 302. It seems, however, that under the statutes of Georgia relating to execution for enforcement of pecuniary judgments, a decree for the payment of money cannot be enforced by attachment of the person: *Clement v. Tullman*, 79 Ga. 451, 11 Am. St. Rep. 441, 5 S. E. 194.

<sup>33</sup> Pom. Eq. Jur., § 1317. See, also, *Watkins v. Holman*, 16 Pet. 25, 10 L. Ed. 873 ("neither the decree itself, nor any conveyance under it, can operate beyond the jurisdiction of the court"); *Corbett v. Nutt*, 10 Wall. 464, 19 L. Ed. 976; *Carpenter v. Strange*, 141 U. S. 87, 106, 35 L. Ed. 640, 11 Sup. Ct. 960; *Dull v. Blackman*, 169 U. S. 243, 42 L. Ed. 733, 18 Sup. Ct. 333; *Fall v. Eastin*, 215 U. S. 1, 17 Ann. Cas. 853, and note, 23 L. R. A. (N. S.) 924, 54 L. Ed. 65, 30 Sup. Ct. 3, citing the text; *Guarantee Trust etc. Co. v. Delta etc. Co.*, 104 Fed. 5, and cases cited; *West Point Min. & Mfg. Co. v. Allen*, 143 Ala. 547, 111 Am. St. Rep. 60, 5 Ann. Cas. 532, and note, 39 South. 351 (no jurisdiction, by decree operating *in rem*, to declare

court of one state to directly affect property in another. No state has power to interfere with the sovereign rights of a sister state.<sup>34</sup> "There are, of course,

void an alleged fraudulent conveyance of lands in another state, though the parties are before the court); *Fall v. Fall*, 75 Neb. 104, 106 N. W. 412; 75 Neb. 120, 113 N. W. 175 (citing § 1318, Pom. Eq. Jur.); *Davis v. Headley*, 22 N. J. Eq. 115; *Lindley v. O'Reilly*, 50 N. J. L. 636, 15 Atl. 379; *Bullock v. Bullock*, 52 N. J. Eq. 561, 46 Am. St. Rep. 528, 27 L. R. A. 213, 30 Atl. 676 (a divorce decree in New York ordered husband to execute a mortgage on lands in New Jersey to secure alimony; the New Jersey court refused to entertain a bill to obtain execution of such mortgage); *Davis v. Tremain*, 205 N. Y. 236, 98 N. E. 383 (no jurisdiction to construe a will creating only legal estates, concerning land in another state; judgment in such a suit would be a nullity, even if no party objected to the jurisdiction); *Joy v. Midland State Bank*, 26 S. D. 244, 128 N. W. 147. Compare *MacGregor v. MacGregor*, 9 Iowa, 65.

<sup>34</sup> This legislation, it has been said, "does not extend to decrees of the United States courts. The effect of equitable remedies granted and decrees rendered by the United States courts, in the absence of legislation by Congress, is governed by the original doctrine of equity; their decrees do not transfer title; they must be executed by the parties, and obedience is compelled by proceedings in the nature of punishment for contempt, attachment, or sequestration": Pom. Eq. Jur., § 1317. See, also, *Shepherd v. Commissioners of Ross Co.*, 7 Ohio, 271.

But Professor Pomeroy's statement, above quoted, does not accurately describe the present practice of the United States courts. The act of Congress (March 3, 1875; 18 Stats. 470; Rev. Stats., § 738) providing for "substituted" service upon absent defendants in suits to enforce any legal or equitable lien upon, or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where the suit is brought, would, it is pointed out, be idle legislation unless the court possessed the power, in this class of cases, to transfer title by means of its decree, without the agency of the defendant: See *Deck v. Whitman*, 96 Fed. 873, 890, and cases cited; *Single v. Scott Paper Mfg. Co.*, 55 Fed. 553. See, also, authorities mentioned in the next section following. But apart from the effect of this act of Congress, the weight of recent authority appears to be in favor of the view that the state legislation in question does not deal merely with a matter of pro-

classes of remedies to which this legislation cannot apply—as, for example, decrees prohibiting any act, general pecuniary recoveries, analogous to money judgments at law, and many purely ancillary or provisional reliefs.”<sup>35</sup>

§ 1436. (§ 15.) **Validity of Decree Based Upon Service by Publication.**—Equity decrees ordinarily act only *in personam*, and can therefore, in general, have effect only as against parties duly served with process within the territorial jurisdiction of the court.<sup>36</sup> It is compe-

cedure, but establishes a substantive right, and that it is therefore within the power, if it is not the duty, of a United States court to conform to the same, in an appropriate case: *Single v. Scott Paper Mfg. Co.*, 55 Fed. 553; *Deck v. Whitman*, 96 Fed. 873, 891; *Langdon v. Sherwood*, 124 U. S. 74, 31 L. Ed. 344, 8 Sup. Ct. 429. In the last case Mr. Justice Miller remarks in speaking of this legislation: “The validity of these statutes has never been questioned, so far as we know, though long in existence in nearly all the states of the Union. There can be no doubt of their efficacy in transferring the title, in the courts of the states which have enacted them; nor do we see any reason why the courts of the United States may not use this mode of effecting that which is clearly within their power.”

<sup>35</sup> Pom. Eq. Jur., § 1317. See, also, *Merrill v. Beckwith*, 163 Mass. 503, 10 N. E. 855; *Adams v. Heckscher*, 80 Fed. 742, 83 Fed. 281. These are cases in which there was no personal service of summons. See, also, *Worthington v. Lee*, 61 Md. 530 (where conveyance in a specific-performance case is made by a trustee appointed by the court, the absent defendant cannot be bound by personal covenants in the deed); *Cloyd v. Trotter*, 118 Ill. 391, 9 N. E. 507 (action to remove cloud; cannot render personal decree for costs); *Parker v. Kelley*, 166 Fed. 968, 969 (action to remove trustee is a proceeding *in personam*, and not *in rem*, both the trustee and the trust fund being without the jurisdiction).

<sup>36</sup> *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101, 3 Sup. Ct. 586, Ames's Cas. in Eq. Jur. 11. The text is quoted in *Banco Minero v. Ross & Masterson* (Tex. Civ. App.), 138 S. W. 224 (suit by vendor for specific performance, jurisdiction not being obtained over one of vendees). See, also, *Tigrett v. Taylor*, 180 Ala. 296, 60 South, 858 (no jurisdiction of bill to enforce a trust and compel an accounting



tent, however, for a state to provide methods for the determination of title to land within its borders, and in the exercise of such power, it may give to equity decrees relating to or affecting the title to land, the effect of judgments *in rem*, which, therefore, may be based upon service of process by publication. "It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem*, in the broader sense which we have mentioned."<sup>37</sup> Statutes in many of the states make an equity decree the equivalent of a conveyance. As a result of statute, it is held in many states that a decree removing a cloud from or quieting title to land within the jurisdiction may be based upon publication of summons.<sup>38</sup> Likewise, a decree for specific performance,

against non-residents, although part of the subject-matter was certain mortgages on land within the state, since an accounting is necessary to determine the amount due); *State ex rel. Bowling Green Trust Co. v. Barnett*, 245 Mo. 99, 149 S. W. 311 (no jurisdiction where main object of the suit was to cancel certain bonds held by a trustee in a foreign state, where most of the defendants reside); *Royal Fraternal Union v. Lunday*, 51 Tex. Civ. App. 637, 113 S. W. 185 (to enjoin officers of insurance company, domiciled in another state, from canceling policy).

<sup>37</sup> *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, per Field, J. The text is quoted in *Banco Minero v. Ross & Masterson* (Tex. Civ. App.), 138 S. W. 224.

<sup>38</sup> "If a state has no power to bring a non-resident into its courts for any purposes by publication, it is impotent to perfect the titles

acting upon the land itself, may issue upon such service.<sup>39</sup> Proceedings for the partition of real estate, the foreclosure of mortgages and the enforcement of liens

of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and, for the purpose of such determination, may provide any reasonable methods of imparting notice”: *Arndt v. Griggs*, 134 U. S. 316, 33 L. Ed. 918, 10 Sup. Ct. 557, per Brewer, J. The text is quoted in *Banco Minero v. Ross & Masterson* (Tex. Civ. App.), 138 S. W. 224; *Clem v. Given's Ex'r*, 106 Va. 145, 55 S. E. 567. See, also, *Bryan v. Kennett*, 113 U. S. 179, 28 L. Ed. 908, 5 Sup. Ct. 407; *Bennett v. Fenton*, 41 Fed. 283, 10 L. R. A. 500 (an instructive opinion); *Ormsby v. Ottman*, 85 Fed. 492, 29 C. C. A. 295; *Morrison v. Marker*, 93 Fed. 692; *Perkins v. Wakeham*, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Pac. 51; *Title & Document Restoration Co. v. Kerrigan*, 150 Cal. 289, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682, 88 Pac. 356 (statute permits quieting title suit without naming any person as defendant); *Knudson v. Litchfield*, 87 Iowa, 111, 54 N. W. 199; *Dillon v. Heller*, 39 Kan. 599, 18 Pac. 693; *Oldham v. Stephens*, 45 Kan. 369, 25 Pac. 863; *Short v. Caldwell*, 155 Mass. 57, 28 N. E. 1124; *Scarborough v. Myrick*, 47 Neb. 794, 66 N. W. 867; *Robinson v. Kind*, 23 Nev. 330, 47 Pac. 1, 977; *Kieffer v. Victor Land Co.*, 53 Or. 174, 90 Pac. 582, 98 Pac. 877; *American B. & L. Ass'n v. Mathews*, 13 Tex. Civ. App. 425, 35 S. W. 690; *Tennant's Heirs v. Fretts*, 67 W. Va. 569, 140 Am. St. Rep. 979, 29 L. R. A. (N. S.) 625, and note, 68 S. E. 387.

<sup>39</sup> *Bostwell v. Otis*, 9 How. 336, 13 L. Ed. 164 (*semble*); *Hollander v. Central Metal & Supply Co.*, 109 Md. 131, 23 L. R. A. (N. S.) 1135, 71 Atl. 442. The text is quoted in *Banco Minero v. Ross & Masterson* (Tex. Civ. App.), 138 S. W. 224; *Clem v. Given's Ex'r*, 106 Va. 145, 55 S. E. 567; *Felch v. Hooper*, 119 Mass. 52. *Contra*, see *dicta* in *Snell v. Hill*, 263 Ill. 211, 105 N. E. 16, and *Fowler v. Fowler*,

upon land within the state, are also within the class.<sup>40</sup> In all of these cases the title is directly affected by the decree.

§ 1437. (§ 16.) **Remedies in Personam Beyond the Territorial Jurisdiction.**—"Where the subject-matter is situated within another state or country, but the parties are within the jurisdiction of the court, any suit may

204 Ill. 82, 68 N. E. 414 (the citations in support of these *dicta* are not in point). In general, see *Robinson v. Kind*, 23 Nev. 330, 47 Pac. 1, 977 (action to cancel deed); *Corson v. Shoemaker*, 55 Minn. 386, 57 N. W. 134 (reformation); *Seculovich v. Martin*, 101 Cal. 673, 36 Pac. 387 (suit to compel conveyance by absent trustee); *Porter Land & W. Co. v. Baskin*, 43 Fed. 323 (to establish trust in real property); *McLaughlin v. McCrory*, 55 Ark. 442, 29 Am. St. Rep. 56, 18 S. W. 762 (cancellation of deed and revesting of title against non-resident); *Quarl v. Abbett*, 102 Ind. 233, 52 Am. Rep. 662, 1 N. E. 476 (suit to set aside fraudulent transfer of shares of stock within the jurisdiction); *Gassert v. Strong*, 38 Mont. 18, 98 Pac. 497 (suit to declare a trust in stock within the jurisdiction, and to obtain a transfer upon the books of the company, though the holder of the legal title is without the jurisdiction); *Sohege v. Singer Mfg. Co.*, 73 N. J. Eq. 567, 68 Atl. 64 (suit to obtain transfer on books of domestic corporation of shares held by residents of foreign states); *Amparo Mining Co. v. Fidelity Trust Co.*, 75 N. J. Eq. 555, 73 Atl. 249, affirming 74 N. J. Eq. 197, 71 Atl. 605 (a similar case); *Perry v. Young*, 133 Tenn. 522, L. R. A. 1917B, 385, 182 S. W. 577 (suit against insurance company to reform an insurance policy, though the party interested in resisting reformation was non-resident; two judges dissenting); but compare *Adams v. Hecksher*, 80 Fed. 742, 83 Fed. 281 (statute does not apply, when complaint requires a personal act of the defendant).

<sup>40</sup> *Martin v. Pond*, 30 Fed. 15 (foreclosure); *Palmer v. McCormick*, 28 Fed. 541 (same); *Roller v. Holly*, 176 U. S. 398, 44 L. Ed. 520, 20 Sup. Ct. 410 (action to enforce vendor's lien); *Wilson v. Martin-Wilson etc. Co.*, 151 Mass. 515, 24 N. E. 784 (creditor's bill to reach patent right of absent defendant). See, also, *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Rhoades v. Rhoades*, 78 Neb. 495, 126 Am. St. Rep. 611, 111 N. W. 122 (only relief sought is payment from non-resident husband's real estate); *Lamkin v. Lovell*, 176 Ala. 334, 58 South. 258 (foreclosure of mortgage).

be maintained and remedy granted which *directly* affect and operate upon the person of the defendant and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts toward it, and it is thus ultimately but *indirectly* affected by the relief granted.<sup>41</sup> This rule applies to the United States courts<sup>42</sup> as well as to the state courts, and is also well settled in England."<sup>43</sup>

<sup>41</sup> Pom. Eq. Jur., § 1318. This portion of Pom. Eq. Jur. is quoted in *Schmaltz v. York Mfg. Co.*, 204 Pa. St. 1, 93 Am. St. Rep. 782, 59 L. R. A. 957, 53 Atl. 522; *Allen v. Buchanan*, 97 Ala. 399, 38 Am. St. Rep. 187, 11 South. 777; *Butterfield v. Nogales Copper Co. (Ariz.)*, 80 Pac. 345. Section 1318 is quoted, also, in the recent cases: *Vacuum Oil Co. v. Eagle Oil Co.*, 154 Fed. 867; *Columbia River Packers' Ass'n v. McGowan*, 219 Fed. 365, 134 C. C. A. 461; *Bethlehem City Water Co. v. Borough of Bethlehem*, 253 Pa. St. 333, 98 Atl. 646; *Banco Minero v. Ross & Masterson (Tex. Civ. App.)*, 138 S. W. 224. Section 1318 is cited in *Fall v. Eastin*, 215 U. S. 1, 17 Ann. Cas. 853, 23 L. R. A. (N. S.) 924, 54 L. Ed. 65, 30 Sup. Ct. 3 (decree does not transfer title in foreign state); *Lamkin v. Lovell*, 176 Ala. 334, 58 South. 258; *Fall v. Fall*, 75 Neb. 120, 113 N. W. 175; *Sharp v. Sharp (Okl.)*, 166 Pac. 175; *Webb v. Ritter*, 60 W. Va. 193, 54 S. E. 484, note by Brannon, J.

<sup>42</sup> Pom. Eq. Jur., § 298.

<sup>43</sup> "The courts of England are, and always have been, courts of conscience, operating *in personam* and not *in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not locally or *ratione domicilii* within their jurisdiction": *Ewing v. Orr Ewing*, L. R. 9 App. Cas. 34, 40, per Lord Selborne.

The leading English case is *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, 2 Lead. Cas. Eq., 4th Am. ed., 1806, where the subject is fully discussed and conclusions are reached in accordance with the statements of the text. See, also, *Toller v. Carteret*, 2 Vern. 494. The leading American case on this subject is *Massie v. Watts*, 6 Cranch, 148, 3 L. Ed. 181, where Marshall, C. J., laid down the rule as follows: "When the defendant is liable, either in consequence of a contract, or as trustee, or as holder of a legal title acquired by a species of *mala fides* practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the



circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest the jurisdiction. . . . In case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person may be found, although lands not within the jurisdiction may be affected by the decree." See similar expressions in *Lindley v. O'Reilly*, 50 N. J. L. 636, 7 *Am. St. Rep.* 802, 1 *L. R. A.* 79, 15 *Atl.* 379; *Lynde v. Columbus C. & I. R'y Co.*, 57 *Fed.* 993; *Smith v. Davis*, 90 *Cal.* 25, 25 *Am. St. Rep.* 94, 27 *Pac.* 27; *Johnson v. Gibson*, 116 *Ill.* 302, 6 *N. E.* 205; *De Klyn v. Watkins*, 3 *Sand. Ch.* 185; *Davis v. Morris*, 76 *Va.* 21; *Byrne v. Jones*, 159 *Fed.* 321, 90 *C. C. A.* 101, reversing *Jones v. Byrne*, 149 *Fed.* 457; *Groom v. Mortimer Land Co.*, 192 *Fed.* 849, 113 *C. C. A.* 173.

In Pomeroy's Equity Jurisprudence, § 1318, "suits for specific performance of contracts, for the enforcement of express or implied trusts, for relief on the ground of fraud, actual or constructive, for the final accounting and settlement of a partnership, and the like" are given as examples of the rule. The following cases are given as illustrations:

**Specific Performance.**—*Municipal Inv. Co. v. Gardiner*, 62 *Fed.* 954; *Montgomery v. United States*, 36 *Fed.* 4, 13 *Saw.* 383 (citing *Pom. Eq. Jur.*, § 1317); *Wilhite v. Skelton*, 149 *Fed.* 67, 68, 78 *C. C. A.* 635; *Penn v. Hayward*, 14 *Ohio St.* 302; *Hayes v. O'Brien*, 149 *Ill.* 403, 23 *L. R. A.* 555, 37 *N. E.* 73; *Poole v. Koons*, 252 *Ill.* 49, 96 *N. E.* 556 (but the decree in this case, directing the master in chancery to execute a conveyance in defendant's behalf in case defendant neglected to do so, appears questionable: See *ante*, note (33)); *Epperly v. Ferguson*, 118 *Iowa*, 47, 91 *N. W.* 816 (*dictum*); *Brown v. Desmond*, 100 *Mass.* 267; *Pingree v. Coffin*, 12 *Gray*, 288 (specific performance of contract to assign bond for conveyance of land in another state); *Olney v. Eaton*, 66 *Mo.* 563; *Potter v. Hollister*, 45 *N. J. Eq.* 508, 18 *Atl.* 204; *Newton v. Bronson*, 13 *N. Y.* 587, 67 *Am. Dec.* 89; *Cleveland v. Burrill*, 25 *Barb.* 532; *Ward v. Arredondo*, *Hopk. Ch.* 213, 14 *Am. Dec.* 543; *Mitchell v. Bunch*, 2 *Paige*, 606, 22 *Am. Dec.* 669; *Sutphen v. Fowler*, 9 *Paige*, 280; *Burnley v. Stevenson*, 24 *Ohio St.* 474, 15 *Am. Rep.* 621; *Episcopal Church of Macon v. Wiley*, 2 *Hill Eq. (S. C.)* 584, 30 *Am. Dec.* 386 (vendor plaintiff); *Western Union Tel. Co. v. Pittsburg, C. C. & St. L. R. Co.*, 137 *Fed.* 435; *Timma v. Timma*, 72 *Kan.* 73, 82 *Pac.* 481; *Anderson-Tully Co. v. Thompson*, 132 *Tenn.* 80, 177 *S. W.* 66 (enjoining interference with plaintiff's contract right to remove timber from defendant's land in another state).

**Partnership Affairs.**—Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067; Lyman v. Lyman, 2 Paine, 11, 15 Fed. Cas. (No. 8628) 1147, 1160 (winding up partnership; court may order sale where order would act only on the parties and would not require agency of any officer out of the jurisdiction).

**Enforcement of Trust.**—Smith v. Davis, 90 Cal. 25, 25 Am. St. Rep. 94, 27 Pac. 27; Moore v. Jaeger, 2 McArth. (D. C.) 465 (suit to declare defendant a constructive trustee); Gilliland v. Inabuit, 92 Iowa, 46, 60 N. W. 211; Hawley v. James, 7 Paige, 213, 32 Am. Dec. 623; Dickinson v. Hoomes's Adm'r, 8 Gratt. 353; Farley v. Shippen (1794), Wythe (Va.), 254, 265 *et seq.* (a very instructive opinion); State v. Superior Court, 7 Wash. 306, 34 Pac. 1103.

**Foreign Corporations.**—The general rule that a court of equity will refuse on grounds of policy, to interfere in the internal management of foreign corporations, does not prevent it from entertaining a stockholder's suit to compel the restoration of property fraudulently misappropriated by directors, where both the directors and the corporation are within the jurisdiction of the court: Babcock v. Farwell, 245 Ill. 14, 137 Am. St. Rep. 284, 19 Ann. Cas. 74, 91 N. E. 683 (an instructive opinion); and see Edwards v. Schillinger, 245 Ill. 231, 137 Am. St. Rep. 308, 33 L. R. A. (N. S.) 895, 91 N. E. 1048; State v. Denton, 229 Mo. 187, 138 Am. St. Rep. 417, 129 S. W. 709.

**Fraud.**—Muller v. Dows, 94 U. S. 444, 24 L. Ed. 207; Vacuum Oil Co. v. Eagle Oil Co., 154 Fed. 867, quoting the text; Stapler v. Hurt's Ex'rs., 16 Ala. 799 (debtor fraudulently removes property from state); Johnson v. Gibson, 116 Ill. 302, 6 N. E. 205; Cooley v. Searlett, 38 Ill. 316, 87 Am. Dec. 298; Baker v. Rockabrand, 118 Ill. 365 (executed contract for exchange of land); Clark v. Seagraves, 186 Mass. 430, 71 N. E. 813; Noble v. Grandin, 125 Mich. 383, 84 N. W. 465; Ewing v. Lamphere, 147 Mich. 659, 118 Am. St. Rep. 563, 111 N. W. 187 (action to have defendants declared trustees of property obtained by fraudulent judgment); United States v. Maxwell Land Grant Co., 5 N. M. 304, 21 Pac. 153; De Klyn v. Watkins, 3 Sand. Ch. 185; Guerrant v. Fowler, 1 Hen. & M. (Va.) 5.

**Suit to Remove Cloud on Title.**—Remer v. McKay, 54 Fed. 432; Kirklin v. Atlas S. & L. Ass'n (Tenn. Ch. App.), 60 S. W. 149; Briggs v. French, 1 Sum. 504, 4 Fed. Cas. (No. 1870) 116 (to prevent cloud on title); Lamkin v. Lovell, 176 Ala. 334, 58 South. 258 (a suit *in personam* to cancel a void mortgage on land in another state).

**Suit to Reform a Deed.**—Bethell v. Bethell, 92 Ind. 318.

**Foreclosure of Mortgages.**—It is within the jurisdiction of an equity court to order the sale of mortgaged property without the ju-

risdiction. Such decrees do not act against the property itself, but must be enforced by process against the defendant: *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *International B. & T. Co. v. Holland Trust Co.*, 26 C. C. A. 469, 81 Fed. 422; *Woodbury v. Allegheny & K. R. R. Co.*, 72 Fed. 371; *Craft v. Indianapolis, D. & W. R'y Co.*, 166 Ill. 580, 46 N. E. 1132 (quoting *Pom. Eq. Jur.*, § 1318); *Eaton v. McCall*, 86 Me. 346, 41 Am. St. Rep. 561, 29 Atl. 1103; *Union Trust Co. v. Olmsted*, 102 N. Y. 729, 7 N. E. 822; *Toller v. Carteret* (1705), 2 Vern. 494; *Paget v. Ede*, L. R. 18 Eq. 118; *Clark v. Iowa Fruit Co.*, 185 Fed. 604; *Mead v. New York, H. & N. R. Co.*, 45 Conn. 199; *Dickson v. Loehr*, 126 Wis. 641, 4 L. R. A. (N. S.) 986, 106 N. W. 793 (strict foreclosure, by compelling mortgagor to convey his interest in the foreign land in case of his failure to pay the amount for which the land is security). This note is cited in *Webb v. Ritter*, 60 W. Va. 193, 54 S. E. 484, note by Brannon, J. This jurisdiction will not be exercised, however, except under unusual or extraordinary conditions. "Wherever it is necessary in order to prevent loss or to protect the rights of a mortgagee it may be done; for instance, in the case of a mortgage upon property situated both within and without the state, where unless a sale of the entire property could be made at one time, great loss might ensue, or in other cases where an equally good reason existed. But ordinarily we think that the holder of a mortgage should be required to resort to the remedies of the courts of jurisdiction in which the land is situated": *Eaton v. McCall*, 86 Me. 346, 41 Am. St. Rep. 561, 29 Atl. 1103; *Jones v. Byrne*, 149 Fed. 457. To the effect that a sale of land in another state by a referee under foreclosure is nugatory, see *Farmers' L. & T. Co. v. Postal Tel. Co.*, 55 Conn. 334, 3 Am. St. Rep. 53, 11 Atl. 184.

In general, to the effect that a court of equity may compel a conveyance of property outside its jurisdiction, see *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *Guarantee Trust & S. D. Co. v. Delta & Pine Land Co.*, 43 C. C. A. 396, 104 Fed. 5; *Lamkin v. Lovell*, 176 Ala. 334, 58 South. 258 (canceling a mortgage); *Butterfield v. Nogales Copper Co. (Ariz.)*, 80 Pac. 345; *Fegan v. Anderson*, 128 Ark. 353, 194 S. W. 234 (cancellation or reconveyance); *McGee v. Sweeney*, 84 Cal. 100, 23 Pac. 1117; *Title Ins. & Trust Co. v. California Development Co.*, 171 Cal. 173, 152 Pac. 542 (controlling action of stockholders in a foreign corporation); *Winn v. Strickland*, 34 Fla. 630, 16 South. 606; *Hayes v. O'Brien*, 149 Ill. 403, 23 L. R. A. 555, 37 N. E. 73 (land in another county); *Johnson v. Gibson*, 116 Ill. 294, 6 N. E. 205 (suit by creditors to set aside fraudulent conveyance); *Bevans v. Murray*, 251 Ill. 603, 96 N. E. 546; *Barringer v. Ryder*,

§ 1438. (§ 17.) **Same: Limitations of the Doctrine.** "On the other hand, where the suit is strictly local, the subject-matter is specific property, and the relief when granted is such that it must act directly upon the subject-matter and not merely upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated."<sup>44</sup> A decree may have extra-territorial effect where the imprisonment of the person is the most proper means to effect that which

119 Iowa, 121, 93 N. W. 56; *Coulthard v. Davis*, 151 Iowa, 578, 131 N. W. 1088 (enjoining conspiracy to interfere with plaintiff's possession of foreign land); *People's State Bank v. T'Miller* 85 Kan. 272, 116 Pac. 884; *McQuerry v. Gilliland*, 89 Ky. 434, 7 L. R. A. 454, 12 S. W. 1037; *Reed v. Reed*, 75 Me. 264 (absolute deed as mortgage); *Carver v. Peck*, 131 Mass. 292 (suit to restrain the transfer of property outside the jurisdiction of the court); *Noble v. Grandin*, 125 Mich. 383, 84 N. W. 465; *Vreeland v. Vreeland*, 49 N. J. Eq. 322, 24 Atl. 551; *Gardner v. Ogden*, 22 N. Y. 327, 332-339, 78 Am. Dec. 192; *Bailey v. Ryder*, 10 N. Y. 363; *Vaught v. Meador*, 99 Va. 569, 86 Am. St. Rep. 908, 39 S. E. 225; *Poindexter v. Burwell*, 82 Va. 507; *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55. See, also, *Wood v. Warner*, 15 N. J. Eq. 81 ("the power of the court to decree the settlement of the accounts between the parties, and the payment of the balance, if any found due, and to enforce such decree *in personam* cannot be questioned").

<sup>44</sup> Pom. Eq. Jur., §§ 1318, 298. This paragraph of Pom. Eq. Jur. is cited in *Fire Ass'n (Burton-Lingo Co.) v. Patton*, 15 N. M. 304, 27 L. R. A. (N. S.) 420, 107 Pac. 679. For illustration, see *Cooley v. Scarlett*, 38 Ill. 316, 87 Am. Dec. 298 (cancellation of deed recorded in another state refused); *Fire Ass'n (Burton-Lingo Co.) v. Patton*, 15 N. M. 304, 27 L. R. A. (N. S.) 420, 107 Pac. 679, citing Pom. Eq. Jur., §§ 1317, 1318 (reinstatement of lien refused); *In re Sall*, 59 Wash. 539, 140 Am. St. Rep. 885, 110 Pac. 32, 626 (cannot appoint a guardian for an incompetent of property outside state); *Roberdeau v. Rous*, 1 Atk. 543 (no jurisdiction to put plaintiff in possession of land in colonies); *Wynne v. Hughes*, 26 Beav. 377 (refusing judicial sale of land outside jurisdiction). Of course, the mere fact that land is in another state or country does not confer jurisdiction upon a court of equity, in a case where the legal remedy by ejectment would be adequate if the land had been within the domestic jurisdiction: *Caldwell v. Newton*, 99 Kan. 846, 163 Pac. 163.



is decreed to be done, viz., the payment of money, making a conveyance, or the like. "But where no obedience of the person imprisoned, or any act of his, can sufficiently execute such a decree, there it is in vain to hold such a plea."<sup>45</sup> Accordingly, it is generally held that a bill to partition realty must be brought in the state in which the land is situated.<sup>46</sup> Likewise, it would seem that an action to abate a nuisance must be maintained in the state in which the land is.<sup>47</sup>

§ 1439. (§ 18.) **Injunctions Against Acts in Foreign States.**—The courts are not in entire harmony as to when an injunction will issue to restrain acts in another state. It is well settled that bills to enjoin the prosecution of suits or the enforcement of judgments in other jurisdictions may, upon proper showing, be sustained.<sup>48</sup> As to torts in general, however, there is a conflict of authority. It is sometimes held that suits to enjoin a trespass or nuisance are purely local and consequently come within the limitation stated in the preceding para-

<sup>45</sup> *Carteret v. Petty*, 2 Swanst. 323. This was a bill for account and partition.

<sup>46</sup> *Carteret v. Petty*, 2 Swanst. 323; *White v. White*, 7 Gill. & J. (Md.) 208; *Schick v. Whitcomb* (Neb.), 94 N. W. 1023; *Reams v. Sinclair*, 88 Neb. 738, *Ann. Cas.* 1912B, 989, 130 N. W. 562; *Johnson v. Kimbro*, 3 Head (Tenn.), 557, 75 *Am. Dec.* 781; *Poindexter v. Burwell*, 82 Va. 507; *Wimer v. Wimer*, 82 Va. 890, 3 *Am. St. Rep.* 126, 5 S. E. 536; *Pillow v. Southwest Va. Imp. Co.*, 92 Va. 144, 53 *Am. St. Rep.* 804, 23 S. E. 32; but see *Vreeland v. Vreeland*, 49 N. J. Eq. 322, 24 Atl. 551, affirming 48 N. J. Eq. 56, 21 Atl. 627.

<sup>47</sup> *People v. Central R. R. Co.*, 42 N. Y. 283; *Morris v. Remington*, 1 Pars. Eq. Cas. 389; *Columbia River Packers' Ass'n v. McGowan*, 219 Fed. 365, 134 C. C. A. 461 (both the structure sought to be abated and the property injured were in another state), quoting *Pom. Eq. Jur.*, § 1318, and note 2.

<sup>48</sup> This subject is discussed at length, *post*, Vol. II. See, also, *Cole v. Cunningham*, 133 U. S. 107, 33 L. Ed. 538, 10 Sup. Ct. 269; *Pickett v. Ferguson*, 45 Ark. 177, 55 *Am. Rep.* 545; *Hawkins v. Ireland*, 64 Minn. 339, 58 *Am. St. Rep.* 534, 67 N. W. 73; *Kendall v.*

graph.<sup>49</sup> On the other hand, it is held by other courts that such suits are maintainable if jurisdiction of the person is obtained.<sup>50</sup>

McClure Coke Co., 182 Pa. St. 1, 61 **Am. St. Rep.** 688, 37 Atl. 823; Allen v. Buchanan, 97 Ala. 399, 38 **Am. St. Rep.** 187, 11 South. 777, and cases cited (injunction against foreign garnishment suit brought to evade the laws of plaintiff's and defendant's domicile); Mead v. Merritt, 2 Paige, 402.

<sup>49</sup> Northern Indiana R. Co. v. Michigan Central R. Co., 15 How. 233, 14 **L. Ed.** 674; Miss. & Mo. R. R. v. Ward, 2 Black, 485, 17 **L. Ed.** 311; Ophir Silver Min. Co. v. Superior Court, 147 Cal. 467, 3 **Ann. Cas.** 340, 82 Pac. 70 (trespass on mine); Columbia National Sand Dredging Co. v. Morton, 28 App. Cas. (D. C.) 288, 8 **Ann. Cas.** 511, reviewing many cases (trespass, question of title to land being chiefly involved).

<sup>50</sup> Great Falls Mfg. Co. v. Worster, 23 N. H. 462; Alexander v. Tolleston Club, 110 Ill. 65; The Salton Sea Cases, 172 Fed. 792, 97 C. C. A. 214 (may enjoin injury to property in the jurisdiction by reason of improper construction of works in foreign country); Louisville & N. R. Co. v. Western Union Tel. Co., 207 Fed. 1, 124 C. C. A. 573 (jurisdiction to restrain domestic railroad corporation from interfering with property of a telegraph company on plaintiff's right of way outside as well as within the state); Taylor v. Hulett, 15 Idaho, 265, 19 **L. R. A. (N. S.)** 535, and note, 97 Pac. 37 (injunction against diversion of water outside of state, in aid of suit to quiet title to water in the state); Longley v. McGeoch, 115 Md. 182, 80 Atl. 843. That a state may sue, in its *quasi-sovereign* capacity, to enjoin a nuisance by mining operations in another state, producing fumes and gases destructive to vegetation in the plaintiff state, see Georgia v. Tennessee Copper Co., 206 U. S. 230, 11 **Ann. Cas.** 488, and note, 51 **L. Ed.** 1038, 27 Sup. Ct. 618. See the following miscellaneous cases in which injunctions were issued: Schmaltz v. York Mfg. Co., 204 Pa. St. 1, 93 **Am. St. Rep.** 782, 59 **L. R. A.** 907, 53 Atl. 522 (injunction against removing fixtures from property in another state); Frank v. Peyton, 82 Ky. 150 (injunction against disposing of property pending suit); Fulton v. Oertling, 131 La. 768, 60 South. 238 (mortgagor enjoined from destroying mortgaged property outside the state); Western Union Tel. Co. v. Louisville & N. R. Co., 201 Fed. 946 (pending suit by telegraph company to condemn for its use property of railroad, defendant enjoined from interfering with the portion of plaintiff's system outside the state, in view of

## III.

§ 1440. (§ 19.) **Laches: In General.**<sup>51</sup>—Probably no principles of equity have been the subject of more contradictory judicial statements than those relating to the effect of *laches* or delay. The resulting confusion is the more deplorable owing to the frequency with which the defense is asserted, and the favor with which it appears to be regarded by many courts.<sup>52</sup> Apart from the element of uncertainty shared by it in common with other equitable defenses, the application of which must necessarily rest in judicial discretion, there appears to be a fundamental difference of opinion as to the ultimate reasons in ethics or in public policy upon which the defense of *laches* should be based.<sup>53</sup> The subject is further complicated by a hopeless confusion in nomenclature. The term “acquiescence,” in one of its two legal significations, is often used interchangeably with the term “laches”;<sup>54</sup> while in the innumerable cases re-

the peculiar character of the property involved). The same principle has been held to apply to suits for injunction against trespass in another county: *Jennings v. Beale*, 158 Pa. St. 283, 27 Atl. 948; *Clad v. Paist*, 181 Pa. St. 148, 37 Atl. 194. It is said in *Western Union Tel. Co. v. Western & Atlantic R.*, 8 Baxt. 54, that equity will not make a decree which it cannot enforce by its own authority.

<sup>51</sup> This paragraph is cited in *Boyd v. Northern Pac. R. Co.*, 170 Fed. 779.

<sup>52</sup> See *post*, § 23, note 70.

<sup>53</sup> Compare the passages quoted in §§ 21, 23, *post*.

<sup>54</sup> The two significations of “acquiescence” are clearly stated in *De Bussche v. Alt*; L. R. 8 Ch. Div. 286, 314; see the passage quoted in full, 2 Pom. Eq. Jur., § 965, note 1; and particularly, the following portion: “The term ‘acquiescence,’ . . . if used at all, must have attached to it a very different signification, according to whether the acquiescence alleged occurs while the act acquiesced in is in progress or only after it has been completed. . . . But when once the act is completed, without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined upon very different legal considerations. A right of action has then vested in him which, at all events as a general rule, can-

lating to relief from fraud, actual or constructive, the courts have seldom been at pains to distinguish the general doctrines relating to *laches* from the particular doctrine as to "confirmation" of the fraudulent act, and the necessity of prompt election to rescind by the defrauded party.<sup>55</sup> These topics have been sufficiently treated elsewhere;<sup>56</sup> the following paragraphs merely

not be divested without accord and satisfaction, or release under seal. *Mere submission* to the injury for any time short of the period limited by statute for the enforcement of the right of action, cannot take away such right, although under the name of *laches* it may afford a ground for refusing relief under some peculiar circumstances," etc. For other definitions of "acquiescence," see *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907; *Babb v. Sullivan*, 43 S. C. 436, 21 S. E. 277. The following paragraphs concern the effect of delay by the injured party, after the commission of the injury, whether or not that delay is termed by the courts "acquiescence" or something else.

55 Cases involving the doctrine as to "ratification," "confirmation" or "election to rescind" are excluded from the following discussion. For instances see, in addition to those cited in the paragraphs of Pom. Eq. Jur., mentioned below, and *post*, in chapter on Cancellation, *Baker v. Cummings*, 169 U. S. 189, 42 L. Ed. 711, 18 Sup. Ct. 367 (enjoying profits of transaction with knowledge of fraud); *Rugan v. Sabin*, 53 Fed. 415, 418, 3 C. C. A. 578, 580, 10 U. S. App. 519, 530 (necessity of prompt election); *Kinne v. Webb*, 54 Fed. 34, 4 C. C. A. 170, 12 U. S. App. 137, affirming 49 Fed. 512 (same); *Scheffel v. Hays*, 58 Fed. 457, 7 C. C. A. 308, 19 U. S. App. 220; *Mudsill Mining Co. v. Watrous*, 61 Fed. 163, 9 C. C. A. 415 (delay for purpose of securing evidence of the fraud does not show ratification); *Brown v. Brown*, 142 Ill. 409, 32 N. E. 500; *Provident Loan Trust Co. v. McIntosh*, 68 Kan. 452, 75 Pac. 498; *Norfolk & N. B. Hosiery Co. v. Arnold*, 49 N. J. Eq. 390, 23 Atl. 514; *Hilliard v. Allegheny Geometrical Wood Carving Co.*, 173 Pa. St. 1, 34 Atl. 231; *Dunn v. Columbia Nat. Bank*, 204 Pa. St. 53, 53 Atl. 519.

56 See 2 Pom. Eq. Jur., § 817 (acquiescence as a *quasi* estoppel upon rights of remedy); §§ 818-820 (acquiescence as a true estoppel upon rights of property or of contract); § 897 (necessity of prompt disaffirmance of fraudulent transaction); §§ 916, 917 (ratification of, and acquiescence in, fraudulent transaction); § 964 (confirmation or ratification in cases of fraud, actual or constructive); § 965 (ac-



attempt to set forth the more important statements in the recent cases defining: (1) The attitude of courts of equity to statutes of limitations, in the cases where those statutes are not, by their terms, binding upon such courts; (2) the general view, that the doctrine of laches is an application of the general principles of estoppel; (3) a broader view, chiefly expressed in a series of important decisions by the United States supreme court; (4) circumstances which operate as an excuse for delay, or tend to minimize its effect in equity.

§ 1441. (§ 20.) **Following the Analogy of Statutes of Limitations.**<sup>57</sup>—The following language of an able federal judge has been frequently referred to as defining the attitude of courts of equity to the statutes of limitations, in those cases, where, from the nature of the relief sought, such statutes are capable of affording guidance.<sup>58</sup> “In the application of the doctrine of laches, the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character.<sup>59</sup> The meaning of this rule

quiescence and lapse of time in cases of fraud, actual or constructive).

<sup>57</sup> This paragraph is cited, generally, in *Hughes v. Wallace* (Ky. Law Rep.), 118 S. W. 324; in *Bennett v. Piatt*, 85 N. J. Eq. 436, 96 Atl. 482; in *Wills v. Nehalem Coal Co.*, 52 Or. 70, 96 Pac. 528.

<sup>58</sup> *Kelley v. Boettcher*, 85 Fed. 55, 62, 29 C. C. A. 14, 21, 56 U. S. App. 363, 383, per Sanborn, C. J. (suit to rescind sale of one-sixth of a mining claim, and to obtain an accounting and recovery of the proceeds thereof).

<sup>59</sup> Citing *Rugan v. Sabin*, 10 U. S. App. 519, 534, 3 C. C. A. 578, 582, 53 Fed. 415, 420; *Billings v. Smelting Co.*, 10 U. S. App. 1, 62, 2 C. C. A. 252, 262, 263, 51 Fed. 338, 349; *Bogan v. Mortgage Co.*, 27 U. S. App. 346, 357, 11 C. C. A. 128, 135, 63 Fed. 192, 199; *Kinne v. Webb*, 12 U. S. App. 137, 148, 4 C. C. A. 170, 177, 54 Fed. 34, 40; *Scheftel v. Hays*, 19 U. S. App. 220, 226, 7 C. C. A. 308, 312, 58 Fed. 457, 460; *Wagner v. Baird*, 7 How. 234, 258, 12 L. Ed. 681; *Godden*

is that, under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after the time fixed by the analogous statute of limitations at law; but if unusual conditions or extraordinary

*v. Kimmell*, 99 U. S. 201, 210, 25 **L. Ed.** 431; *Wood v. Carpenter*, 101 U. S. 135, 139, 25 **L. Ed.** 807.

See, in general, *Baker v. Cummings*, 169 U. S. 189, 42 **L. Ed.** 711, 18 Sup. Ct. 367 (no jurisdiction when an adequate remedy at law has been barred by limitation); *Church of Christ v. Reorganized Church etc.*, 70 Fed. 179, 17 C. C. A. 387, 36 U. S. App. 110; *Kelley v. Boettcher*, 85 Fed. 55, 62, 56 U. S. App. 363, 383, 29 C. C. A. 14, 21; *Continental Nat. Bank v. Heilman*, 86 Fed. 514, 30 C. C. A. 232; *Williamson v. Monroe*, 101 Fed. 322; *Nash v. Ingalls*, 101 Fed. 645, 41 C. C. A. 545 (affirming 79 Fed. 510); *Stevens v. Grand Central Min. Co. (C. C. A.)*, 133 Fed. 28; *Brun v. Mann*, 151 Fed. 145, 12 **L. R. A. (N. S.)** 154, 80 C. C. A. 513; *Layton Pure Food Co. v. Church & Dwight Co.*, 182 Fed. 35, 32 **L. R. A. (N. S.)** 274, 104 C. C. A. 475; *Kentucky Coal & Timber Development Co. v. Kentucky Union Co.*, 187 Fed. 945, 110 C. C. A. 93; *Rodgers v. Thomas*, 193 Fed. 952; 113 C. C. A. 580; *Davey v. Dodge*, 213 Fed. 722, 130 C. C. A. 236; *Smith v. Smith*, 224 Fed. 1, 139 C. C. A. 465; *Pond Creek Coal Co. v. Hatfield*, 239 Fed. 622, 152 C. C. A. 456; *Moore v. Moore*, 103 Ga. 517, 30 S. E. 535; *Evans v. Moore*, 247 Ill. 60, 139 **Am. St. Rep.** 302, 93 N. E. 118 (where equitable remedy exclusive, court not bound by limitations); *People v. Michigan Cent. R. R. Co.*, 145 Mich. 140, 108 N. W. 772; *Sherwood v. Baker*, 105 Mo. 472, 24 **Am. St. Rep.** 399, 16 S. W. 938 (one having equitable title to realty, although there is no right to recover possession at law, can lose his right only by adverse possession for the time required to extinguish a legal title); *Colton v. Depew*, 60 N. J. Eq. 454, 83 **Am. St. Rep.** 650, 46 Atl. 728 (foreclosure of mortgage); *Holzer v. Thomas*, 69 N. J. Eq. 515, 61 Atl. 154; *Sternberg v. L. Sternberg & Co. (N. J. Eq.)*, 69 Atl. 492 (concurrent jurisdiction); *Tooker v. National Sugar Refining Co.*, 80 N. J. Eq. 305, 84 Atl. 10; *Church v. Winton*, 196 Pa. St. 107, 46 Atl. 363; *Maxwell v. Wilson*, 54 W. Va. 495, 46 S. E. 349; *Newberger v. Wells*, 51 W. Va. 624, 42 S. E. 625; *Waldron v. Harvey*, 54 W. Va. 608, 102 **Am. St. Rep.** 959, 46 S. E. 603; *Craig v. Gauley Coal Land Co.*, 73 W. Va. 624, 80 S. E. 945.

In the following cases relief was refused because the corresponding legal remedy was barred by the statute of limitations: *Kansas City Southern R. Co. v. Stevenson*, 135 Fed. 553; *Kinne v. Webb*,

circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but

54 Fed. 34, 4 C. C. A. 170, 12 U. S. App. 137 (bill to set aside transfer of personal property); *Southern Pac. R. Co. v. Groeck*, 68 Fed. 609; *Hale v. Coffin*, 120 Fed. 470 (bill to follow properties of a deceased stockholder and to charge legatee, based on a legal demand); *Citizens' Savings & Tr. Co. v. Belleville & S. I. R. Co.*, 157 Fed. 73, 84 C. C. A. 577; *Redd v. Brun*, 157 Fed. 190, 84 C. C. A. 638; *Ela v. Ela*, 158 Mass. 54, 32 N. E. 957 (action for accounting by guardian, when plaintiff might have brought trover); *Clrak v. Van Cleef*, 75 N. J. Eq. 152, 71 Atl. 260; *St. John v. Coates*, 63 Hun, 460, 18 N. Y. Supp. 419; *Drake v. Wild*, 70 Vt. 52, 39 Atl. 248. An instructive instance of the granting of relief by a federal court, though the period prescribed by the statute of limitations of the state had run, is found in the very recent case of *Stevens v. Grand Central Min. Co. (C. C. A.)*, 133 Fed. 28, relying on *Kelley v. Boettcher*.

In the following cases the period of the statute had not run, and the delay was not fatal; *Fowle v. Park*, 48 Fed. 789; *Jonathan Mills Mfg. Co. v. Whitehurst*, 60 Fed. 81 (suit for infringement of patent); *Ritchie v. Sayers*, 100 Fed. 520; *Williamson v. Monroe*, 101 Fed. 322; *Ide v. Trorlicht, Duncker & Renard Carpet Co.*, 115 Fed. 137, 148; *Brown v. Arnold (C. C. A.)*, 131 Fed. 723; *Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley*, 164 Fed. 963, 91 C. C. A. 91; *West-erlund v. Black Bear Mining Co.*, 203 Fed. 599, 121 C. C. A. 627; *Wilson v. Colorado Mining Co.*, 227 Fed. 721, 142 C. C. A. 245; *Davis v. Williams*, 121 Ala. 542, 25 South. 704; *First Nat. Bank v. Nelson*, 106 Ala. 535, 18 South. 154; *Meigs v. Pinkham*, 159 Cal. 104, 112 Pac. 883; *Pierce v. Middle Georgia Land & Lumber Co.*, 131 Ga. 99, 61 S. E. 1114; *Gordon v. Johnson*, 186 Ill. 18, 57 N. E. 790; *Ross v. Payson*, 160 Ill. 358, 43 N. E. 399; *Hinds v. Surbeck*, 260 Ill. 606, 103 N. E. 599 (partition); *Moore v. Dick (Mass.)*, 72 N. E. 967; *Shevlin v. Shevlin*, 96 Minn. 398, 105 N. W. 257; *Oliver v. Lansing*, 48 Neb. 338, 67 N. W. 195; *Michigan Trust Co. v. City of Red Cloud (Neb.)*, 92 N. W. 900; *Condit v. Bigalow*, 64 N. J. Eq. 504, 54 Atl. 160; *Knowles v. Knowles*, 33 R. I. 491, 82 Atl. 257; *Renshaw v. First Nat. Bank (Tenn. Ch. App.)*, 63 S. W. 194; *Watson v. Texas & P. Ry. Co. (Tex. Civ. App.)*, 73 S. W. 830; *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571.

will determine the extraordinary case in accordance with the equities which condition it. . . . When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches; and, when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case."<sup>60</sup> It should be noticed that the courts of the

<sup>60</sup> The text is cited to this effect in *Page Belting Co. v. Prince*, 77 N. H. 309, 91 Atl. 961; in *Ruckman v. Cox*, 63 W. Va. 74, 59 S. E. 760. Sanborn, Cir. J., continues: "The cases of *Wagner v. Baird*, 7 How. 234, 12 L. Ed. 681; *Godden v. Kimmell*, 99 U. S. 201, 25 L. Ed. 431; *Wood v. Carpenter*, 101 U. S. 135, 139, 25 L. Ed. 807, and *Rugan v. Sabin*, 10 U. S. App. 519, 534, 3 C. C. A. 578, 582, 53 Fed. 415, 420, belong to the class of cases in which the doctrine of laches was applied after the statute of limitations had run. The cases of *Billings v. Smelting Co.*, 10 U. S. App. 1, 62, 2 C. C. A. 252, 262, 263, 51 Fed. 338, 349, and *Bogan v. Mortgage Co.*, 27 U. S. App. 347, 357, 11 C. C. A. 128, 135, 63 Fed. 192, 199, belong to the class of cases in which the court refused to apply the doctrine of laches within the time fixed by the statute." See, also, *Boynton v. Haggart*, 120 Fed. 819; *Kansas City Southern R. Co. v. Stevenson*, 135 Fed. 553. In further support of the text, as to the burden of proof when the statutory period has or has not elapsed, see *Brun v. Mann*, 151 Fed. 145, 12 L. R. A. (N. S.) 154, 80 C. C. A. 513; *Wilson v. Plutus Mining Co.*, 174 Fed. 317, 98 C. C. A. 189 (extraordinary situation and excuse for delay shown); *Bower v. Stein*, 177 Fed. 673, 101 C. C. A. 299 (under special circumstances, delay much shorter than statutory period constituting laches); *Westerlund v. Black Bear Mining Co.*, 203 Fed. 599, 121 C. C. A. 627; *Pooler v. Hyne*, 213 Fed. 154, 129 C. C. A. 506 (relief may be refused though much shorter time has run); *Sullivan v. Ellis*, 219 Fed. 694, 135 C. C. A. 366; *Fowler v. Alabama Iron & Steel Co.*, 164 Ala. 414, 51 South. 393; *Woodlawn Realty & Development Co. v. Hawkins*, 186 Ala. 234, 65 South. 183; *Costello v. Muheim*, 9 Ariz. 422, 84 Pac. 906; *Ferrell v. Lord*, 43 Wash. 667, 86 Pac. 1060.

The effect of statutes which are by their very terms applicable to suits in equity is well described in a very recent judgment of the



United States are not bound, by way of analogy or otherwise, by the statutes of limitations of the several states, in cases where to apply such statutes would be to im-

supreme court of the United States: *Patterson v. Hewitt*, 195 U. S. 309, 49 L. Ed. 214, 25 Sup. Ct. 35, by Mr. Justice Brown: "When the statute is in terms applicable to suits in equity, as well as at law, it is ordinarily construed, in cases demanding equitable relief, as fixing a time beyond which the suit will not, under any circumstances, lie; but not as precluding the defense of laches, provided there has been unreasonable delay within the time limited by the statute. In an action at law, courts are bound by the literalism of the statute; but in equity the question of unreasonable delay within the statutory limitation is still open: *Alsop v. Riker*, 155 U. S. 448-460, 39 L. Ed. 218-222, 15 Sup. Ct. 162. . . . If this were not so, it would seem to follow that in the code states, where there is but one form of action applicable both to proceedings of a legal and equitable nature, a statute of limitations, general in its terms, would apply to suits of both descriptions, and the doctrine of laches become practically obsolete. This, however, is far from being the case, as questions of laches are as often arising and being discussed in the code states as in the others. In a few cases where the statute of limitations is made applicable in terms to suits in equity, it has been construed as allowing a suit to be begun at any time within the period limited by the statute, notwithstanding the intermediate laches of the complainant, although in those cases it will usually be found that the language of the statute is explicit and imperative: *Hill v. Nash*, 73 Miss. 849, 19 South. 709; *Washington v. Soria*, 73 Miss. 665, 55 Am. St. Rep. 555, 19 South. 485. But the weight of authority is the other way, and we consider the better rule to be that, even if the statute of limitations be made applicable, in general terms, to suits in equity, and not to any particular defense, the defendant may avail himself of the laches of the complainant, notwithstanding the time fixed by the statute has not expired. This has been expressly held in Alabama (*Scruggs v. Decatur Mineral & Land Co.*, 86 Ala. 173, 5 South. 440), in Missouri (*Bliss v. Prichard*, 67 Mo. 181; *Kline v. Vogel*, 90 Mo. 239, 1 S. W. 733, 2 S. W. 408), and in New York (*Calhoun v. Millard*, 121 N. Y. 69, 8 L. R. A. 248, 24 N. E. 27). In the last case the question is discussed at considerable length by Chief Judge Andrews, and the conclusion reached that 'the period of limitations of equitable actions fixed by the statute is not, where a purely equitable remedy is invoked, equivalent to a legislative direction that no period short of that time shall be a bar to relief in

pair or abridge the equity jurisdiction of such courts;<sup>61</sup> as for example, statutes which alter the settled rule of equity that a cause of action for fraud accrues at the time when the fraud was or should have been discovered.<sup>62</sup>

§ 1442. (§ 21.) **General Doctrine: Laches is Prejudicial Delay.**—The true doctrine concerning laches has never been more concisely and accurately stated than in

any case, or precludes the court from denying relief in accordance with equitable principles for unreasonable delay, although the full period of ten years has not elapsed since the cause of action accrued.' ”

For recent cases to the effect that laches for a period short of the statutory period may bar relief, see *Clark v. Chase*, 101 Me. 270, 64 Atl. 493; *American Mining Co. v. Basin & B. S. M. Co.*, 39 Mont. 476, 24 L. R. A. (N. S.) 305, 104 Pac. 525. On the other hand, that mere delay, when the statutory period has not elapsed, does not amount to laches, see *Treadwell v. Clark*, 190 N. Y. 51, 82 N. E. 505; *Cox v. Stokes*, 156 N. Y. 491, 511, 51 N. E. 316; *Cordiner v. Finch Inv. Co.*, 54 Wash. 574, 103 Pac. 829; *Petticrew v. Green-shields*, 61 Wash. 614, 112 Pac. 749; *Schuster v. Milwaukee Electric R'y & Light Co.*, 142 Wis. 578, 126 N. W. 26.

<sup>61</sup> *Kirby v. Lake Shore & M. S. R. Co.*, 120 U. S. 137, 7 Sup. Ct. 430, 30 L. Ed. 571; *Stevens v. Grand Central Min. Co. (C. C. A.)*, 133 Fed. 28; *Johnston v. Roe*, 1 McCrary, 165, 1 Fed. 692, 695; *Tice v. School District*, 5 McCrary, 362, 17 Fed. 283, 285. But “although the ordinary chancery jurisdiction of the courts of the United States cannot be abridged by state statutes, they recognize those of the state in which the court is sitting, limiting the time for bringing suits, and adopt them, if they do not act in obedience to them. Accordingly, they will adjudge, in cases over which there is a concurrent jurisdiction by courts of law and equity, that lapse of time to be a bar in equity which would have constituted a bar if the action had been at law”: Per Wallace, Cir. J., in *Miles v. Vivian*, 79 Fed. 848, 25 C. C. A. 208; and see *Pulliam v. Pulliam*, 10 Fed. 30; *Percy v. Cockrill*, 53 Fed. 872, 4 C. C. A. 73, 10 U. S. App. 574; *Hale v. Coffin*, 120 Fed. 470; *Higgins Oil & Fuel Co. v. Snow*, 113 Fed. 433, 51 C. C. A. 267.

<sup>62</sup> *Kirby v. Lake Shore & M. S. R'y Co.*, 120 U. S. 137, 30 L. Ed. 571, 7 Sup. Ct. 430.

the following language of an able living judge: "Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but when a court sees negligence on one side and injury therefrom on the other it is a ground for denial of relief."<sup>63</sup> The following definition has probably been

63 *Chase v. Chase*, 20 R. I. 202, 37 Atl. 804, by Stinness, C. J. The above passage of the text is quoted, with approval, in *Hauser v. Foley & Co.*, 190 Ala. 437, 67 South. 252; in *Cunningham v. Costello*, 16 Ariz. 479, 147 Pac. 714; in *Tatum v. Arkansas Lumber Co.*, 103 Ark. 251, 146 S. W. 135; in *Casey v. Trout*, 114 Ark. 359, 170 S. W. 75; in *Nobles v. Poe*, 121 Ark. 613, 182 S. W. 270; in *Leathers v. Stewart*, 108 Me. 96, *Ann. Cas.* 1913B, 366, 79 Atl. 16; in *Comans v. Tapley*, 101 Miss. 203, *Ann. Cas.* 1914B, 307, 57 South. 567; in *Shelton v. Horrell*, 232 Mo. 358, 134 S. W. 988, 137 S. W. 264; and in *Ruckman v. Cox*, 63 W. Va. 74, 59 S. E. 760; and cited in *De Graffenried v. Breitling*, 192 Ala. 254, 68 South. 265; *Woody v. Matthews*, 194 Ala. 390, 69 South. 607; *Dennis v. Harris* (Iowa), 153 N. W. 343; *Bennett v. Piatt*, 85 N. J. Eq. 436, 96 Atl. 482; *Hatch v. Hatch*, 46 Utah, 116, 148 Pac. 1096; *Wilder's Ex'r v. Wilder*, 82 Vt. 123, 72 Atl. 203. See, also, *Abraham v. Ordway*, 158 U. S. 416, 39 L. Ed. 1036, 15 Sup. Ct. 894; *Willard v. Wood*, 164 U. S. 502, 524, 41 L. Ed. 531, 17 Sup. Ct. 176; *Penn Mutual Life Ins. Co. v. City of Austin*, 168 U. S. 685, 42 L. Ed. 627, 18 Sup. Ct. 223 (no injunction against enforcement of ordinance for municipal waterworks, where there has been a delay of five years, during which bonds had been issued and a large part of the proceeds expended); *O'Brien v. Wheelock*, 184 U. S. 450, 46 L. Ed. 636, 22 Sup. Ct. 354, affirming 95 Fed. 883, 37 C. C. A. 309 ("it is not a mere matter of lapse of time, but of change of situation during neglectful repose,

more often relied on by recent cases than any other proceeding from an English judge: "The doctrine of laches in courts of equity is not an arbitrary or technical

rendering it inequitable to afford relief"); *McIntire v. Pryor*, 173 U. S. 38, 43 L. Ed. 606, 19 Sup. Ct. 352 (affirming 10 App. D. C. 432); *Hammond v. Hopkins*, 143 U. S. 224, 250, 36 L. Ed. 134, 12 Sup. Ct. 418; *Wilson v. Smith*, 117 Fed. 707; *State Trust Co. v. Kansas City P. & G. R. Co.*, 120 Fed. 398; *London & S. F. Bank, Ltd., v. Dexter Horton & Co.*, 126 Fed. 593; *Jonathan Mills Mfg. Co. v. Whitehurst*, 60 Fed. 81; *Lasher v. McCreery*, 66 Fed. 834; *O'Brien v. Wheelock*, 78 Fed. 673; *Bartlett v. Ambrose*, 78 Fed. 839, 24 C. C. A. 397; *Wheeling Bridge & Terminal R'y Co. v. Reymann Brewing Co.*, 90 Fed. 189, 32 C. C. A. 571 (delay of seven years not laches when no change in condition); *Hanchett v. Blair*, 100 Fed. 817, 41 C. C. A. 76; *Williamson v. Monroe*, 101 Fed. 322; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. 357 (mere delay of six years no bar to injunction against unfair competition); *Shea v. Nilima (C. C. A.)*, 133 Fed. 209 (delay of two years in suing to recover interest in mining claim, no laches when defendants have not been prejudiced); *Steinbeck v. Bon Homme Min. Co.*, 152 Fed. 333, 81 C. C. A. 441; *Brissell v. Knapp*, 155 Fed. 809 (increase in value not due to defendant's act, no bar to relief); *Cunningham v. Pettigrew*, 169 Fed. 335, 94 C. C. A. 457; *Layton Pure Food Co. v. Church & Dwight Co.*, 182 Fed. 35, 32 L. R. A. (N. S.) 274, 104 C. C. A. 475; *Bachrach v. Jewish Foster Home*, 185 Fed. 847; *Drees v. Waldron*, 212 Fed. 93, 128 C. C. A. 609; *Bogert v. Southern Pac. Co.*, 215 Fed. 218; *Schwartz v. Loftus*, 216 Fed. 320, 132 C. C. A. 464; *In re International Mineral Co.*, 222 Fed. 415; *Wilson v. Colorado Mining Co.*, 227 Fed. 721, 142 C. C. A. 245; *Mathieson v. Craven*, 228 Fed. 345; *Pickens v. Merriam*, 242 Fed. 363, 155 C. C. A. 139; *Bogert v. Southern Pac. Co.*, 244 Fed. 61, 156 C. C. A. 489; *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81, 30 South. 34; *Pratt Land & Imp. Co. v. McClain*, 135 Ala. 452, 93 Am. St. Rep. 35, 33 South. 185; *Gurley v. Robertson*, 178 Ala. 326, 59 South. 643 (bill to enforce deficiency judgment brought within statutory period, and no change of position); *Gayle v. Pennington*, 185 Ala. 53, 64 South. 572; *Woodlawn Realty & Development Co. v. Hawkins*, 186 Ala. 234, 65 South. 183 (delay of thirty-three years, but no change of position or injury to defendants); *Keeble v. Jones*, 187 Ala. 207, 65 South. 384 (delay for twenty years in action for accounting and to redeem a pledge, but no change of position); *Waddail v. Vassar*, 196 Ala. 184, 72 South. 14; *Duke v. State*, 56 Ark. 485, 20 S. W. 600 (foreclosure of



doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent

mortgage made in 1837 allowed in 1876, when no prejudice); *Bryan v. Hobbs* (Ark.), 83 S. W. 340; *Rozell v. Chicago Mill & Lumber Co.*, 76 Ark. 525, 89 S. W. 469; *Updegraff v. Marked Tree Lumber Co.*, 83 Ark. 154, 103 S. W. 606; *Hovey v. Bradbury*, 112 Cal. 620, 44 Pac. 1077; *Ex-Mission Land & Water Co. v. Flash*, 97 Cal. 610, 32 Pac. 600; *Cook v. Ceas*, 147 Cal. 614, 82 Pac. 370; *Cohen v. Cohen*, 150 Cal. 99, 11 **Ann. Cas.** 520, 88 Pac. 267; *Union Ice Co. v. Doyle*, 6 Cal. App. 284, 92 Pac. 112; *Chamberlain v. Chamberlain*, 7 Cal. App. 634, 95 Pac. 659; *Verdugo Canyon Water Co. v. Verdugo*, 152 Cal. 655, 93 Pac. 1021; *Finnell v. Finnell*, 156 Cal. 589, 134 **Am. St. Rep.** 143, 105 Pac. 740; *Marsh v. Lott*, 156 Cal. 643, 105 Pac. 968; *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34; *Meigs v. Pinkham*, 159 Cal. 104, 112 Pac. 883; *Taber v. Bailey*, 22 Cal. App. 617, 135 Pac. 975; *Helm v. Brewster*, 42 Colo. 25, 93 Pac. 1101; *City of Hartford v. Mechanics' Savings Bank*, 79 Conn. 38, 63 **Atl.** 658; *Bergen v. Johnson*, 21 Idaho, 619, 123 Pac. 484; *Venner v. Chicago City R'y Co.*, 236 Ill. 349, 86 N. E. 266; *Compton v. Johnson*, 240 Ill. 621, 88 N. E. 991; *Peabody v. Burri*, 255 Ill. 592, 99 N. E. 690; *Earl v. Van Natta*, 29 Ind. App. 532, 64 N. E. 901; *Brake v. Payne*, 137 Ind. 479, 37 N. E. 140; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259 (delay of eleven months in asking reformation is not such laches as will bar relief when there is no change in the relative positions of the parties); *Curtis v. Armagast*, 158 Iowa, 507, 138 N. W. 873; *In re Mahin's Estate*, 161 Iowa, 459, 143 N. W. 420; *Dunbar v. Green* (Kan.), 72 Pac. 243 ("the mere extent of the delay is one item to be considered. Among others are any change of conditions, the intervention of the rights of third parties, the likelihood of other interests being affected by the delay, the presence of fraud and its character, the diligence required to discover it, and so on"); *Detweiler v. Swartley*, 74 Kan. 855, 86 Pac. 141; *Basye v. Paola Refining Co.*, 79 Kan. 755, 131 **Am. St. Rep.** 746, 25 **L. R. A. (N. S.)** 1302, 101 Pac. 658 (delay can be compensated by payment); *Harris v. Defenbaugh*, 82 Kan. 765, 109 Pac. 681; *Osineup v. Henthorn*, 89 Kan. 58, **Ann. Cas.** 1914C, 1262, 46 **L. R. A. (N. S.)** 174, 130 Pac. 652; *Spalding v. St. Joseph's Industrial School*, 107 Ky. 382, 54 S. W. 200 (delay of twenty-five years without knowledge of facts not laches when relative positions of parties not changed); *Hughes v. Wallace* (Ky.), 118 S. W. 324; *Houck v. Houck*, 112 Md. 122, 76 **Atl.** 581; *Cooke v. Barrett*, 155 Mass. 413, 29 N. E. 625 (delay of four months

to a waiver of it, or where, by his conduct and neglect, he has, perhaps, not waiving that remedy, yet put the other party in a situation in which it would not be rea-

after distribution is fatal to objection to composition with creditors, because of change of position of parties); *Manning v. Mulrey*, 192 Mass. 547, 78 N. E. 551; *Hawkes v. Lackey*, 207 Mass. 424, 93 N. E. 828; *Taft v. Henry*, 219 Mass. 78, 106 N. E. 553; *Lufkin v. Cutting*, 225 Mass. 599, 114 N. E. 822; *Ripley v. Seligman*, 88 Mich. 177, 50 N. W. 143; *Washington Lodge v. Frelinghuysen* (Mich.), 101 N. W. 569 (delay of twelve years, during which rights had accrued); *Quinn v. Tully*, 174 Mich. 30, 140 N. W. 492; *Walker v. Schultz*, 175 Mich. 280, 141 N. W. 543 (delay of thirteen years to avoid foreclosure sale not laches); *Parkinson v. Parkinson*, 177 Mich. 336, 143 N. W. 4; *Johnson v. Cook*, 179 Mich. 117, 146 N. W. 343; *Humiston, Keeling & Co. v. Yore*, 181 Mich. 629, 148 N. W. 266; *Lloyd v. Simons*, 97 Minn. 315, 105 N. W. 902; *Haataja v. Saarenpaa*, 118 Minn. 255, 136 N. W. 871; *Lake v. Perry*, 95 Miss. 550, 49 South. 569; *Sherwood v. Baker*, 105 Mo. 472, 24 **Am. St. Rep.** 399, 16 S. W. 938; *Dunklin County v. Choteau*, 120 Mo. 577, 25 S. W. 553; *Lindell Real Estate Co. v. Lindell*, 142 Mo. 61, 43 S. W. 368 (delay of eleven years not laches when no change in condition); *Hudson v. Cahoon*, 193 Mo. 547, 91 S. W. 72; *Blackford v. Heman Const. Co.*, 132 Mo. App. 157, 112 S. W. 287 (nuisance); *Walther v. Null*, 233 Mo. 104, 134 S. W. 993; *Collier v. Gault*, 234 Mo. 457, 137 S. W. 884; *Troll v. City of St. Louis*, 257 Mo. 626, 168 S. W. 167; *Connecticut Mutual Life Ins. Co. v. Carson*, 186 Mo. App. 221, 172 S. W. 69; *O'Day v. Annex Realty Co. (Mo.)*, 191 S. W. 41; *Wolf v. Great Falls etc. Co.*, 15 Mont. 49, 38 Pac. 115; *Mantle v. Speculator Min. Co.*, 27 Mont. 473, 71 Pac. 665; *Riley v. Blacker*, 51 Mont. 364, 152 Pac. 758; *Fitzgerald v. Fitzgerald & Mallory Const. Co.*, 44 Neb. 463, 62 N. W. 899; *Hawley v. Von Lanken*, 75 Neb. 597, 106 N. W. 456; *Harrison v. Rice*, 78 Neb. 654, 111 N. W. 594; *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 111 **Am. St. Rep.** 637, 3 **L. R. A. (N. S.)** 551, 62 Atl. 971; *Daggers v. Van Dyck*, 37 N. J. Eq. 130; *Tynan v. Warren*, 53 N. J. Eq. 313, 31 Atl. 596; *Lundy v. Seymour*, 55 N. J. Eq. 1, 35 Atl. 893 (mere delay of fourteen years is not laches); *Law v. Smith* (N. J. Eq.), 59 Atl. 327 (four years; no change in position); *Day v. Devitt*, 79 N. J. Eq. 342, 81 Atl. 368; *Retsch v. Renehan*, 16 N. M. 541, 120 Pac. 897; *Spencer v. Seaboard Air Line R'y Co. (N. C.)*, 49 S. E. 96; *Wilson v. Wilson*, 41 Or. 459, 69 Pac. 923; *Gorham v. Sayles*, 23 R. I. 449, 50 Atl. 848; *Stephens*

sonable to place him if the remedy were afterward to be asserted in either of these cases, lapse of time is most material.”<sup>64</sup> The language of an able western court in a very recent case describes the general doctrine with notable accuracy: “Several conditions may combine to render a claim or demand stale in equity. If by the laches and delay of the complainant it has become doubtful whether adverse parties can command the evi-

v. Dubois, 31 R. I. 138, 140 **Am. St. Rep.** 741, 76 Atl. 656; Brock v. Kirkpatrick, 72 S. C. 491, 52 S. E. 592; Edwards v. Johnson, 90 S. C. 90, 72 S. E. 638; Shearer v. Hutterische Bruder Gemeinde, 28 S. D. 509, 134 N. W. 63; Parker v. Bethel Hotel Co., 96 Tenn. 252, 31 **L. R. A.** 706, 34 S. W. 209; Renshaw v. First Nat. Bank (Tenn. Ch. App.), 63 S. W. 194; Robinson v. Kampmann, 5 Tex. Civ. App. 605, 24 S. W. 529; Hamilton v. Dooly, 15 Utah, 280, 49 Pac. 769; Royce v. Carpenter, 80 Vt. 37, 66 Atl. 888 (nuisance); Steinman v. Jessee, 108 Va. 567, 62 S. E. 275; Conaway v. Co-operative Home Builders, 65 Wash. 39, 117 Pac. 716; Tidball’s Ex’rs v. Shenandoah Nat. Bank (W. Va.), 42 S. E. 867 (good statement); Snyder v. Charleston & S. Bridge Co., 65 W. Va. 1, 131 **Am. St. Rep.** 947, 63 S. E. 616; Depue v. Miller, 65 W. Va. 120, 23 **L. R. A. (N. S.)** 775, 64 S. E. 740; White v. Bailey, 65 W. Va. 573, 23 **L. R. A. (N. S.)** 232, 64 S. E. 1019; O’Neal v. Moore, 78 W. Va. 296, 88 S. E. 1044; Ludington v. Patton, 111 Wis. 208, 86 N. W. 571; Northern Trust Co. v. Snyder, 113 Wis. 516, 90 **Am. St. Rep.** 867, 89 N. W. 460 (mere delay not sufficient to bar taxpayers’ suit against municipal corporation); Schuster v. Milwaukee Electric R’y & Light Co., 142 Wis. 578, 126 N. W. 26; Gimbel Bros. v. Tolman, 161 Wis. 382, 154 N. W. 628; Farr v. Hauenstein (N. J. Eq.), 61 Atl. 147; Wollaston v. Tribe, **L. R.** 9 Eq. Cas. 44, per Romily, M. R.

<sup>64</sup> *Lindsay Petroleum Co. v. Hurd*, **L. R.** 5 P. C. 221, per Lord Selborne, who continues: “But in every case, if an argument against relief which otherwise would be just is founded upon mere delay, that delay, of course, not amounting to a bar by any statute of limitations, the validity of that defense must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might effect either party and cause a balance of justice or injustice in taking one course or the other.” The text above is quoted in *Cunningham v. Costello*, 16 Ariz. 479, 147 Pac. 714. See *Ryason v. Dunten* (Ind.), 73 N. E. 74.

dence necessary to a fair presentation of the case on their part, or if it appears that they have been deprived of any such advantages they might have had if the claim had been seasonably insisted upon, or before it became antiquated, or if they be subjected to any hardship that might have been avoided by reasonably prompt proceedings, a court of equity will not interfere to give relief, but will remain passive; and this although the full time may not have elapsed which would be required to bar a remedy at law. If, however, upon the other hand, it clearly appears that lapse of time has not in fact changed the conditions and relative positions of the parties, and that they are not materially impaired, and there are peculiar circumstances entitled to consideration as excusing the delay, the court will not deny the appropriate relief, although a strict and unqualified application of the rule of limitations would seem to require it. Every case is governed chiefly by its own circumstances.”<sup>65</sup> Dicta to substantially the same effect from nearly all the American courts may be readily accumulated, all tending to show that the doctrine of laches is, for the most part, merely an application of the broader maxims of equity, “He who seeks equity must do equity,” and “He who comes into equity must come with clean hands.” It exacts of the plaintiff no more than fair dealing with his adversary. It is in no way dependent on those general considerations of public utility, and the “repose of society,” which are, in legal theory, the legislative motive for statutes of limitations.

§ 1443. (§ 22.) **Illustrations: Improvements or Sales by Defendant—Loss or Obscuring of Defendant’s Evidence.**—“A delay of a party holding an equitable right

<sup>65</sup> *Wilson v. Wilson*, 41 Or. 459, 69 Pac. 923, per Woolverton, J. The above passage of the text is quoted in *Cunningham v. Costello*, 16 Ariz. 479, 147 Pac. 714; and in *Snyder v. Charleston & S. Bridge Co.*, 65 W. Va. 1, 131 Am. St. Rep. 947, 63 S. E. 616.



to property which has permitted another, who holds the legal title, to expend large sums of money in the improvement of the property, and thereby greatly enhance it in value, which he would not have done had the right been properly asserted, has usually been considered such laches as will preclude the party guilty of it from relief. If the party holding the equitable right would avail himself of it, he must assert it in a reasonable time. Equity will not permit him to stand by and permit the other party, who holds the legal title, to improve and develop the property until it has become valuable, or greatly increased in value, and then assert his right."<sup>66</sup> Again, when the property in dispute has been

<sup>66</sup> *Gibson v. Herriott*, 55 Ark. 85, 29 *Am. St. Rep.* 17, 17 S. W. 589. See, also, *Gildersleeve v. New Mexico Min. Co.*, 161 U. S. 573, 582, 40 *L. Ed.* 812, 16 Sup. Ct. 663 (delay of thirty years); *O'Brien v. Wheelock*, 184 U. S. 450, 46 *L. Ed.* 636, 22 Sup. Ct. 354 (delay of nine years); *Halstead v. Grinnan*, 152 U. S. 412, 38 *L. Ed.* 495, 14 Sup. Ct. 641; *Schlawig v. Purslow*, 59 Fed. 848, 8 C. C. A. 315, 19 U. S. App. 501 (delay of ten years); *Wetzel v. Minnesota R'y Transfer Co.*, 65 Fed. 23, 12 C. C. A. 490, 27 U. S. App. 594 (delay of forty-two years); *Steinbeck v. Bon Homme Min. Co.*, 152 Fed. 333, 81 C. C. A. 441 (speculative property, viz., an undeveloped mine); *Iowa v. Carr*, 191 Fed. 257, 112 C. C. A. 477 (delay of twenty-seven years); *Duggan v. Wetmore*, 221 Fed. 916, 137 C. C. A. 486 (twenty-nine years); *Hubbert v. Fagan*, 99 Ark. 480, 138 S. W. 1001 (cancellation; four years' delay); *Davis v. Harrell*, 101 Ark. 230, 142 S. W. 156 (thirteen years); *Nobles v. Poe*, 121 Ark. 613, 182 S. W. 270 (forty-three years); *Bennett v. Bird*, 139 Ga. 25, 76 S. E. 568 (delay of twenty years by ward to vacate settlement with guardian); *Bradley v. Johnson*, 11 Idaho, 689, 83 Pac. 927 (mining property, twelve years' delay); *Mahaffy v. Faris*, 144 Iowa, 220, 24 *L. R. A. (N. S.)* 840, 122 N. W. 934 (suit to redeem, against mortgagee in possession); *Dickman v. Dryden*, 90 Minn. 244, 95 N. W. 1120; *Webb v. Borden*, 145 N. C. 188, 58 S. E. 1083 (twenty-eight years); *Loomis v. Rosenthal*, 34 Or. 585, 57 Pac. 55; *Chezum v. McBride*, 21 Wash. 558, 58 Pac. 1067; *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 57 *Am. St. Rep.* 899, 66 N. W. 518. Compare *McCarter v. Lehigh Valley R. Co.*, 78 N. J. Eq. 346, 79 Atl. 93 (no laches, where improvements would have been made in any case).

sold by the party at fault to innocent parties, a delay by the complainant may amount to laches.<sup>67</sup>

Where important evidence in behalf of the defendant has been lost during the delay of the complainant, he will generally be barred from relief. The loss may result from the death or incapacity of some of the witnesses. Again, the delay may be so long that under the circumstances many of the important facts have become obscured. To allow a complainant relief in such cases would frequently risk a great hardship to innocent parties. Consequently, the courts decline to interfere.<sup>68</sup>

67 *Wetzel v. Minnesota R'y Transfer Co.*, 65 Fed. 23, 12 C. C. A. 490, 27 U. S. App. 594; *Nantahala Marble & Tale Co. v. Thomas*, 76 Fed. 59 (delay of twelve years); *Helfenstein v. Reed*, 62 Fed. 214, 10 C. C. A. 327, 27 U. S. App. 103 (delay of twenty-five years); *St. Paul, S. & T. F. R. Co. v. Sage*, 49 Fed. 315, 1 C. C. A. 256, 4 U. S. App. 160 (reversing 32 Fed. 821, 44 Fed. 817); *Davis v. Harrell*, 101 Ark. 230, 142 S. W. 156 (thirteen years); *American Mortgage Co. v. Williams*, 103 Ark. 484, 145 S. W. 234 (five years); *Bateman v. Butler*, 19 Colo. 547, 36 Pac. 548; *Converse v. Brown*, 200 Ill. 166, 65 N. E. 644; *Dunbar v. Green*, 66 Kan. 557, 72 Pac. 243 (delay of twenty-one years); *Snow v. Mfg. Co.*, 158 Mass. 325, 33 N. E. 588 (delay of one year in suing to set aside sale of corporate property to directors, during which time property had been sold to others); *Berkey v. St. Paul Nat. Bank*, 54 Minn. 448, 56 N. W. 53 (plaintiff barred by delay of seven years although purchaser had constructive notice); *North v. Platte County*, 29 Neb. 447, 26 Am. St. Rep. 395, 45 N. W. 692 (delay of nine years); *Commonwealth v. Reading Traction Co.*, 204 Pa. 151, 53 Atl. 755.

*Intervening rights of third persons, in general:* See, as illustrations, *McNeil v. McNeil*, 170 Fed. 289, 95 C. C. A. 485 (suit to avoid decree of divorce; eighteen months' delay and remarriage of defendant); *Jackson v. Bechtold Printing & Book Mfg. Co.*, 86 Ark. 591, 20 L. R. A. (N. S.) 454, 112 S. W. 161; *Venner v. Chicago City R'y Co.*, 236 Ill. 349, 86 N. E. 266 (delay of six months to set aside acceptance of ordinance, fatal, where company has issued ten million dollars of bonds).

68 In the following cases, the death of witnesses, coupled with delay by complainant, was held sufficient to bar relief: *Foster v. Mansfield etc. Co.*, 146 U. S. 88, 36 L. Ed. 899, 13 Sup. Ct. 28; *Hinchman*

v. Kelley, 54 Fed. 63, 4 C. C. A. 189, 7 U. S. App. 481; Eiffert v. Craps, 58 Fed. 470, 7 C. C. A. 319, 8 U. S. App. 436 (delay of forty years); Socrates Quicksilver Mines v. Carr Realty Co., 64 C. C. A. 539, 130 Fed. 293 (delay of twenty-eight years); Naylor v. Foreman-Blades Lumber Co., 230 Fed. 658; Rives v. Morris, 108 Ala. 527, 18 South. 743; Street v. Henry, 124 Ala. 153, 27 South. 411 (delay of twenty-six years); Salmon v. Wynn, 153 Ala. 538, 15 Ann. Cas. 478, 45 South. 133; Ryan v. Woodin (Idaho), 75 Pac. 261 (delay of five years); Thomas v. Van Meter, 164 Ill. 304, 45 N. E. 405 (delay of sixteen years); Moore v. Taylor, 251 Ill. 468, 96 N. E. 229 (thirty years); Woodward v. Barr, 128 Iowa, 727, 105 N. W. 207 (twenty years); McBride v. Caldwell, 142 Iowa, 228, 119 N. W. 741 (forty years); Gray v. Bloom, 151 Iowa, 566, 132 N. W. 42 (fifteen years); New York Life Ins. Co. v. Weaver's Adm'r, 24 Ky. Law Rep. 1086, 70 S. W. 628; Clark v. Chase, 101 Me. 270, 64 Atl. 493 (nine years); Smith v. Emery, 106 Me. 258, 76 Atl. 686 (ten years); Ripple v. Kuehne (Md.), 60 Atl. 464 (delay of eight years after fraud, and almost a year after death of party charged with fraud, and of attorney who transacted the business); Hadaway v. Hynson, 89 Md. 305, 43 Atl. 806; Preston v. Horwitz, 85 Md. 164, 36 Atl. 710; Eames v. Manley, 121 Mich. 300, 80 N. W. 15; Sheldon v. Miller, 151 Mich. 283, 114 N. W. 1015 (twenty-eight years); Baker v. Cunningham, 162 Mo. 134, 85 Am. St. Rep. 490, 62 S. W. 445; Ryan v. Gorman (Mo.), 183 S. W. 594 (thirty-seven years); Riley v. Blacker, 51 Mont. 364, 152 Pac. 758; United Boxboard & Paper Co. v. McEwan Bros. Co. (N. J. Eq.), 76 Atl. 550; McKechnie v. McKechnie, 39 N. Y. Supp. 402, 3 App. Div. 91; Webb v. Borden, 145 N. C. 188, 58 S. E. 1083 (twenty-eight years); Taylor v. Slater, 21 R. I. 104, 41 Atl. 1001; Garland's Adm'r v. Garland's Adm'r (Va.), 24 S. E. 505; Snipes v. Kelleher, 31 Wash. 386, 72 Pac. 67. See, however, Ball v. Ball, 20 R. I. 520, 40 Atl. 234; Young v. Young, 51 N. J. Eq. 491, 27 Atl. 627 (death of witnesses not sufficient when it causes no serious disadvantage); Holsberry v. Harris (W. Va.), 49 S. E. 404.

In the following cases witnesses became incapacitated during the time of complainant's delay, and relief was denied; Whitney v. Fox, 166 U. S. 637, 41 L. Ed. 1145, 17 Sup. Ct. 713 (defendant became mentally impaired); Dispeau v. First Nat. Bank, 24 R. I. 508, 53 Atl. 868.

Illustrations of refusal of relief on account of the evidence becoming obscure are found in the following cases: In Doane v. Preston, 183 Mass. 569, 67 N. E. 867, a bill founded upon neglect of corporation officers to act upon an offer to convey the right to manufacture patented machines was filed after a delay of six years. Re-

**§ 1444. (§ 23.) Defense of Laches Favored by United States Courts—Increase in Value of the Property**

lief was refused because it would require an investigation of an alleged offer made six years before suit, as well as conduct and motives of parties, and of the state and condition at that time of a branch of manufacture in which new inventions play an important part. In *Lutjen v. Lutjen* (N. J. Eq.), 53 Atl. 625, the court says: "Lapse of time alone is deemed by the authorities to be a sufficient ground of estoppel in cases like the present, when the court cannot feel confident of its ability to ascertain the truth now, as well as it could when the subject for investigation was recent, and before the memories of those who had knowledge of the material facts have become faded and weakened by time. To constitute estoppel of this description, it is not essential that any actual loss of testimony, through death or otherwise, or means of proof, or changed relations, to the prejudice of the other party, should have occurred. But the estoppel arises because the court cannot, after so great a lapse of time, rely upon the memory of witnesses to reproduce the details that entered into the final execution of the instrument of settlement."

In general, see the following cases, where the questions were considered: *Abraham v. Ordway*, 158 U. S. 416, 39 L. Ed. 1036, 15 Sup. Ct. 894; *Lemoine v. Dunklin County*, 51 Fed. 487, 2 C. C. A. 343, 10 U. S. App. 227 (affirming 46 Fed. 219); *Wood v. Perkins*, 64 Fed. 817; *Jones v. Perkins*, 76 Fed. 82; *Davey v. Dodge*, 213 Fed. 722, 130 C. C. A. 236 (seventeen years); *Davis v. Harrell*, 101 Ark. 230, 142 S. W. 156; *Anderson v. Northrop*, 30 Fla. 612, 12 South. 318; *Hamilton v. Hamilton*, 231 Ill. 128, 83 N. E. 125; *Carlock v. Carlock*, 249 Ill. 330, 94 N. E. 507 (ten years); *Hawley v. Von Lanken*, 75 Neb. 597, 106 N. W. 456; *Ten Broeck v. Jackson*, 71 N. J. Eq. 582, 69 Atl. 488; *Swinley v. Force*, 78 N. J. Eq. 52, 78 Atl. 249; *Cartun v. Myers*, 78 N. J. Eq. 303, 82 Atl. 14; *Soper v. Cisco*, 85 N. J. Eq. 165, 95 Atl. 1016; *Patterson v. Hewitt* (N. M.) 55 L. R. A. 658, 66 Pac. 552; *Baber v. Caples*, 71 Or. 212, Ann. Cas. 1916C, 1025, 138 Pac. 472 (twelve years' delay to set aside gift *causa mortis*); *Evans v. Steele*, 125 Tenn. 483, 145 S. W. 162; *Lockwood v. White*, 65 Vt. 466, 26 Atl. 639; *Nelson v. Triplett*, 99 Va. 421, 39 S. E. 150; *Jameson v. Rixey*, 94 Va. 342, 64 Am. St. Rep. 726, 26 S. E. 861; *Pethel v. McCullough*, 49 W. Va. 520, 39 S. E. 199; *Seymour v. Alkire*, 47 W. Va. 302, 34 S. E. 953.



**Fatal to Plaintiff's Claim.**<sup>69</sup>—This fair degree of unanimity as to the theoretical basis of the doctrine is shaken by a series of decisions by the supreme court of the United States, followed, of course, by recent cases in the lower federal and the territorial courts and to a limited extent by state courts. The decisive feature in these cases has been that the property which is the subject-matter of the litigation has greatly risen in value since the complainant's cause of action accrued. The courts profess to find in the plaintiff's delay under such circumstances an element of injury to the defendant, consisting, apparently, in the latter's uncertainty whether suit will or will not be brought; and base the doctrine of laches not on the unfairness of the plaintiff's conduct, but rather on motives of public policy against the disturbance of possessory titles, however acquired. The "growing favor" with which the defense is recognized by the federal courts has not escaped judicial comment.<sup>70</sup>

This view of the federal courts is well presented in the following excerpts: "In cases of actual fraud, or of want of knowledge of the facts, the law is very tolerant of delay; but where the circumstances of the case negative this idea, and the transaction is sought to be impeached only by reason of the confidential relations

<sup>69</sup> This paragraph of the text is cited, generally, in *Sinclair v. Gunzenhauser*, 179 Ind. 78, 98 N. E. 37, 100 N. E. 376.

<sup>70</sup> As in *Lasher v. McCreery*, 66 Fed. 834, 840 (1895), by Jackson, D. J., speaking from the vantage ground of over thirty years' experience as federal judge. "This is an equitable defense, and is often resorted to when the party who sets it up has no defense in law, and for this reason courts should be very cautious in applying this doctrine to defeat a rightful owner of the land who, from neglect, which may be the result of the want of proper information, refrains from an assertion of his rights until the presumption of abandonment arises from his course of conduct. I am aware of the tendency of the courts of this day to recognize the defense with growing favor as both meritorious and valid."

between the parties, and the *cestuis que trustent* have ample notice of the facts, they ought not to wait and make their action in setting aside the sale dependent upon the question whether it is likely to prove a profitable speculation. As the question whether the sale should be vacated or not depends upon the facts as they existed at the time of the sale, so, in taking proceedings to avoid such sale, the plaintiff should act upon his information as to such facts, and not delay for the purpose of ascertaining whether he is likely to be benefited by a rise in the property, since that would practically amount to throwing upon the purchaser any losses he might sustain by a fall, and denying him the benefit of a possible rise.”<sup>71</sup> “No doctrine is so wholesome,

<sup>71</sup> Hoyt v. Latham, 143 U. S. 553, 36 L. Ed. 259, 12 Sup. Ct. 568. See, in general, as to change in value proving fatal to complainant's case, Oil Co. v. Marbury, 91 U. S. 592, 23 L. Ed. 331; Galliher v. Cadwell, 145 U. S. 368, 36 L. Ed. 738, 12 Sup. Ct. 873 (affirming 3 Wash. T. 501, 18 Pac. 68); McIntire v. Pryor, 173 U. S. 38, 43 L. Ed. 606, 19 Sup. Ct. 352 (affirming 10 App. D. C. 432); Felix v. Patrick, 145 U. S. 317, 36 L. Ed. 719, 12 Sup. Ct. 862 (affirming 36 Fed. 457); Johnston v. Standard Min. Co., 148 U. S. 360, 37 L. Ed. 480, 13 Sup. Ct. 585; Patterson v. Hewitt, 195 U. S. 309, 49 L. Ed. 214, 25 Sup. Ct. 35; Starkweather v. Jenner, 216 U. S. 524, 17 Ann. Cas. 1167, 54 L. Ed. 602, 30 Sup. Ct. 382 (four years); Sagadahoc Land Co. v. Ewing, 65 Fed. 702, 13 C. C. A. 83, 31 U. S. App. 102; Continental Nat. Bank v. Heilman, 81 Fed. 36 (affirmed 86 Fed. 514, 30 C. C. A. 232); Old Colony Trust Co. v. Dubuque L. & T. Co., 89 Fed. 794; Kinne v. Webb, 49 Fed. 512; Lemoine v. Dunklin County, 51 Fed. 487, 2 C. C. A. 343, 10 U. S. App. 227 (affirming 46 Fed. 219); Church of Jesus Christ v. Reorganized Church etc., 70 Fed. 179, 17 C. C. A. 387, 36 U. S. App. 110; Curtis v. Lakin, 94 Fed. 251, 36 C. C. A. 222 (delay of two years only); Arbuckle v. Kelley, 144 Fed. 276 (eighteen years); Jackson v. Jackson, 175 Fed. 710, 99 C. C. A. 286 (three years); Stuart v. Holland, 179 Fed. 969 (twenty-three years' delay in prosecution of suit); Peralta v. State of California, 182 Fed. 755, 105 C. C. A. 491 (thirty years); Childs v. Missouri, K. & T. R'y Co., 221 Fed. 219, 136 C. C. A. 629 (property of speculative character); Meyer v. Johnson, 60 Ark. 50, 28 S. W. 797; Board of Levee Inspectors v. Southwestern Land & T. Co., 112 Ark. 467, 166 S. W.

when wisely administered, as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many."<sup>72</sup> "The equitable rule that one who is negligent shall not have relief, and the barring of proceedings after the lapse of stated periods of time by statutory enactments, are alike based upon public policy, as well as upon considerations affecting only individual rights. It is to the public interest that stability in the title to property should exist, and that all uncertainties and disputes as to the ownership of land should be speedily put at rest. . . . Hence, there lies at the foundation of the

589 (more than twenty years); *Stevenson v. Boyd*, 153 Cal. 630, 19 L. R. A. (N. S.) 525, 96 Pac. 284; *Bateman v. Reitler*, 19 Colo. 547, 36 Pac. 548; *Graff v. Portland Town & Mineral Co.*, 12 Colo. App. 106, 54 Pac. 854; *Hanson v. Gallagher*, 154 Iowa, 192, 134 N. W. 421 (twenty years); increase in value from three to one hundred and sixty dollars an acre); *Skelding v. Dean*, 141 Mich. 143, 104 N. W. 410; *Burke v. Backus*, 51 Minn. 174, 53 N. W. 458; *Patterson v. Hewitt* (N. M.), 66 Pac. 552, 55 L. R. A. 658 (eight years' delay in enforcing resulting trust); affirmed, 195 U. S. 309, 25 Sup. Ct. 35; *Spoonheim v. Spoonheim*, 14 N. D. 380, 104 N. W. 845 (seven years); *Skinner v. Scott*, 29 Okl. 364, 118 Pac. 394; *Loomis v. Rosenthal*, 34 Or. 585, 57 Pac. 55; *Bryant v. Groves*, 42 W. Va. 10, 24 S. E. 605; *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 57 Am. St. Rep. 899, 66 N. W. 518; *Likens v. Likens*, 136 Wis. 321, 117 N. W. 799 (ten years' delay; great increase in value).

<sup>72</sup> *Naddo v. Bardon*, 51 Fed. 493, 2 C. C. A. 335, 4 U. S. App. 642, per *Brewer, J.*

principle that the lapse of time will become a defense to the title of the one in possession of property not only consideration for his personal rights and equities, but also a recognition of the higher public interests which can only be subserved by putting at rest, as speedily as possible, all doubts and uncertainties touching the title of realty, to which end it is the duty of courts to discourage delays in the assertion of conflicting claims thereto."<sup>73</sup>

<sup>73</sup> *St. Paul etc. R. Co. v. Sage*, 49 Fed. 315, 326, 1 C. C. A. 256, 4 U. S. App. 160, per Shiras, J., reversing 32 Fed. 821, 44 Fed. 817. See, also, *Halstead v. Grinnan*, 152 U. S. 412, 38 L. Ed. 495, 14 Sup. Ct. 641.

It appears to the writer far from easy to adjust the principle announced in these decisions, if worked out to its logical conclusion, with those ordinary ideas of fair dealing which usually guide the chancellor's discretion. It practically amounts to saying, that if the defendant's wrong has turned out to be an enormously profitable one to him, that affords a reason, either alone or in connection with other reasons, why he should be protected in the enjoyment of his profit by a court of equity; and the greater the profit, the stronger the protection. The fact that the plaintiff, in the exercise of ordinary business prudence, has delayed until it has become apparent that his success in the litigation will not be a fruitless victory, is, in this view, conduct more inequitable than any of which the defendant can possibly have been guilty, and excuses the court from investigation of the defendant's wrong. The delay may be far less than that allowed by the most stringent statute of limitations; and the circumstance which most strongly operates upon the conscience of the court—viz., the rise in value of the property—is a purely accidental one, unconnected with any fault of the plaintiff or merit of the defendant. The motives of public policy and the repose of society by which this favoritism shown to the defense of laches has been justified seem rather appropriate for the consideration of a legislature than of a court, and hardly warrant the court's overruling a legislative policy already expressed in statutes of limitation.

The doctrine explained and criticised in the text and note, above, is expressly rejected in the following recent cases: *Indiana & Arkansas Lumber & Mfg. Co. v. Milburn*, 161 Fed. 531, 88 C. C. A. 473 (delay of over twenty years; no laches, though great increase in



§ 1445. (§ 24.) **Limitation of the General Doctrine in Case of Injunction in Support of Strict Legal Right.**—

An important limitation upon the general rule as to the effect of delay has been established by a considerable preponderance of authority. "Where an injunction is asked in support of a strict *legal* right, the party is entitled to it if his legal right is established; mere delay and acquiescence will not, therefore, defeat the remedy unless it has continued so long as to defeat the right itself."<sup>74</sup> This rule has had frequent application where

value); *Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley*, 164 Fed. 963, 91 C. C. A. 91 (great increase in value alone of no importance); *Earle Improvement Co. v. Chatfield*, 81 Ark. 296, 99 S. W. 84; *Updegraff v. Marked Tree Lumber Co.*, 83 Ark. 154, 103 S. W. 606; *Harrison v. Rice*, 78 Neb. 654, 111 N. W. 594; *Davisson v. Smith*, 60 W. Va. 413, 55 S. E. 466.

**Laches from Long Delay Alone.**—For the sake of completeness, it should be noticed that in a considerable number of cases no element of laches save the long delay alone is mentioned by the court; but it is not impossible that some of the additional elements heretofore described may have existed to influence these decisions. See, for examples, *De Martin v. Phelan*, 51 Fed. 865, 2 C. C. A. 523, 7 U. S. App. 233, affirming 47 Fed. 761 (action to declare deed a mortgage); *Reed v. Dingess*, 56 Fed. 171 (bill to redeem); *Streight v. Junk*, 59 Fed. 321, 8 C. C. A. 137, 16 U. S. App. 608 (delay of two years by stockholder in suing to enforce the rights of a corporation against a director); *Kemp v. Nickerson*, 66 Fed. 682; *Halsey v. Cheney*, 68 Fed. 763, 15 C. C. A. 656, 34 U. S. App. 50; *Guarantee Trust & S. D. Co. v. Delta & Pine Land Co.*, 104 Fed. 5, 43 C. C. A. 396 (delay of twenty-five years, unexcused); *Jones v. Perkins*, 76 Fed. 82; *Tetrault v. Fournier* (Mass.), 72 N. E. 350; *Fennyery v. Ransom*, 170 Mass. 303, 49 N. E. 620; *Wiggin v. Swamscot Mach. Co.*, 68 N. H. 14, 38 Atl. 727; *Shields v. Tarleton*, 48 W. Va. 343, 37 S. E. 589.

<sup>74</sup> 2 Pom. Eq. Jur., § 817. See, also, *Galway v. Metropolitan Elev. R. Co.*, 128 N. Y. 132, 13 L. R. A. 788, 28 N. E. 479, citing Pom. Eq. Jur., § 817, and many cases (nuisance); *Higgins Oil & Fuel Co. v. Snow*, 113 Fed. 433, 51 C. C. A. 267, and cases cited (in Texas, laches not imputable to one whose title is capable of being established at law). See, also, *United States v. Luce*, 141 Fed. 385 (nuisance from offensive odors); *Kirby v. Union Pac. R'y Co.*, 51 Colo. 509, *Ann.*

injunction has been sought against the pollution<sup>75</sup> or diversion<sup>76</sup> of water; or against the infringement of a patent<sup>77</sup> or a trade-mark.<sup>78</sup>

§ 1446. (§ 25.) **Whether Laches is Imputable to the Government.**—Laches is not imputable to the government of the United States when it has a direct pecuniary interest in the subject of the litigation.<sup>79</sup> This rule is

**Cas.** 1913B, 461, 119 Pac. 1042 (injunction against ticket scalping); Pollitz v. Wabash R. Co., 207 N. Y. 113, 100 N. E. 721 (stockholder's suit to enforce legal right of the corporation for misuse of its assets); and *post*, § 536.

<sup>75</sup> Goldsmid v. Tunbridge Wells Imp. Comm'rs, L. R. 1 Eq. 161; State of Missouri v. State of Illinois, 180 U. S. 208, 45 L. Ed. 497; 21 Sup. Ct. 331; Chapman v. Rochester, 110 N. Y. 273, 6 Am. St. Rep. 366, 1 L. R. A. 296, 18 N. E. 88.

<sup>76</sup> Lonsdale Co. v. City of Woonsocket, 21 R. I. 498, 44 Atl. 929 (sixteen years' delay); Rigney v. Tacoma L. & W. Co., 9 Wash. 576, 26 L. R. A. 425, 38 Pac. 147 (relying on Pom. Eq. Jur., § 817). See, also, Cobia v. Ellis, 149 Ala. 108, 42 South. 751.

<sup>77</sup> Taylor v. Sawyer Spindle Co., 75 Fed. 301, 304, 22 C. C. A. 203, 206, and cases cited; Ide v. Thorlight etc. Carpet Co., 115 Fed. 137, 148, and cases cited.

<sup>78</sup> Fullwood v. Fullwood, L. R. 9 Ch. Div. 176; Menendez v. Holt, 128 U. S. 514, 32 L. Ed. 526, 9 Sup. Ct. 143; Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 35, 32 L. R. A. (N. S.) 274, 104 C. C. A. 475. Compare Grand Lodge A. O. U. W. v. Graham, 96 Iowa, 592, 31 L. R. A. 133, 65 N. W. 837.

<sup>79</sup> San Pedro & Canon del Agua Co. v. United States, 146 U. S. 120, 36 L. Ed. 912, 13 Sup. Ct. 94; United States v. State of Michigan, 190 U. S. 379, 47 L. Ed. 1103, 23 Sup. Ct. 742; Southern Pac. R. Co. v. Stanley, 49 Fed. 263; United States v. Dastervignes, 118 Fed. 199; United States v. Willamette Val. & C. M. Wagon Road Co., 54 Fed. 807. In this last case the court said: "It is held that laches is not imputable to the government upon grounds of public policy. The common-law rule that no lapse of time can bar the right of the king is not only recognized in the United States, but is deemed to be applicable with added reason, from the fact that here property is held, not as by a monarch for personal or private purposes, but in trust for the common welfare; and, where the agencies of the people are so numerous and scattered, the utmost vigilance would not save

based on public policy. Where, however, "the government is a mere formal complainant in a suit, not for the purpose of asserting any public right, or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person," laches may be imputed.<sup>80</sup> It has been held that it is imputable to a state,<sup>81</sup> and also to a municipal corporation, but the doctrine should be applied cautiously.<sup>82</sup>

§ 1447. (§ 26.) **Excuses for Laches—(1) Party's Ignorance of His Rights.**—"A person cannot be deprived of his remedy in equity on the ground of laches, unless it appears that he had knowledge of his rights. As one cannot acquiesce in the performance of an act of which he is ignorant, so one cannot be said to neglect the prosecution of a remedy when he has no knowledge that his rights have been invaded, excepting, always, that his want of knowledge is not the result of his own culpable negligence. It is not a little difficult to deter-

the public from loss." See, further, *United States v. Spohrer*, 175 Fed. 440; *United States v. Oregon & C. R. Co.*, 186 Fed. 861.

<sup>80</sup> *United States v. Beebe*, 127 U. S. 338, 32 L. Ed. 121, 8 Sup. Ct. 1083; *United States v. Chicago, M. & St. P. R. Co.*, 54 C. C. A. 545, 116 Fed. 969; *La Clair v. United States*, 184 Fed. 128; *United States v. Fletcher*, 231 Fed. 326.

<sup>81</sup> *Attorney-General v. Central R. Co. (N. J. Eq.)*, 59 Atl. 348; *State v. Livingston*, 164 Iowa, 31, 145 N. W. 91; *State v. Lincoln St. R. Co.*, 80 Neb. 333, 14 L. R. A. (N. S.) 336, 114 N. W. 422. Holding that laches is not imputable to the state, *Iowa v. Carr*, 191 Fed. 257, 112 C. C. A. 477 (but estoppel may be invoked against it as against an individual); *State v. Portland General Electric Co.*, 52 Or. 502, 95 Pac. 722, 98 Pac. 160; *Norfolk & W. R'y Co. v. Board of Sup'rs*, 110 Va. 95, 65 S. E. 531; and see *McCarter v. Lehigh Valley R. Co.*, 78 N. J. Eq. 346, 79 Atl. 93 (state not guilty of laches where it could not bring an action until authorized by the legislature).

<sup>82</sup> *Dunklin County v. Chouteau*, 120 Mo. 577, 25 S. W. 553; *Board of Levee Inspectors v. Southwestern Land & T. Co.*, 112 Ark. 467, 166 S. W. 589.

mine what knowledge is necessary to place the party in the position of negligently delaying his action.”<sup>83</sup>

<sup>83</sup> *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907, per Green, V. C. This paragraph of the text is quoted in *Goss v. Herman*, 20 N. D. 295, 127 N. W. 78. See, also, *Hodge v. Palms*, 68 Fed. 61, 15 C. C. A. 220, 37 U. S. App. 61; *Kansas City Southern R. Co. v. Stevenson*, 135 Fed. 553; *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317 (no laches before discovery of mistake in judgment, there being nothing to put plaintiff on inquiry); *Union Ice Co. v. Doyle*, 6 Cal. App. 284, 92 Pac. 112 (no laches before discovery of mistake); *Spalding v. St. Joseph's Industrial School*, 107 Ky. 382, 54 S. W. 200; *Whitridge v. Whitridge*, 76 Md. 54, 24 Atl. 645 (delay of twelve years); *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680; *Tooker v. National Sugar Refining Co.*, 80 N. J. Eq. 305, 84 Atl. 10 (cancellation of invalid issue of stock; delay of eleven years); *Stephens v. Dubois*, 31 R. I. 138, 140 *Am. St. Rep.* 741, 76 Atl. 656; *Moorman v. Arthur*, 90 Va. 455, 18 S. E. 869; *Jameson v. Rixey*, 94 Va. 342, 64 *Am. St. Rep.* 726, 26 S. E. 861 (delay of twenty years); *Craufurd's Adm'r v. Smith's Ex'r*, 93 Va. 623, 23 S. E. 235, 25 S. E. 657; *Steinman v. Jessee*, 108 Va. 567, 62 S. E. 275.

Where there is no fraud in the case, plaintiff's ignorance may be no excuse after a great lapse of time. “The interests of public order and tranquillity demand that parties shall acquaint themselves with their rights within a reasonable time, and, although this time may be extended by their actual ignorance, or want of means, it is by no means illimitable”: *Wetzel v. Minn. R'y Transfer Co.*, 169 U. S. 237, 2 *L. Ed.* 730, 18 Sup. Ct. 307 (affirming 65 Fed. 23, 12 C. C. A. 490). The delay in this case was thirty years. Ignorance is not an excuse when the plaintiff has notice of facts which should put him on inquiry; *Loomis v. Rosenthal*, 34 Or. 585, 57 Pac. 55. It has been held that one who knows that another is selling an article in violation of contract cannot justify delay on the ground that he did not have enough evidence, since he could bring suit and have a discovery of details by means of interrogatories: *Fowler v. Park*, 48 Fed. 789. See, also, the following cases where ignorance was not an excuse; *Cole v. Birmingham Union R'y Co.*, 143 Ala. 427, 39 South. 403; *Board of Levee Inspectors v. Southwestern Land & T. Co.*, 112 Ark. 467, 166 S. W. 589; *Knight v. Hollings*, 73 N. H. 495, 63 Atl. 38 (twelve years); *Plant v. Humphries*, 66 W. Va. 88, 26 *L. R. A. (N. S.)* 558, 66 S. E. 94.

See, also, *post*, at note 114.



§ 1448. (§ 27.) **Ignorance of Fraud.**—"The right of the party defrauded is not affected by the lapse of time, or generally speaking, by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed."<sup>84</sup> What is culpable negligence on the part of the defrauded party in acquainting himself with the fraud is incapable of exact definition. Such negligence is not imputed where the relation between the parties is one of trust and confidence;<sup>85</sup> and a considerable de-

**Ignorance of Law.**—Though a party may be fully apprised of the facts from which his equitable right arises, his ignorance of that right has sometimes been held to excuse a long delay in its enforcement: See *Lasher v. McCreery*, 66 Fed. 834, where the law was generally supposed to be settled adversely to the plaintiff during the period of the plaintiff's inaction; *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892, where delay of twenty years in suing to reform a deed for mistake of law was due to the advice of a reputable attorney that the deed correctly expressed the grantor's intention. See, also, *Nicholson v. Nicholson*, 83 Kan. 223, 109 Pac. 1086 (ignorance of law of another state); *Brundy v. Canby*, 50 Mont. 454, 148 Pac. 315; *Hale v. Hale*, 62 W. Va. 609, 14 L. R. A. (N. S.) 221, 59 S. E. 1056. But see *Wetzel v. Minnesota R'y Transfer Co.*, 65 Fed. 23, 12 C. C. A. 490, 27 U. S. App. 594; affirmed, 169 U. S. 237, 241, 42 L. Ed. 730, 18 Sup. Ct. 307; *Board of Levee Inspectors v. Southwestern Land & T. Co.*, 112 Ark. 467, 166 S. W. 589.

<sup>84</sup> *Rolfe v. Gregory*, 4 De Gex, J. & S. 576, per Lord Westbury; 2 Pom. Eq. Jur., § 917, and note. This paragraph of the text is cited in *Goss v. Herman*, 20 N. D. 295, 127 N. W. 78. See, also, *Alger v. Anderson*, 78 Fed. 729; *Balfour v. San Joaquin Valley Bank*, 156 Fed. 500; *Fowler v. Alabama Iron & Steel Co.*, 189 Ala. 31, 66 South. 672 (eighteen years); *Wilson v. Augur*, 176 Ill. 561, 52 N. E. 289; *Manning v. Mulrey*, 192 Mass. 547, 78 N. E. 551; *Butler v. Prentiss*, 158 N. Y. 49, 52 N. E. 652 (reversing 36 N. Y. Supp. 301, 91 Hun, 643); *Simpkins v. Taylor*, 81 Hun, 467, 31 N. Y. Supp. 169; *Smith v. Linder*, 77 S. C. 535, 58 S. E. 610 (burden on defendant to prove knowledge or facts putting on inquiry); *Foote v. Harrison*, 137 Wis. 588, 119 N. W. 291 (ten years).

<sup>85</sup> *Bitzeman v. Bitzeman*, [1895] 2 Ch. 474 (no duty of inquiry); *Reavis v. Reavis*, 103 Fed. 813 (reliance upon a relative); *Miller v.*

gree of inaction is excused by active measures taken by the fraudulent party for the concealment of the fraud.<sup>86</sup> "The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."<sup>87</sup>

Ash, 156 Cal. 544, 105 Pac. 600 (failure of wards for thirty-six years after majority to obtain accounting from guardian, excused); Penn v. Folger, 182 Ill. 76, 55 N. E. 192 (reversing 77 Ill. App. 365); Voorhees v. Campbell, 275 Ill. 292, 114 N. E. 147; Hawkes v. Lackey, 207 Mass. 424, 93 N. E. 828; Stanwood v. Wishard, 134 Fed. 959 (fraud of attorney; client a non-resident.)

<sup>86</sup> "The perpetrator of a fraud can hardly be permitted to successfully plead in a court of equity that he so completely secured and betrayed the confidence of his victim that the latter believed his false statement that no inquiry or examination would avail him aught so long that, when his faith faltered, it was too late for him to recover": Kelley v. Boetteher, 85 Fed. 55, 62, 29 C. C. A. 14, 56 U. S. App. 363. See, also, Salsbury v. Ware, 183 Ill. 505, 56 N. E. 149 (reversing 80 Ill. App. 485). Compare Townsend v. Vanderwerker, 160 U. S. 171, 40 L. Ed. 383, 16 Sup. Ct. 258.

<sup>87</sup> Foster v. Mansfield C. & L. M. R. Co., 146 U. S. 88, 99, 36 L. Ed. 899, 13 Sup. Ct. 28, affirming 36 Fed. 627; Wetzel v. Minnesota R'y Tr. Co., 65 Fed. 23, 12 C. C. A. 490, 27 U. S. App. 594, affirmed, 169 U. S. 237, 18 Sup. Ct. 309. See, also, Felix v. Patrick, 145 U. S. 317, 36 L. Ed. 719, 12 Sup. Ct. 862 (affirming 36 Fed. 457); Eiffert v. Craps, 58 Fed. 470, 7 C. C. A. 319, 8 U. S. App. 436 (chargeable when fraud might have been discovered by inspection of one recorded deed); Scheffel v. Hays, 58 Fed. 457, 7 C. C. A. 308, 19 U. S. App. 220 (inquiry of the chief perpetrator of the fraud is not sufficient); Lant v. Manley, 71 Fed. 7, 19 (fraud evidenced by a public record); McMonagle v. McGlinn, 85 Fed. 88; Cunningham v. Pettigrew, 169 Fed. 335, 94 C. C. A. 457; Mathieson v. Craven, 228 Fed. 345; Reynolds & Hamby etc. Co. v. Martin, 116 Ga. 495, 42 S. E. 796; Fitch v. Miller, 200 Ill. 170, 65 N. E. 650; Donaldson v. Jacobitz, 67 Kan. 244, 72 Pac. 846; Stieff Co. of Baltimore City v.

Knowledge of facts which would put a person of ordinary prudence and diligence on inquiry is, in the eyes of the law, equivalent to a knowledge of all the facts which a reasonably diligent inquiry would disclose.<sup>88</sup>

Ulrich, 110 Md. 629, 73 Atl. 874; *Cole v. Boyd* (Neb.), 93 N. W. 1003. The bill must show with particularity how and when the plaintiffs' knowledge was obtained, in order that the court may determine whether reasonable effort was made by him to ascertain the facts; *Hardt v. Heidweyer*, 152 U. S. 547, 558, 38 L. Ed. 548, 14 Sup. Ct. 671, and cases cited; *Stearns v. Page*, 1 Story, 204, 215, 217, Fed. Cas. No. 13,339, by Story, J.; *Stearns v. Page*, 7 How. 819, 829, 12 L. Ed. 928, by Grier, J.; *Badger v. Badger*, 2 Wall. 87, 95, 17 L. Ed. 836; *Wood v. Carpenter*, 101 U. S. 135, 140, 25 L. Ed. 807; *Bangs v. Loveridge*, 60 Fed. 963 ("a party seeking to avoid the bar of the statute on the ground of fraud must aver and show that he used due diligence to detect the fraud, and if he had the means of discovering it, he will be held in equity to have known it"); *Hubbard v. Manhattan Trust Co.*, 87 Fed. 51, 30 C. C. A. 520; *Cutter v. Iowa Water Co.*, 128 Fed. 505 ("there must be allegations and evidence showing what he did to discover the fraud, and a showing why he did not discover it"); *Redd v. Brun*, 157 Fed. 190, 84 C. C. A. 638; *Kentucky Coal & Timber Development Co. v. Kentucky Union Co.*, 187 Fed. 945, 110 C. C. A. 93; *Burke v. Maguire*, 154 Cal. 456, 471, 98 Pac. 21; *Del Campo v. Camarillo*, 154 Cal. 647, 98 Pac. 1049; *Martin v. Martin* (Del.), 74 Atl. 864; *Weber v. Chicago & W. I. R. Co.*, 246 Ill. 464, 92 N. E. 931; *Mason v. Odum*, 210 Ill. 471, 102 Am. St. Rep. 180, 71 N. E. 386; *Sweet v. Lowry*, 131 Minn. 109, 154 N. W. 793; *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 57 Am. St. Rep. 899, 66 N. W. 518; *Steinberg v. Saltzman*, 130 Wis. 419, 110 N. W. 198. See, also, *Felix v. Patrick*, 145 U. S. 317, 36 L. Ed. 719, 12 Sup. Ct. 862 (affirming 36 Fed. 457).

<sup>88</sup> This passage of the text is quoted in *Mathieson v. Craven*, 228 Fed. 345. See, also, *Swift v. Smith*, 79 Fed. 709, 713, 25 C. C. A. 154, 49 U. S. App. 188 (citing many cases); *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 174, 57 Am. St. Rep. 899, 66 N. W. 518, and cases cited; *Johnston v. Standard Min. Co.*, 148 U. S. 360, 37 L. Ed. 480, 13 Sup. Ct. 585, affirming 39 Fed. 304 (plaintiff is "chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known to him were such as to put upon a man of ordinary intelligence the duty of inquiry"); *Edwards v. Mercantile Trust Co.*, 124 Fed. 381. See, also, *Rugan v. Sabin*, 53 Fed. 415, 418.

§ 1449. (§ 28.) **Breach of Express Continuing Trust.**<sup>89</sup>—In cases of express continuing trusts, “so long as the relation of trustee and *cestui que trust* continues to exist, no length of time will bar the *cestui que trust* of his rights in the subject of the trust as against the trustee, unless circumstances exist to raise a presumption from lapse of time of an extinguishment of the trust, or unless there has been an open denial or repudiation of the trust brought home to the knowledge of the *cestui que trust* which requires him to act as upon an asserted adverse title.”<sup>90</sup> But where the repudiation

3 C. C. A. 578, 580, 10 U. S. App. 519, 530; *Jewell v. Trilby Mines Co.*, 229 Fed. 98, 143 C. C. A. 374; *Miller v. Ash*, 156 Cal. 544, 105 Pac. 600; *O’Neal v. Moore*, 78 W. Va. 296, 88 S. E. 1044.

<sup>89</sup> This paragraph of the text is cited, generally, in *Taylor v. Interstate Inv. Co.*, 75 Wash. 490, 135 Pac. 240.

<sup>90</sup> *Anderson v. Northrop*, 30 Fla. 612, 12 South. 318, 324, and cases cited; *Hoyt v. Latham*, 143 U. S. 553, 36 L. Ed. 259, 12 Sup. Ct. 568; *New Orleans v. Warner*, 175 U. S. 120, 130, 44 L. Ed. 96, 20 Sup. Ct. 44; *Wood v. Perkins*, 64 Fed. 817, 57 Fed. 258; *Ten Mile Coal & Coke Co. v. Burt*, 170 Fed. 332; *Huntington Nat. Bank v. Huntington Distilling Co.*, 152 Fed. 240; *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81, 30 South. 34; *Mullen v. Walton*, 142 Ala. 166, 39 South. 97 (constructive notice by record of will in another state does not charge with knowledge); *Small v. Hockinsmith*, 158 Ala. 234, 48 South. 541; *Hovey v. Bradbury*, 112 Cal. 620, 44 Pac. 1077 (delay of eight years not laches when no notice of repudiation); *White v. Costigan*, 138 Cal. 564, 72 Pac. 178; *Fleming v. Shay*, 19 Cal. App. 276, 125 Pac. 761; *MacMullan v. Kelly*, 19 Cal. App. 700, 127 Pac. 819; *Taber v. Bailey*, 22 Cal. App. 617, 135 Pac. 975; *French v. Woodruff*, 25 Colo. 339, 54 Pac. 1015; *Stanley’s Estate v. Pence*, 160 Ind. 636, 66 N. E. 51, 67 N. E. 441; *Lewis v. Hershey*, 45 Ind. App. 104, 90 N. E. 332; *Allen v. Stewart*, 214 Mass. 109, 100 N. E. 1092; *Scott v. Dilley*, 53 Ind. App. 100, 101 N. E. 313; *Sunter v. Sunter*, 190 Mass. 449, 77 N. E. 497; *Andrews v. Tuttle-Smith Co.*, 191 Mass. 461, 78 N. E. 99; *Johnston v. Johnston*, 107 Minn. 109, 119 N. W. 652; *Elliott v. Landis Mach. Co.*, 236 Mo. 546, 139 S. W. 356; *Jones v. Haines*, 79 N. J. Eq. 110, 80 Atl. 943; *Backes v. Crane*, 87 N. J. Eq. 229, 100 Atl. 900; *Raymond v. Flavel*, 27 Or. 219, 40 Pac. 158; *Joy v. Ft. Worth Compress Co.*, 24 Tex. Civ. App. 94, 58 S. W. 173;



or breach of the trust has been brought home to the actual knowledge of the *cestui que trust*, the ordinary rules as to laches apply; the same degree of diligence is required of him as in cases of the rescission of a contract for fraud or mistake.<sup>91</sup>

Ruckman v. Cox, 63 W. Va. 74, 59 S. E. 760; Roush v. Griffith, 65 W. Va. 752, 65 S. E. 168; Sommers v. Bennett, 68 W. Va. 157, 69 S. E. 690. See, however, Preston v. Horwitz, 85 Md. 164, 36 Atl. 710, citing Maryland cases, *contra*; and compare Snodgrass v. Snodgrass (Ala.), 58 South. 201 (no accounting or recognition of the trust for thirty years); Kleinclaus v. Dutard, 147 Cal. 245, 81 Pac. 516.

<sup>91</sup> In states where the statutes of limitations apply to equitable actions, the rules as to the time when the statute begins to run are generally analogous to those which apply to the running of time considered as an element of laches. Consequently both classes of cases may be cited as authority for the text: See Naddo v. Bardon, 51 Fed. 493, 2 C. C. A. 335, 4 U. S. App. 642, 681 (affirming 47 Fed. 782); Church of Christ v. Reorganized Church of Jesus Christ of Latter-Day Saints, 70 Fed. 179, 17 C. C. A. 387, 36 U. S. App. 110; Curtis v. Lakin, 94 Fed. 251, 36 C. C. A. 222; Nash v. Ingalls, 101 Fed. 645, 41 C. C. A. 545 (affirming 79 Fed. 510); Swift v. Smith, 79 Fed. 709, 714, 25 C. C. A. 154, 159, 49 U. S. App. 188; Eddy v. San Francisco, 162 Fed. 441, 89 C. C. A. 327, affirming 148 Fed. 272 (twenty-five years); Ewald v. Kierulff, 175 Cal. 363, 165 Pac. 942 (delay of forty-three years after notice of repudiation); Lambert v. Shumway, 36 Colo. 350, 85 Pac. 89 (failure to receive income for thirteen years); Woodruff v. Williams, 35 Colo. 28, 5 L. R. A. (N. S.) 986, and note, 85 Pac. 90 (elaborate discussion); Dennison v. Barney, 49 Colo. 442, 113 Pac. 519; Olympia Mining & Milling Co. v. Kerns, 24 Idaho, 481, 135 Pac. 255; Oehmich v. Hedstrom, 251 Ill. 481, 96 N. E. 256; Moore v. Taylor, 251 Ill. 468, 96 N. E. 229 (thirty years); Hitchcock v. Cospser (Ind.), 73 N. E. 264; Love v. Rogers, 118 Md. 525, 85 Atl. 771 (delay of seventeen years after repudiation); Young v. Walker, 224 Mass. 491, 113 N. E. 363 (vendor's repudiation of contract of sale); Mueller v. Becker, 263 Mo. 165, 172 S. W. 322; Mantle v. Speculator Min. Co., 27 Mont. 473, 71 Pac. 665; Boydston v. Jacobs, 38 Nev. 175, 147 Pac. 447; Finnegan v. McGuffog, 203 N. Y. 342, 96 N. E. 1015; Church v. Winton, 196 Pa. St. 107, 46 Atl. 363; City of Centerville v. Turner County, 25 S. D. 300, 126 N. W. 605; Snipes v. Kelleher, 31 Wash. 386, 72 Pac. 67; Olympia Mining & Milling Co. v. Kerns, 24 Idaho, 481, 135 Pac. 255 (seven years' delay after repudiation).

Constructive and resulting trusts are also governed by the ordinary rules as to laches;<sup>92</sup> but in cases of

<sup>92</sup> The rules in this respect as to laches and the statute of limitations are identical; cases of both kinds are therefore cited: See *Holt v. Murphy*, 207 U. S. 407, 52 L. Ed. 271, 28 Sup. Ct. 212; *Lemoine v. Dunklin County*, 51 Fed. 487, 2 C. C. A. 343, 10 U. S. App. 227 (affirming 46 Fed. 219); *McMonagle v. McGlinn*, 85 Fed. 88; *Higginbotham v. Boggs*, 234 Fed. 253, 148 C. C. A. 155 (twenty-two years); *Lady Ensley Coal etc. Co. v. Gordon*, 155 Ala. 528, 46 South. 983; *Butt v. McAlpine*, 167 Ala. 521, 52 South. 420; *Smith v. Dallas Compress Co.*, 195 Ala. 534, 70 South. 662; *Nouges v. Newlands*, 118 Cal. 102, 50 Pac. 386; *Castro v. Adams*, 153 Cal. 382, 95 Pac. 1027; *Stevenson v. Boyd*, 153 Cal. 630, 19 L. R. A. (N. S.) 525, 96 Pac. 284; *Norton v. Bassett*, 154 Cal. 411, 129 Am. St. Rep. 162, 97 Pac. 894 (where voluntary trust becomes involuntary by death of trustee and descent to heir, statute of limitations begins to run without any demand or repudiation); *Schofield v. Wooley*, 98 Ga. 548, 58 Am. St. Rep. 315, 25 S. E. 769; *Franklin v. Lesser (Ga.)*, 92 S. E. 890; *McLaffin v. Jones*, 155 Ill. 539, 40 N. E. 330, affirming 55 Ill. App. 518 (delay of thirteen years); *Hamilton v. Hamilton*, 231 Ill. 128, 83 N. E. 125 (resulting trust, fifteen years after open repudiation); *Chicago & N. W. R'y Co. v. Garrett*, 255 Ill. 420, 99 N. E. 643; *Scott v. Dilley*, 53 Ind. App. 100, 101 N. E. 313; *Blackledge v. Blackledge (Iowa)*, 91 N. W. 818; *Wilson v. Louisville Trust Co.*, 102 Ky. 522, 44 S. W. 121; *Freeland v. Williamson*, 220 Mo. 217, 119 S. W. 560; *Mills v. Hendershot*, 70 N. J. Eq. 258, 62 Atl. 542; *Heinisch v. Pennington*, 73 N. J. Eq. 456, 68 Atl. 233; *Patterson v. Hewitt (N. M.)*, 55 L. R. A. 658, 66 Pac. 552; *Southall v. Southall*, 6 Tex. Civ. App. 694, 26 S. W. 150; *Nuckols v. Stanger (Tex. Civ. App.)*, 153 S. W. 931; *Redford v. Clark*, 100 Va. 115, 40 S. E. 630; *Newman v. Newman*, 60 W. Va. 371, 7 L. R. A. (N. S.) 370, 55 S. E. 377; *Sommers v. Bennett*, 68 W. Va. 157, 69 S. E. 690; *Merton v. O'Brien*, 117 Wis. 437, 94 N. W. 340; *Boyd v. Mutual Fire Ass'n*, 116 Wis. 155, 96 Am. St. Rep. 948, 61 L. R. A. 918, 90 N. W. 1086, 94 N. W. 171 (officers and directors of corporations are not express trustees and are not precluded from setting up limitations). In *Landis v. Saxton*, 105 Mo. 486, 24 Am. St. Rep. 406, 16 S. W. 912, the rule is stated as follows: "The trusts against which the statute will not run are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of a court of equity; but other trusts which are the ground of an action at law are open to the operation of the statute."

resulting trust, where the trustee constantly acknowledges the right of the one in whose favor the trust is raised by virtue of his payment of the purchase-money, the trust is properly treated as express, so far as the operation of the doctrine of laches is concerned.<sup>93</sup>

§ 1450. (§ 29.) **Excuses: (2) Infancy.**—Infancy is a defense for delay both at law and in equity.<sup>94</sup> An infant, having no capacity to sue, cannot be held blameworthy for delaying to sue. After becoming of age, however, he must act promptly.<sup>95</sup> Following the an-

The United States supreme court has drawn a distinction between cases involving actual fraud and cases of constructive fraud merely—such as the purchase by the trustee of the trust property for a price which was fair at the time of the transaction—holding the *cestui que trust* to a more stringent obligation of diligence in the latter class of cases: See *Hammond v. Hopkins*, 143 U. S. 224, 250, 36 L. Ed. 134, 12 Sup. Ct. 418.

<sup>93</sup> *Fawcett v. Fawcett*, 85 Wis. 332, 39 Am. St. Rep. 844, 55 N. W. 405; *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81, 30 South. 34; *Zeigler v. Zeigler*, 180 Ala. 246, 60 South. 810; *Cooney v. Glynn*, 157 Cal. 583, 108 Pac. 506; *Wright v. Wright*, 242 Ill. 71, 26 L. R. A. (N. S.) 161, 89 N. E. 789 (laches of forty years to assert resulting trust excused by intimate relationship of husband and wife); *Snyder v. Snyder*, 280 Ill. 467, 117 N. E. 465 (no repudiation during lifetime of trustee); *In re Mahin's Estate*, 161 Iowa, 459, 143 N. W. 420; *Hunnicut v. Oren*, 84 Kan. 460, 114 Pac. 1059; *Lufkin v. Jakeman*, 188 Mass. 528, 74 N. E. 933; *Howe v. Howe*, 199 Mass. 598, 127 Am. St. Rep. 516, 85 N. E. 945; *Davis v. Downer*, 210 Mass. 573, 97 N. E. 90; *McCall v. McCall*, 159 Mich. 144, 123 N. W. 550; *Delmoe v. Long*, 35 Mont. 139, 88 Pac. 778; *Hanson v. Hanson*, 78 Neb. 584, 111 N. W. 368; *Levy v. Ryland*, 32 Nev. 460, 109 Pac. 905; *Miller v. Saxton*, 75 S. C. 237, 55 S. E. 310.

<sup>94</sup> *Robinson v. Kampmann*, 5 Tex. Civ. App. 605, 24 S. W. 529; *Cole v. Grigsby* (Tex. Civ. App.), 35 S. W. 680; *Robinett v. Robinett's Heirs* (Va.), 19 S. E. 845; *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 57 Am. St. Rep. 899, 66 N. W. 518; *Patrick v. Stark*, 62 W. Va. 602, 59 S. E. 606; *Marr v. Marr*, 73 N. J. Eq. 643, 133 Am. St. Rep. 742, 70 Atl. 375.

<sup>95</sup> *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 57 Am. St. Rep. 899, 66 N. W. 518.

alogy of the statute of limitations, it has been held that where time has commenced to run against the ancestor, it still continues to run against the minor heir.<sup>96</sup>

§ 1451. (§ 30.) **Excuses: (3) Mental Unsoundness.**—Laches cannot be imputed to one of unsound mind;<sup>97</sup> and this rule holds, although the next friend who brings the suit is clearly guilty of laches.<sup>98</sup>

§ 1452. (§ 31.) **Excuses: (4) Coverture.**—Whether the common-law rule that a married woman cannot be guilty of laches<sup>99</sup> has been changed by the modern statutes permitting a married woman to sue in her own name, is a question on which there appears to be some disagreement.<sup>100</sup> The marital relation may, so long as cohabitation continues, afford the wife a partial or total excuse for delay in commencing litigation to which the husband is a party defendant.<sup>101</sup>

<sup>96</sup> *Gibson v. Herriott*, 55 Ark. 85, 29 *Am. St. Rep.* 17, 17 S. W. 589.

<sup>97</sup> *Bradley v. Singleterry*, 178 Ala. 106, 59 South. 58; *Taylor v. Colley*, 138 Ga. 41, 74 S. E. 694; *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383 (delay of forty-two years); *Kidder v. Houston* (N. J. Eq.), 47 Atl. 336; *Trowbridge v. Stone's Adm'r*, 42 W. Va. 454, 26 S. E. 363.

<sup>98</sup> *Kidder v. Houston* (N. J. Eq.), 47 Atl. 336.

<sup>99</sup> *Gibson v. Herriott*, 55 Ark. 85, 29 *Am. St. Rep.* 17, 17 S. W. 589; *Lindell Real Estate Co. v. Lindell*, 142 Mo. 61, 43 S. W. 368; *Cole v. Grigsby* (Tex. Civ. App.), 35 S. W. 680.

<sup>100</sup> Compare *Lindell Real Estate Co. v. Lindell*, 142 Mo. 61, 43 S. W. 368 (no laches), with *Gibson v. Herriott*, 55 Ark. 85, 29 *Am. St. Rep.* 17, 17 S. W. 589 (guilty of laches with respect to her separate property). See, also, *Phillips v. Pinney Coal & Coke Co.*, 53 W. Va. 543, 97 *Am. St. Rep.* 1040, 44 S. E. 774, where a married woman was held guilty of laches; *McPeck's Heirs v. Graham's Heirs* (W. Va.), 49 S. E. 125 (same); *Waldron v. Harvey*, 54 W. Va. 608, 102 *Am. St. Rep.* 959, 46 S. E. 603 (laches cannot be imputed to a married woman to defeat her right to land not her separate estate). See, further, *Duggan v. Wetmore*, 221 Fed. 916, 137 C. C. A. 486 (laches from twenty-nine years' delay).

<sup>101</sup> *Fawcett v. Fawcett*, 85 Wis. 332, 39 *Am. St. Rep.* 844, 55



§ 1453. (§ 32.) (5) **When Laches not Imputed to Reversioners.**—It is generally held “that no laches can be imputed to reversioners in a contest between them and the tenant for life over the reversionary property until after the termination of the life estate, unless it be shown clearly and unequivocally that before that time they had actual knowledge of an abandonment by the life tenant of her *status* as such, and of a holding of the property by her under a different and adverse right.”<sup>102</sup> And it is further held “that the *onus* of showing such notice or knowledge as, when coupled with long acquiescence, would amount to laches, is on the party urging laches as a defense.”<sup>103</sup>

§ 1454. (§ 33.) (6) **When Party in Possession not Chargeable With Laches.**—A party in possession of land who resorts to a court of equity to settle a question of title is not chargeable with laches, no matter how long his

N. W. 405; *Conner v. Leach*, 84 Md. 571, 36 Atl. 591; *Zeigler v. Zeigler*, 180 Ala. 246, 60 South. 810 (delay of twenty-eight years, until husband's death, to enforce resulting trust, no laches); *Wright v. Wright*, 242 Ill. 71, 26 L. R. A. (N. S.) 161, 89 N. E. 789 (delay of forty years to assert resulting trust excused); *Tilton v. Tilton*, 130 Ky. 281, 132 Am. St. Rep. 359, 113 S. W. 134 (delay of thirty-two years, till husband's death, to set aside antenuptial contract, excused); *Hudson v. Wright*, 204 Mo. 412, 103 S. W. 8.

<sup>102</sup> *Anderson v. Northrop*, 30 Fla. 612, 12 South. 318, and cases cited; *Howell v. Jump*, 140 Mo. 441, 41 S. W. 976. And see *Gibson v. Herriott*, 55 Ark. 85, 29 Am. St. Rep. 17, 17 S. W. 589. In further support of the rule that there is no laches as against the remainderman during the continuance of the life estate, see *Pugh v. Frierson*, 221 Fed. 513, 137 C. C. A. 223; *Mathieson v. Craven*, 228 Fed. 345; *Dallas Compress Co. v. Smith*, 190 Ala. 423, 67 South. 289; *Davis v. Neal*, 100 Ark. 399, L. R. A. 1916A, 999, 140 S. W. 278.

<sup>103</sup> *Anderson v. Northrop*, 30 Fla. 612, 12 South. 318, and cases cited. “And it is for the party urging laches to show when his adversary acquired a knowledge of the truth, and to prove that he knowingly forebore to assert his right.”

delay.<sup>104</sup> Such a party is at liberty to wait until his title is attacked before he is obliged to act. The most frequent illustrations of this principle are found in suits by

<sup>104</sup> This sentence is quoted in *Smith v. Burrus*, 139 Ga. 10, 76 S. E. 362. The text is cited and followed in *Fowler v. Alabama Iron & Steel Co.*, 164 Ala. 414, 51 South. 393; in *Woodlawn Realty & Development Co. v. Hawkins*, 186 Ala. 234, 65 South. 183; in *Pavlovski v. Klassing*, 134 Ga. 704, 68 S. E. 511; in *Retsch v. Renahan*, 16 N. M. 541, 120 Pac. 897; and in *Smith v. Owens*, 63 W. Va. 60, 59 S. E. 762. See, also, *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. Ed. 1063, 12 Sup. Ct. 239 (delay of forty years); *Thompson v. Dumas*, 85 Fed. 517, 29 C. C. A. 312; *Massenburg v. Denison*, 71 Fed. 618, 18 C. C. A. 280, 30 U. S. App. 612; *Gunnison Gas & Water Co. v. Whitaker*, 91 Fed. 191; *Burns v. Cooper*, 140 Fed. 273, 72 C. C. A. 25 (failure to bring suit to avoid mortgage not bar to asserting its invalidity on foreclosure); *Seefeld v. Duffer*, 179 Fed. 214, 103 C. C. A. 32 (party in possession under an equitable title); *Ogletree v. Rainer*, 152 Ala. 467, 44 South. 565 (same); *Shaw v. Allen*, 184 Ill. 77, 56 N. E. 403 (affirming 85 Ill. App. 23); *Gordon v. Johnson*, 186 Ill. 18, 57 N. E. 790 (reversing 79 Ill. App. 423); *Brumback v. Brumback*, 198 Ill. 66, 64 N. E. 740 (owner in common in possession cannot be precluded by laches from asserting a right to partition or to assignment of dower); *Sheldon v. Dunbar*, 200 Ill. 490, 65 N. E. 1095 (delay of eleven years in asserting right to specific performance not laches); *Schroeder v. Smith*, 249 Ill. 574, 94 N. E. 969 (one in possession seeking to reform deed to him for mistake); *Wykle v. Bartholomew*, 258 Ill. 358, 101 N. E. 597 (same); *Gray v. Bloom*, 151 Iowa, 566, 132 N. W. 42; *Harris v. Defenbaugh*, 82 Kan. 765, 109 Pac. 681; *Eakle v. Hagan*, 101 Md. 22, 60 Atl. 615; *Howe v. Howe*, 199 Mass. 598, 127 Am. St. Rep. 516, 85 N. E. 945; *Hayes v. Carroll*, 74 Minn. 134, 76 N. W. 1017 (delay of twenty-three years); *Hudson v. Wright*, 204 Mo. 412, 103 S. W. 8; *Stearns Coal & Lumber Co. v. Patton*, 134 Tenn. 556, 184 S. W. 855 (what is possession of wild land); *Mullins v. Shrewsbury*, 60 W. Va. 694, 55 S. E. 736; *Mills v. McLanahan*, 70 W. Va. 288, 73 S. E. 927 (specific performance); *Gimbel Bros. v. Tolman*, 161 Wis. 382, 154 N. W. 628. In *Cook v. Lasher*, 73 Fed. 701, 19 C. C. A. 654, 42 U. S. App. 42, it was held that a delay of twenty-one years in suing to annul a void tax deed to the state was not laches. It has been held that "so long as a defendant can assert an equitable title without invoking any affirmative relief," the doctrine of stale demand does not apply;

parties in possession to remove a cloud on title or to quiet title. Where, however, statutes permit such suits by parties out of possession, the doctrine of laches does apply, if the plaintiff is not in possession.<sup>105</sup>

§ 1455. (§ 34.) (7) **Pendency of Another Suit is Excuse for Delay.**—The pendency in the same or in another jurisdiction of a suit relating to the subject-matter is generally regarded as an excuse for delay until its termination; provided, however, this other suit is prosecuted with due diligence. Such a condition may arise when the complainant seeks the wrong jurisdiction or the wrong remedy in the first instance; and it may also occur when the decision in one case depends largely upon that in another.<sup>106</sup> As already intimated, however, the mere institution of a suit does not relieve a person from the charge of laches. If he fails in the diligent prosecu-

*Hensel v. Kegans* (Tex. Civ. App.), 28 S. W. 705. In *Jackson v. Boyd* (Ark.), 87 S. W. 126, neither party was in possession, and a delay of thirteen years was held not to be laches. See, also, *Weir v. Cordy-Fisher Lumber Co.* (Mo.), 85 S. W. 341; *Waldron v. Harvey*, 54 W. Va. 608, 102 *Am. St. Rep.* 959, 46 S. E. 603.

<sup>105</sup> *Sage v. Winona & St. P. R. Co.*, 58 Fed. 297, 7 C. C. A. 237, 19 U. S. App. 1.

<sup>106</sup> Thus, a failure to sue pending the decision of the federal Land Department has been held not to be laches: *Hodge v. Palms*, 117 Fed. 396. Likewise, the pendency of one suit to test the validity of a patent has excused delay in bringing other suits: *United States Mitis Co. v. Detroit Steel & Spring Co.*, 122 Fed. 863. The pendency of a suit in the federal court which has finally been dismissed for want of jurisdiction has excused delay in suing a state court: *Russell v. Dayton Coal & Iron Co.*, 109 Tenn. 43, 70 S. W. 1. Delay in suing to set aside an agreement has been excused pending an unsuccessful suit for reformation: *Russell v. Russell*, 129 Fed. 434. In general, see, also, *Central R. Co. of New Jersey v. Jersey City*, 199 Fed. 237; *Bogert v. Southern Pac. Co.*, 244 Fed. 61, 156 C. C. A. 489; *McAfee v. Reynolds*, 130 Ind. 33, 30 *Am. St. Rep.* 194, 28 N. E. 423; *Garrett v. Finch*, 107 Va. 25, 57 S. E. 604.

tion of the action the consequences are the same as though no action had been begun.<sup>107</sup>

§ 1456. (§ 35.) (8) **Miscellaneous Excuses.**—As what amounts to laches depends largely upon the circumstances of each particular case, so, also, the excuses which may be satisfactory to the court are many and various. A few additional ones may here be mentioned. It has been held that where the party interposing the defense of laches has contributed to or caused the delay, he cannot take advantage of it.<sup>108</sup> Likewise, a constant recognition of the right by all the parties has been held a sufficient excuse.<sup>109</sup> In some instances, prompt action looking toward the enforcement of the claim has excused delay in suing.<sup>110</sup> It is sometimes said that the same diligence is not required between members of

<sup>107</sup> *Johnston v. Standard Min. Co.*, 148 U. S. 360, 37 L. Ed. 480, 13 Sup. Ct. 585; *Stuart v. Holland*, 179 Fed. 969; *United States v. Fletcher*, 231 Fed. 326; *Rupp v. Rogers*, 118 Md. 534, 85 Atl. 774; *Streicher v. Murray*, 36 Mont. 45, 92 Pac. 36; *Skinner v. Scott*, 29 Okl. 364, 118 Pac. 394.

<sup>108</sup> The text is quoted in *Northern Pac. R'y Co. v. Boyd*, 177 Fed. 804, 101 C. C. A. 18. See, also, *Stevinson v. San Joaquin & K. R. Canal & Irrigation Co.*, 162 Cal. 141, 121 Pac. 398 (plaintiff relies on assurances of defendant's officer); *Fred Macey Co. v. Macey*, 143 Mich. 138, 5 L. R. A. (N. S.) 1036, 106 N. W. 722 (delay of two years excused by continued negotiations for a settlement); *Richards v. Hatfield*, 40 Neb. 879, 59 N. W. 777; *Hellams v. Prior*, 64 S. C. 296, 42 S. E. 106 (delay due to defendant's requests for time).

<sup>109</sup> *Riggs v. Polk*, 3 Tex. Civ. App. 179, 21 S. W. 1013. See, also, *Zeigler v. Zeigler*, 180 Ala. 246, 60 South. 810 (twenty-eight years); *Lufkin v. Cutting*, 225 Mass. 599, 114 N. E. 822; *Delmoe v. Long*, 35 Mont. 139, 88 Pac. 778; *Holzer v. Thomas*, 69 N. J. Eq. 515, 61 Atl. 154 (sixteen years).

<sup>110</sup> *Billings v. Aspen Min. & S. Co.*, 51 Fed. 338, 2 C. C. A. 252, 10 U. S. App. 1; *Ulman v. Clark*, 75 Fed. 868 (claimants not guilty of laches "when they do everything that is necessary to protect their rights, except the commencement of a legal action"); *Dunning v. Bates*, 186 Mass. 123, 71 N. E. 309.



the same family as between strangers.<sup>111</sup> A few other miscellaneous cases will be found in the note.<sup>112</sup>

It has been distinctly held that the plaintiff's poverty is not a sufficient excuse for laches;<sup>113</sup> but the reason assigned for this ruling is not so convincing as to preclude the hope that it may sometimes be a circumstance to be considered in his favor, at least in connection with other disabilities or excuses. The mere fact that the complainant resides in a remote region, and therefore remains in ignorance of facts which are notorious at the place where the property is situated, is not an excuse.<sup>114</sup> And the fact that the complainant delays be-

<sup>111</sup> *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907; *Bennett v. Finnegan*, 72 N. J. Eq. 155, 65 Atl. 239 (husband and wife); *Snyder v. Snyder*, 280 Ill. 467, 117 N. E. 465 (children and mother). See, also, *ante*, note 101.

<sup>112</sup> *Southern Pac. R. Co. v. Stanley*, 49 Fed. 263; *West Arlington Imp. Co. v. Mt. Hope Retreat*, 97 Md. 191, 54 Atl. 982 (plaintiff's delay in suing to enjoin pollution of stream until convinced that water was rendered unfit for use is not laches); *Kinthead v. Ryan*, 64 N. J. Eq. 454, 53 Atl. 1053 (failure of life tenant to insist upon his rights against the remainderman while the latter is an infant is not laches).

<sup>113</sup> *Leggett v. Standard Oil Co.*, 149 U. S. 287, 37 L. Ed. 737, 13 Sup. Ct. 902; *Hayward v. National Bank*, 96 U. S. 611, 24 L. Ed. 855; *Naddo v. Bardon*, 51 Fed. 493, 2 C. C. A. 335, 4 U. S. App. 642 (affirming 47 Fed. 782); *Bower v. Stein*, 177 Fed. 673, 101 C. C. A. 299; *Wolf v. Great Falls etc. Co.*, 15 Mont. 49, 38 Pac. 115; *Patterson v. Hewitt (N. M.)*, 66 Pac. 552, 55 L. R. A. 658. In *Naddo v. Bardon*, *supra*, *Brewer, J.*, says, with apparent seriousness: "It is to the glory of our profession in this country that it is ever ready to champion the cause of the poor; and no man who has a just claim, and makes an effort to assert it, will ever fail of securing the needed professional assistance. The courts are always open, and the lawyers are always willing and at hand; and if he fails to establish his rights it is because he does not make an effort to assert them."

<sup>114</sup> *Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599; *Rudland v. Mastie*, 77 Fed. 688; *Naddo v. Bardon*, 51 Fed. 493, 2 C. C. A. 335, 4 U. S. App. 642 (affirming 47 Fed. 782); *Bower v. Stein*, 177 Fed.

cause he fears that action may interfere with his employment or with contractual rights is not sufficient.<sup>115</sup>

§ 1457. (§ 36.) **Pleading Excuses for Laches.**—"The party who appeals to the conscience of the chancellor in support of a claim, when there has been laches in prosecuting it, or long acquiescence in the assertion of adverse rights, should set forth in his bill, specifically, what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondents to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor must refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."<sup>116</sup>

673, 101 C. C. A. 299; *Marvel v. Cobb*, 200 Mass. 293, 86 N. E. 360. Compare *Atkinson v. Schilman*, 60 Fla. 301, 53 South. 844, 56 South. 274. Where fraud was practised by non-residents, other party was not bound to go into another state to sue, but might wait an opportunity to pursue his equitable remedy in the courts of his own state; *Page Belting Co. v. Prince*, 77 N. H. 309, 91 Atl. 961.

<sup>115</sup> *Lane & Bodley Co. v. Locke*, 150 U. S. 193, 37 L. Ed. 1049, 14 Sup. Ct. 78 (fear of dismissal from employment is no excuse); *Thorn Wire Hedge Co. v. Washburn & Moen Mfg. Co.*, 159 U. S. 423, 40 L. Ed. 205, 16 Sup. Ct. 94 (fear that litigation might imperil receipt of future royalties under contract is no excuse).

<sup>116</sup> *Badger v. Badger*, 2 Wall. 95, 17 L. Ed. 836. This paragraph of the text is cited in *Boyd v. Northern Pac. R. Co.*, 170 Fed. 779; *State v. Warner Valley Stock Co.*, 56 Or. 283, 106 Pac. 780, 108 Pac. 861; *Ruckman v. Cox*, 63 W. Va. 74, 59 S. E. 760. See, also, *Potts v. Alexander*, 118 Fed. 885; *Gibson v. Herriott*, 55 Ark. 85, 29 Am. St. Rep. 17, 17 S. W. 589; *Wetzel v. Minn. R'y Transfer Co.*, 65 Fed. 23, 12 C. C. A. 490, 27 U. S. App. 594; *Lant v. Manley*, 71 Fed. 7; *Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229. See, further, *Kleinclaus v. Dutard*, 147 Cal. 245, 81 Pac. 516; *Brundy v. Canby*, 50 Mont. 454, 148 Pac. 315 (where delay is less than the period of

limitations, no excuse need be made in the bill); *Skinner v. Scott*, 29 Okl. 364, 118 Pac. 394. It is not necessary for the defendant to set up laches. "To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive and refuse relief": *Sullivan v. Railroad Co.*, 94 U. S. 806, 24 L. Ed. 324; *Moore v. Nickley* (C. C. A.), 133 Fed. 289.

## CHAPTER II.

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### INTERPLEADER.

#### ANALYSIS.

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  - § 61. Interpleader in legal actions.

§ 1458. (§ 37.) **Common-law Interpleader.**<sup>1</sup>—“Under the ancient common law, the relief of interpleader was

<sup>1</sup> Section 1319, Pom. Eq. Jur., classifying interpleader as an ancillary and provisional remedy, is cited in *Smith v. Grand Lodge*



allowed in two special cases in a legal action by a court of law: when two or more persons had made a joint bailment and then brought separate actions of detinue against the depositary for the thing bailed; and when the thing came into the holder's possession by finding, and two or more persons claiming to be owners sued him in separate actions of detinue. Modern statutes, English and American, have enabled courts of law to grant a similar relief, in a summary manner, in certain legal actions, but this legislation has no connection with the ancient common-law jurisdiction above mentioned."<sup>2</sup>

§ 1459. (§ 38.) **Interpleader—General Nature and Object.**<sup>3</sup>—"I purpose in this chapter to describe the general equitable jurisdiction to grant the remedy of interpleader independent of statute; and afterwards to notice briefly the modern statutes, some of which may perhaps have enlarged that jurisdiction, but most of which have simply conferred a similar jurisdiction upon courts of law, to be exercised in certain kinds of legal actions. Where two or more persons, whose titles are connected

A. O. U. W., 124 Mo. App. 181, 101 S. W. 662. Sections 1319 *et seq.*, Pom. Eq. Jur., are cited, generally, in *Lavelle v. Bellin*, 121 Mo. App. 442, 97 S. W. 200; *United R'ys Co. of St. Louis v. O'Connor*, 153 Mo. App. 128, 132 S. W. 262. Sections 1320 *et seq.*, Pom. Eq. Jur., are cited in *Nixon v. Malone*, 100 Tex. 250, 98 S. W. 380, 99 S. W. 403. This chapter is cited in *Wainwright v. Connecticut Fire Insurance Co. (Fla.)*, 74 South. 8.

<sup>2</sup> The above paragraph of the text is quoted in *Lavelle v. Bellin*, 121 Mo. App. 442, 97 S. W. 200. "For a more full account of this common-law relief, see Mitford's Eq. Pl., Jeremy's ed., 141, 142; *Crawshay v. Thornton*, 2 Mylne & C. 1": Pom. Eq. Jur., § 1320, note. As to interpleader in common-law actions under the practice in Pennsylvania, see *Brownfield v. Canon*, 25 Pa. St. 299; *Pennypacker's Appeal*, 57 Pa. St. 114.

<sup>3</sup> Sections 38 *et seq.*, are cited in *Chicago, R. I. & P. R'y Co. v. Moore*, 92 Ark. 446, 123 S. W. 233. This paragraph is cited in *Dyas v. Dyas*, 231 Ill. 367, 83 N. E. 229; *Page Belting Co. v. Prince*, 74 N. H. 262, 67 Atl. 401.

by reason of one being derived from the other, or of both being derived from a common source, claim the same thing, debt, or duty by different or separate interests, from a third person, and he, not knowing to which of the claimants he ought of right to render the debt or duty, or to deliver the thing, fears he may be hurt by some of them, he may maintain a suit and obtain against them the remedy of interpleader.<sup>4</sup> In his bill of complaint he must state his own rights and their several claims, and pray that they may interplead, so that the court may adjudge to whom the thing, debt, or duty belongs, and he may be indemnified. If any suits at law have been brought against him, he may also pray that such proceedings be restrained until the right be determined.<sup>5</sup> The object of the suit is, that the conflict-

<sup>4</sup> The text is quoted in *Chicago, R. I. & P. R'y Co. v. Moore*, 92 Ark. 446, 123 S. W. 233; *Wilmer v. Philadelphia & Reading Coal & Iron Co.*, 124 Md. 599, 93 Atl. 157; *McGinn v. Interstate Nat. Bank*, 178 Mo. App. 347, 166 S. W. 345; *Runkle's Adm'r v. Runkle's Adm'r*, 112 Va. 788, 72 S. E. 695.

<sup>5</sup> The text is quoted in *Wilmer v. Philadelphia & Reading Coal & Iron Co.*, 124 Md. 599, 93 Atl. 157. This description is taken, with some additions and alterations, to conform to later decisions, from *Mitford's Equity Pleading*, 58, 59. As to the general nature of the remedy, see *Crawshay v. Thornton*, 2 Mylne & C. 1; *Sieveking v. Behrens*, 2 Mylne & C. 581; *Glyn v. Duesbury*, 11 Sim. 139, 147; *Langston v. Boylston*, 2 Ves. 101, 103, 109; *Jones v. Thomas*, 2 Smale & G. 186; *Prudential Assur. Co. v. Thomas*, L. R. 3 Ch. 74; *Farley v. Blood*, 30 N. H. 354; *Lincoln v. Rutland etc. R. R.*, 24 Vt. 639; *Crane v. McDonald*, 118 N. Y. 648, 23 N. E. 991; *Bassett v. Leslie*, 123 N. Y. 396, 25 N. E. 386; *Dorn v. Fox*, 61 N. Y. 264; *Shaw v. Coster*, 8 Paige, 339, 35 Am. Dec. 690; *Mohawk etc. R. R. v. Clute*, 4 Paige, 384; *Bedell v. Hoffman*, 2 Paige, 199; *Badeau v. Rogers*, 2 Paige, 209; *Bell v. Hunt*, 3 Barb. Ch. 391; *Richards v. Salter*, 6 Johns. Ch. 445; *Atkinson v. Manks*, 1 Cow. 691; *Cady v. Potter*, 55 Barb. 463; *Delaware, L. & W. R. Co. v. Corwith*, 5 N. Y. Supp. 792, 16 Civ. Proc. Rep. 312; *Packard v. Stevens*, 58 N. J. Eq. 489, 46 Atl. 250; *Wakeman v. Kingsland*, 46 N. J. Eq. 113, 18 Atl. 680; *Mount Holly etc. Tp. Co. v. Ferree*, 17 N. J. Eq. 117; *Coates v. Roberts*, 4 Rawle (Pa.), 100; *National Park Bk. v. Lanahan*, 60 Md.

ing claimants shall litigate the matter among themselves, without involving the stakeholder in their controversy, with which he has no interest. It is plain, therefore, that the plaintiff can obtain no *specific* relief. So far as he is concerned, upon his filing the bill, and surrendering up the thing or money into the custody of the court, *his* remedy is exhausted by the decree that the defendants do interplead with each other, and that he be freed from or indemnified against their demands, and that he recover his costs; with the result of their dispute he has no concern.”<sup>6</sup>

477; *Dickeshied v. Exchange Bank*, 28 W. Va. 340; *Strange v. Bell*, 11 Ga. 103; *Burton v. Black*, 32 Ga. 53; *Hayes v. Johnson*, 4 Ala. 267; *Morris v. Cain's Ex'rs*, 34 La. Ann. 657, 35 La. Ann. 759; *Michigan etc. Co. v. White*, 44 Mich. 25, 5 N. W. 1086; *Cogswell v. Armstrong*, 77 Ill. 139; *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21; *Roselle v. Farmers' Bank*, 119 Mo. 84, 24 S. W. 744; *Hathaway v. Foy*, 40 Mo. 540; *Orr Water Ditch Co. v. Larcombe*, 14 Nev. 53; *Pope v. Ames*, 20 Or. 199, 25 Pac. 393; *North Pacific Lumber Co. v. Lang*, 28 Or. 246, 52 Am. St. Rep. 780, 42 Pac. 799; *Pfister v. Wade*, 56 Cal. 43; *McWhirter v. Halstead*, 24 Fed. 828; *Louisiana State Lottery Co. v. Clark*, 16 Fed. 20, 4 Woods, 169.

<sup>6</sup> Pom. Eq. Jur., § 1320. The text is quoted in *Wilmer v. Philadelphia & Reading Coal & Iron Co.*, 124 Md. 599, 93 Atl. 157. This section of Pom. Eq. Jur. is cited in *Crass v. Memphis & C. R. Co.*, 96 Ala. 447, 11 South. 480. That the decree of interpleader is interlocutory and does not determine the validity of the claims in controversy, see *Heald v. Rhind*, 86 Md. 320, 38 Atl. 43; *Owings v. Rhodes*, 65 Md. 408, 9 Atl. 903. In general, as to the practice upon a decree of interpleader see *Penn Mutual Life Ins. Co. v. Union Trust Co.*, 83 Fed. 891 (after interpleader the parties occupy the position of plaintiff and defendant); *Willson v. Salmon*, 45 N. J. Eq. 257, 17 Atl. 815; *Lamon v. McKee*, 18 D. C. (7 Mackey) 446, 479; *State v. Kumpff*, 62 Mo. App. 332 (result of decree upon plaintiff's rights); *McMurray v. Sisters of Charity*, 68 N. J. L. 312, 53 Atl. 389. See, also, *Chicago, R. I. & P. R'y Co. v. Moore*, 92 Ark. 446, 123 S. W. 233 (proper to restrain parties to suit from proceeding in other tribunals to have same matters adjudicated); *Interlocking Stone Co. v. Scribner*, 19 Cal. App. 344, 126 Pac. 178; *Wainwright v. Connecticut Fire Ins. Co. (Fla.)*, 74 South. 8; *Dyas v. Dyas*, 231

§ 1460. (§ 39.) **Rationale of the Remedy.**—"The ground of the jurisdiction is plain. The party seeking the remedy is exposed to the hazard, vexation and expense of several actions at law for the same demand, while he is ready and willing to satisfy that demand in favor of the claimant who establishes his right thereto. For this liability the law furnishes no adequate remedy, and in most instances no remedy whatever."<sup>7</sup> "It is sometimes supposed that the remedy of interpleader is allowed to avoid the risk of two recoveries. This is

Ill. 367, 83 N. E. 229, citing section 1320, Pom. Eq. Jur. (not the province of the court to permit a general accounting between the defendant and decree payment of the balance out of the money brought into court); *Wilmer v. Philadelphia & Reading Coal & Iron Co.*, 124 Md. 599, 93 Atl. 157 (cross-bill cannot be maintained in regard to some other subject-matter not in plaintiff's bill); *Horner v. Lehman*, 130 Md. 275, 100 Atl. 285 (injunction against prosecution of other suits between the claimants); *McAlister Bros. & Co. v. Sanders*, 107 Miss. 283, 65 South. 249 (on non-appearance of one of the claimants, plaintiff cannot complain if fund is awarded to the other); *Howland Bros. & Carr v. Barre Savings Bank & Trust Co.*, 87 Vt. 181, 88 Atl. 732.

That an ordinary interpleader suit is not an action *in rem* so as to dispense with personal service of process, see *Cross v. Armstrong*, 44 Ohio St. 613, 10 N. E. 160; *Gary v. Northwestern M. A. Ass'n* (Iowa), 50 N. W. 27; *Washington Life Ins. Co. v. Gooding*, 19 Tex. Civ. App. 490, 49 S. W. 123; *Expressman's Mut. Benef. Ass'n v. Hurlock*, 91 Md. 585, 80 Am. St. Rep. 470, 46 Atl. 957.

In addition to the summary remedy by motion in a legal action, the statutes of some states contain provisions relating to the action of interpleader: See *National Sav. Bank v. Cable*, 73 Conn. 568, 48 Atl. 428 (Pub. Acts of Conn., 1893, c. 42); *Barnes v. Bamberger*, 196 Pa. St. 123, 46 Atl. 303 (act of June 13, 1836); *Mosher v. Bruhn*, 15 Wash. 332, 46 Pac. 397 (2 Hill's Code, Wash., § 153); *Agnew v. Barto & Son's Bank*, 48 Wash. 66, 92 Pac. 885 (Bal. Codes, § 4843; statutory action is equitable); *City of Atlanta v. McDaniel*, 96 Ga. 190, 22 S. E. 896 (Georgia Code, § 3234).

<sup>7</sup> Pom. Eq. Jur., § 1320, end. Quoted in *Atkinson v. Carter*, 101 Mo. App. 477, 74 S. W. 502; *Wilmer v. Philadelphia & Reading Coal & Iron Co.*, 124 Md. 599, 93 Atl. 157.



entirely a mistaken view. If a party has in any way made himself liable, even for the same demand, to two claimants, he is not entitled to an interpleader. It is the essential fact that he should actually be liable to only one of the claimants. The true *rationale* of interpleader is, that the party thereby avoids the risk of being vexed by two or more suits. Even though there is no danger of his being compelled to pay the same demand twice, the danger of two suits against him, with the consequent trouble and expense, is the sufficient ground for the remedy.<sup>8</sup> The supreme object of an interpleader is to protect the plaintiff,—the stakeholder,—and not the claimants against him; to protect him from the danger and vexation of two opposing suits for the same demand by those claimants, while he is ready and willing to pay the demand to the one who is judicially ascertained to be entitled to it.”<sup>9</sup>

<sup>8</sup> Pom. Eq. Jur., § 1320, note; *Crawford v. Fisher*, 1 Hare, 436, 441; *East and West India Dock Co. v. Littledale*, 7 Hare, 57, 60; *Langston v. Boylston*, 2 Ves. 101; *Sabliciech v. Russell*, L. R. 2 Eq. 441; *Greene v. Mumford*, 4 R. I. 313; *School District v. Weston*, 31 Mich. 85; *Pfister v. Wade*, 56 Cal. 43; *Hechmer v. Gilligan*, 28 W. Va. 750, 757; *Livingston v. Bank of Montreal*, 50 Ill. App. 562; *Yarborough v. Thompson*, 3 Smedes & M. (Miss.) 291, 41 Am. Dec. 626. See, also, in support of the text, *Smith v. Grand Lodge A. O. U. W.*, 124 Mo. App. 181, 101 S. W. 662; *United R'ys Co. of St. Louis v. O'Connor*, 153 Mo. App. 128, 132 S. W. 262. In *Crawford v. Fisher*, Wigram, V. C., said: “The office of an interpleading suit is, not to protect a party against a *double liability*, but against double vexation in respect of *one* liability. If the circumstances of a case show that the plaintiff is liable to both claimants, that is no case for interpleader. It is of the essence of an interpleading suit that the plaintiff shall be liable to one only of the claimants; and the relief which the court affords him is against the vexation of two proceedings on a matter which may be settled in a single suit.”

<sup>9</sup> Pom. Eq. Jur., § 1320, note. The text is quoted in *Karabacek v. Richards*, 249 Mo. 608, 155 S. W. 777; and cited in *Rochelle v. Pacific Express Co.*, 56 Tex. Civ. App. 142, 120 S. W. 543. See, also, *Trigg v. Hitz*, 17 Abb. Pr. 436; *Farley v. Blood*, 30 N. H. 354; *Michi-*

§ 1461. (§ 40.) **Nature of the Risk to Which Plaintiff is Exposed.**—The danger of a double vexation must be real; a mere suspicion of risk will not be sufficient to support a bill.<sup>10</sup> It is settled, by a long series of cases in New York, that it is not enough for the party seeking interpleader to show that a claim has been presented against a fund already claimed by another, but he must prove that such claim is plausible, and has some reasonable foundation, so that he cannot, without hazard, determine to which of the claimants he should pay the fund.<sup>11</sup> The plaintiff's risk may depend upon a doubt-

gan etc. Co. v. White, 44 Mich. 25, 5 N. W. 1086; Newhall v. Kastens, 70 Ill. 156; Nelson v. Barter, 2 Hem. & M. 334, 33 L. J. Ch. 705, 10 Jur., N. S., 832.

<sup>10</sup> Pom. Eq. Jur., § 1320, note; Blair v. Porter, 13 N. J. Eq. 267; Baltimore and Ohio R. R. Co. v. Arthur, 90 N. Y. 234; Partlow v. Moore, 184 Ill. 119, 56 N. E. 317, affirming Moore v. Partlow, 84 Ill. App. 119; Fitch v. Brower, 42 N. J. Eq. 300, 11 Atl. 330 (reasonable doubt arises from the claim); National Bank of Augusta v. Augusta etc. Co., 99 Ga. 286, 25 S. E. 686 (claims should be sufficiently set forth to enable the court to determine whether it is doubtful or dangerous for plaintiff to act). See, also, in support of the text, United R'ys Co. of St. Louis v. O'Connor, 153 Mo. App. 128, 132 S. W. 262; Page Belting Co. v. Prince, 74 N. H. 262, 67 Atl. 401, 77 N. H. 309, 91 Atl. 961 (facts held to expose plaintiff to hazard); Metropolitan Life Ins. Co. v. Hamilton (N. J. Eq.), 70 Atl. 677 (danger sufficiently real where two parties have already commenced suit).

<sup>11</sup> Dorn v. Fox, 61 N. Y. 264; Crane v. McDonald, 118 N. Y. 648; Pustet v. Flannelly, 60 How. Pr. 67; Nassau Bank v. Yandes, 44 Hun, 55; Pratt v. Myers, 63 Hun, 634, 28 Abb. N. C. 460, 18 N. Y. Supp. 466; Mars v. Albany Savings Bank, 64 Hun, 429, 19 N. Y. Supp. 791, affirmed 69 Hun, 398, 23 N. Y. Supp. 658; Stevenson v. New York L. I. Co., 10 App. Div. 233, 41 N. Y. Supp. 964; Lennon v. Metropolitan L. I. Co., 20 Misc. Rep. 403, 45 N. Y. Supp. 1033; Roberts v. Van Horne, 21 App. Div. 369, 47 N. Y. Supp. 448; Cosgriff v. Hudson City Sav. Inst., 24 Misc. Rep. 4, 52 N. Y. Supp. 189; Sexton v. Home Fire Ins. Co., 35 App. Div. 170, 54 N. Y. Supp. 862; Southwark Nat. Bank v. Childs, 39 App. Div. 560, 57 N. Y. Supp. 789; Wells v. National City Bank, 40 App. Div. 498, 29 Civ. Proc. Rep.

ful and disputed question of law, instead of a question of fact. "So long as a principle is still under discussion . . . it would seem fair to hold that there was sufficient doubt and hazard to justify the protection which is afforded by the beneficent action of interpleader."<sup>12</sup>

§ 1462. (§ 41.) **At What Stage Interpleader may be Brought.**—"Such being the theory of the remedy, it is not essential that any suit should have been actually commenced by either claimant against the plaintiffs."<sup>13</sup>

158, 58 N. Y. Supp. 125; *Post v. Emmett*, 40 App. Div. 477, 58 N. Y. Supp. 129; *Kreiser v. City of New York*, 46 App. Div. 16, 61 N. Y. Supp. 329; *Merchant v. Northwestern M. L. I. Co.*, 57 App. Div. 375, 68 N. Y. Supp. 406. This note is cited in *Page Belting Co. v. Prince*, 77 N. H. 309, 91 Atl. 961. Many of these cases concerned the showing required to be made by affidavits in the statutory interpleader by motion in an action at law; but it has been repeatedly held that there is no difference between the rule in statutory interpleader and that in interpleader by suit. The moving party is merely required to show that the claim interposed renders his position hazardous to the extent of creating a reasonable doubt; he need not show that the claim would probably be successful; *Burritt v. Press Pub. Co.*, 19 App. Div. 609, 46 N. Y. Supp. 295; *Dreyfus v. Casey*, 52 Hun, 95, 5 N. Y. Supp. 65; and his affidavit need not allege that he himself is in doubt as to who has the just claim, if it gives facts which may raise a reasonable doubt in the mind of the court: *Schell v. Lowe*, 75 Hun, 43, 23 Civ. Proc. Rep. 300, 26 N. Y. Supp. 991. The rule, as applied in statutory interpleader by motion in a pending action, is designed for the protection of the plaintiff in that action, and cannot be invoked by the adverse claimant; it is the latter's duty either to take position squarely with respect to the nature of his claim or to withdraw the same: *Butler v. Atlantic Trust Co.*, 28 Misc. Rep. 42, 59 N. Y. Supp. 814.

<sup>12</sup> *Dorn v. Fox*, 61 N. Y. 270; *Crane v. McDonald*, 118 N. Y. 648, 654, 23 N. E. 991; *Sovereign Camp, Woodmen of the World v. Wood*, 100 Mo. App. 655, 75 S. W. 377. The text is quoted in *Little v. St. Louis Union Trust Co.*, 197 Mo. 281, 94 S. W. 890; and cited in *Smith v. Grand Lodge A. O. U. W.*, 124 Mo. App. 181, 101 S. W. 662.

<sup>13</sup> *Angell v. Hadden*, 15 Ves. 244; *Morgan v. Marsack*, 2 Mer. 107; *Farley v. Blood*, 30 N. H. 354; *Richards v. Salter*, 6 Johns. Ch. 445;

It is enough that the conflicting claimants make their respective claims and threaten suit.<sup>14</sup> The plaintiff must, however, positively allege an actual claim made by each defendant."<sup>15</sup> It is held that the plaintiff cannot interplead claimants who have reduced their claims to judgment, as this would be to increase instead of diminish the number of suits, and because of the familiar rule that a court of equity cannot give relief when the party might have made defense at law.<sup>16</sup>

*Yates v. Tisdale*, 3 Edw. Ch. 71; *Schuyler v. Pelissier*, 3 Edw. Ch. 191; *Strange v. Bell*, 11 Ga. 103; *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592; Pom. Eq. Jur., § 1320, note.

<sup>14</sup> *Langston v. Boylston*, 2 Ves. 101; *Providence Bank v. Wilkinson*, 4 R. I. 507, 70 Am. Dec. 160; *Briant v. Reed*, 14 N. J. Eq. 271; *Yarborough v. Thompson*, 2 Smedes & M. (Miss.) 291, 41 Am. Dec. 626; Pom. Eq. Jur., § 1320, note.

<sup>15</sup> *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 82; Pom. Eq. Jur., § 1320, note.

<sup>16</sup> *Yarborough v. Thompson*, *supra*; *McKinney v. Kuhn*, 59 Miss. 186. See, also, *Larabrie v. Brown*, 26 N. J. Rep., Eq., N. S., 605; *Bank v. Kerr*, 2 Md. Ch. 460; *Hichmer v. Gilligan*, 28 W. Va. 757; *Wabash R. Co. v. Flannigan*, 95 Mo. App. 477, 75 S. W. 691; and the recent cases: *H. Stevenson & Son, Ltd., v. Brownell*, [1912] 2 Ch. 344 (judgment by consent); *Lackmann v. Klauenberg*, 3 Cal. App. 183, 84 Pac. 776 (judgment in a justice's court from which appeal is taken, is not within the rule, since plaintiff could take no steps to interplead there); *Maxwell v. Leichtman*, 72 N. J. Eq. 780, 65 Atl. 1007 (but right is not lost by filing pleas at bar in action at law). In *Yarborough v. Thompson*, it was said: "There is no evidence that anything unconscientious was done by either of the defendants in this case, in obtaining their judgments. Each proceeded upon a legal claim. The complainant defended each, but for some cause was unsuccessful in both. One of the judgments is no doubt wrong; but, from the bill, the error was induced by the complainant's answer to the garnishment. . . . If a case of fraud or surprise in obtaining either of the judgments were made out against either of the parties, that might entitle the complainant to relief against such party; but that would be done upon an original bill, not a bill of interpleader."



§ 1463. (§ 42.) **The Claims, Legal or Equitable.**—“The equitable jurisdiction exists, although both or all the conflicting claims against the stakeholder are legal,<sup>17</sup> since it depends upon the fact that distinct claims are made, rather than upon their intrinsic nature as being legal or equitable. It is not necessary, however, that all the claims should be legal; the remedy is granted when one of them is legal and the other equitable.<sup>18</sup> Indeed, if one or more of the conflicting claims

<sup>17</sup> *Lowndes v. Cornford*, 18 Ves. 299.

<sup>18</sup> Quoted in *Atkinson v. Carter*, 101 Mo. App. 477, 74 S. W. 502. See, also, *Lowndes v. Cornford*, *supra*; *Morgan v. Marsack*, 2 Mer. 107; *Wright v. Ward*, 4 Russ. 215; *Paris v. Gilham*, Coop. 56; *Martinius v. Helmuth*, 2 Ves. & B. 412; *Smith v. Hammond*, 6 Sim. 10; *Crawford v. Fisher*, 10 Sim. 479; *Hamilton v. Marks*, 5 De Gex & S. 638; *Prudential Assur. Co. v. Thomas*, L. R. 3 Ch. 74; *Duke of Bolton v. Williams*, 4 Brown Ch. 297, 309; *Farley v. Blood*, 30 N. H. 354; *Fairbanks v. Belknap*, 135 Mass. 179; *Richards v. Salter*, 6 Johns. Ch. 445; *Yates v. Tisdale*, 3 Edw. Ch. 71; *Schuyler v. Pelissier*, 3 Edw. Ch. 191; *Lozier's Ex'rs v. Van Saun's Adm'rs*, 3 N. J. Eq. 325; *Ireland v. Kelly*, 60 N. J. Eq. 308, 47 Atl. 51; *Oil Run Petroleum Co. v. Gale*, 6 W. Va. 525; *Strange v. Bell*, 11 Ga. 103; *Burton v. Black*, 32 Ga. 53; *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592; *Whitney v. Cowan*, 55 Miss. 626, 647; *Newhall v. Kastens*, 70 Ill. 156; *People's Sav. Bank v. Look*, 95 Mich. 7, 54 N. W. 629. See, also, the recent case, *Nelson v. Piper*, 213 Mass. 531, 100 N. E. 749. In England the necessity of a resort to equity is removed, although the equity jurisdiction is not at all affected, by the statute of 1 & 2 Wm. IV, c. 58, § 1, as amended and enlarged by the common-law procedure act (23 & 24 Viet., c. 126, § 12), which enabled a court of law, on motion, to direct what amounts to an interpleader in actions of debt, assumpsit, trover and detinue. Under the present system of procedure, equitable claims may be adjudicated upon in an interpleader issue connected with a legal action: *Rusden v. Pope*, L. R. 3 Ex. 269; *Engleback v. Nixon*, L. R. 10 Com. P. 645; *Duncan v. Cashin*, L. R. 10 Com. P. 554; *Attenborough v. London and St. Katherine's Dock Co.*, L. R. 3 C. P. D. 450; see *Langton v. Horton*, 3 Beav. 464. Analogous statutes have been passed in many American states, *post*, § 61. For illustrations of relief against equitable claims in interpleader proceedings under these statutes, see *Underwood v.*

are purely equitable, there is the stronger reason for a resort to the equity jurisdiction; and prior to recent legislation in England and in the United States, such a resort was indispensable under those circumstances."<sup>19</sup>

§ 1464. (§ 43.) **Essential Elements.** — "From the description given in a previous paragraph, and from the whole course of authorities, it is clear that the equitable remedy of interpleader, independent of recent statutory regulations, depends upon and requires the existence of the four following elements, which may be regarded as its essential conditions: 1. The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded; 2. All their adverse titles or claims must be dependent, or be derived from a common source; 3. The person asking the relief—the plaintiff—must not have nor claim any interest in the subject-matter; 4. He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder. As the original equitable jurisdiction is founded, to a great extent, upon these four propositions, I shall examine them separately."<sup>20</sup>

Boston etc. Bank, 141 Mass. 305, 4 N. E. 822; *Dixon v. National L. I. Co.*, 168 Mass. 48, 46 N. E. 430; *Brierly v. Equitable Aid Union*, 170 Mass. 218, 64 *Am. St. Rep.* 297, 48 N. E. 1090; *Windecker v. Mut. L. Ins. Co.*, 12 App. Div. (N. Y.) 73, 43 N. Y. Supp. 358.

<sup>19</sup> Pom. Eq. Jur., § 1321.

<sup>20</sup> Pom. Eq. Jur., § 1322. This analysis was quoted and approved in *Wells, Fargo & Co. v. Miner*, 25 Fed. 533, 537, by Sawyer, J.; *Stewart v. Sample*, 168 Ala. 270, 53 South. 182; in *Morrill v. Manhattan Life Ins. Co.*, 82 Ill. App. 410, affirmed and opinion adopted 183 Ill. 260, 55 N. E. 656; in *Kile v. Goodrum*, 87 Ill. App. 462; in *Platte Valley State Bank v. National Livestock Bank*, 54 Ill. App. 483, affirmed and opinion adopted, 155 Ill. 250, 40 N. E. 621; in *Newman v. Commercial Nat. Bank*, 156 Ill. 530, 41 N. E. 156 (affirming 55 Ill. App. 534); in *Northwestern Mut. Life Ins. Co. v. Kidder*, 162 Ind. 382, 70 N. E. 489; *Smith v. Grand Lodge A. O. U. W.*, 124 Mo. App. 181, 101 S. W. 662; *Supreme Lodge Knights of Honor v.*

§ 1465. (§ 44.) **First: The Same Thing, Debt, or Duty.**—"The same thing, debt, or duty must be claimed by both the parties against whom the interpleader is demanded.<sup>21</sup> This requisite results from the very nature and object of the remedy. If the subject in dispute has a bodily existence,—is a *thing*,—there can be no doubt nor question as to the identity. The difficulty in applying the rule arises where the subject is a chose in action; and then the identity must be determined in each particular case, not by any general rules, but by the nature, constitution, and incidents of the debt, demand, or duty itself."<sup>22</sup>

Selby, 153 N. C. 203, 69 S. E. 51; *More v. Western Grain Co.*, 31 N. D. 369, 153 N. W. 976; *Runkle's Adm'r v. Runkle's Adm'r*, 112 Va. 788, 72 S. E. 695, and other cases; and cited in *Lowry v. Downing Mfg. Co. (Fla.)*, 74 South. 525; *Northwestern Mut. Life Ins. Co. v. Kidder (Ind. App.)*, 69 N. E. 204; *Lanning v. Stiles*, 176 Mich. 275, 142 N. W. 581; *McGinn v. Interstate Nat. Bank*, 178 Mo. App. 347, 166 S. W. 345; *Matlack v. Kline (Mo. App.)*, 190 S. W. 408. Sections 43 *et seq.* are cited in *Times-Herald Printing Co. v. St. Paul Sanitarium (Tex. Civ. App.)*, 175 S. W. 1121.

<sup>21</sup> *Desborough v. Harris*, 5 De Gex, M. & G. 439, 455. See, also, *Standley v. Roberts*, 59 Fed. 836, 19 U. S. App. 407, 8 C. C. A. 305; *Ryan v. Lamson*, 44 Ill. App. 204, affirmed in 153 Ill. 520, 39 N. E. 979; *Rauch v. Ft. Dearborn Nat. Bank*, 223 Ill. 507, 11 L. R. A. (N. S.) 545, 79 N. E. 273; *Detroit Trust Co. v. Hunrath*, 168 Mich. 180, 131 N. W. 147 (plaintiff is under a contract liability to two parties); *Metropolitan Life Ins. Co. v. Brown (Mo. App.)*, 186 S. W. 1155; *Taylor v. Satterthwaite*, 22 N. Y. Supp. 187, 2 Misc. Rep. 441; *Heyman v. Smadbeck*, 27 N. Y. Supp. 141, 6 Misc. Rep. 527; *Travelers' Insurance Co. v. Healey*, 86 Hun, 524, 33 N. Y. Supp. 911; *Du Bois v. Union Dime Sav. Inst.*, 89 Hun, 382, 35 N. Y. Supp. 397, 25 Civ. Proc. R. 288, 2 N. Y. Ann. Cas. 221; *Freda v. Montauk Co.*, 55 N. Y. Supp. 748, 26 Misc. Rep. 199; *Johnston v. Oliver*, 51 Ohio St. 6, 36 N. E. 458; *Bank of Whitehouse v. Balbridge*, 134 Tenn. 7, 183 S. W. 158; and additional cases cited in the notes to this and the following paragraphs.

<sup>22</sup> Pom. Eq. Jur., § 1323. This section of Pom. Eq. Jur. is cited in *Northwestern Mut. Life Ins. Co. v. Kidder*, 162 Ind. 382, 70 N. E. 489. See *City Bank v. Bangs*, 2 Paige, 570; *Briant v. Reed*, 14 N. J.

§ 1466. (§ 45.) **Same; Claims of Different Amounts.** “In *Glyn v. Duesbury*, 11 Sim. 139, 148, Shadwell, V. C., said: ‘*Where the claims made by the defendants are of different amounts, they can never be identical; but where they are the same in amount, that circumstance goes far to determine their identity. The amount, however, may not be sufficient of itself to determine the identity; for the amount may be the same and the debt may be different.*’ This *dictum* was approved in *Pfister v. Wade*, 56 Cal. 43. In my opinion, however, that portion of the *dictum* which is italicized—the statement that claims of different amounts can never be identical—is incorrect; it seems alike opposed to principle and to authority. Where both defendants claim one, single, undivided *debt*, technically so called, the statement is undoubtedly true; a difference in their amounts would be fatal to their identity. But it is clearly not necessarily so where the claims are for unliquidated damages. Where, for example, a chattel is in the plaintiff’s hands, to which both defendants claim title, they do not sue to recover the article itself, but allege a *technical* conversion, and seek to recover damages—the value of the chattel. Here the claim of the defendants would not be for a ‘thing,’ nor for a ‘debt,’ but it would be for a ‘duty’—a *chose in action*. If each defendant alleged a different value, and claimed a different amount of damages, the *duty* asserted would still be identically the same in each demand.<sup>23</sup> Another instance of difference in the amounts claimed by the different defendants, where the debt or duty may still be the same, occurs in cases where a fund being in plaintiff’s hands, the whole of it is claimed by

Eq. 271; *Dodd v. Bellows*, 29 N. J. Eq. 127; *Leddel’s Ex’r v. Starr*, 20 N. J. Eq. 274; *Salisbury Mills v. Townsend*, 109 Mass. 115; *Oil Run Petroleum Co. v. Gale*, 6 W. Va. 525; *Pfister v. Wade*, 56 Cal. 43; *Blue v. Watson*, 59 Miss. 619.

<sup>23</sup> See, to the same effect, *Packard v. Stevens*, 58 N. J. Eq. 489, 46 Atl. 255, criticising *Glyn v. Duesbury*.



one defendant, and parts of it are claimed by the others. With regard to such cases, Christiancy, J., said, in *School District v. Weston*, 31 Mich. 85: 'Upon the great weight of authority, both English and American, a much more liberal and reasonable rule has been established, and bills of interpleader have been frequently maintained, where the several claimants, instead of claiming the whole fund or matter in dispute, have claimed different portions of the fund, when the aggregate of all the claims exceeded the full amount of the fund; and the complainant being, as in the present case, virtually a stakeholder, and unable to determine to whom or in what proportions the payments should be made.' In this case the plaintiff had let a contract for building a school-house for a specified sum to a contractor, and portions of this contract price were claimed by subcontractors and material-men, the total amount of their claims exceeding the whole contract price."<sup>24</sup>

<sup>24</sup> Pom. Eq. Jur., § 1323, note. The text is quoted in *Enterprise Lumber Co. v. First Nat. Bank of Dothan*, 181 Ala. 388, 61 South. 930; and cited in *Chicago, R. I. & P. R'y Co. v. Moore*, 92 Ark. 446, 123 S. W. 233, a case resembling that quoted in the text. See, also, as examples of such partial claims, *Yates v. Tisdale*, 3 Edw. Ch. 71; *Fargo v. Arthur*, 43 How. Pr. 193; *Newhall v. Kastens*, 70 Ill. 156; *Board of Education v. Seoville*, 13 Kan. 17; *Barnes v. City of New York*, 27 Hun, 236; *Van Zandt v. Van Zandt*, 7 N. Y. Supp. 706, 17 Civ. Proc. R. 448; *Koenig v. New York Life Ins. Co.*, 14 N. Y. St. R. 250, 14 Civ. Proc. R. 269; also, the recent cases: *Enterprise Lumber Co. v. First Nat. Bank of Dothan*, 181 Ala. 388, 61 South. 930 (subscribers deposited sums in a bank to be paid to a railroad company on its compliance with a contract; interpleader by bank on dispute between company and subscribers as to whether contract has been performed); *Western & A. R'y Co. v. Union Inv. Co.*, 128 Ga. 74, 57 S. E. 100; *Wilmer v. Philadelphia & Reading Coal & Iron Co.*, 124 Md. 599, 93 Atl. 157 (several claimants to royalties under a lease); *Novinger Bank v. St. Louis Union Trust Co.*, 196 Mo. App. 335, 189 S. W. 826 (several claimants to a fund; not necessary that identity of the thing claimed shall be absolute and perfect throughout). "Additional cases may be found in the many interpleader

§ 1467. (§ 46.) **Same; Illustrations.**—"Where the same property had been taxed to the owner in two counties, in some cases for different amounts, in others for the same amount, a bill of interpleader by the owner to determine which of the counties was entitled to the tax has been maintained. It is difficult to perceive how the tax levied by two different counties, even though the amount of each tax is the same, is one and the same debt or duty, so as to sustain a bill of interpleader."<sup>25</sup>

The question whether the plaintiff is liable for the same debt, or has incurred a double liability, has fre-

suits in this court, under the mechanics' lien act, when the contract is filed, and noticing creditors and holders of equitable assignments are brought in because their claims upon the contract price conflict. In these cases the claims often vary widely in amount, and sometimes involve little other dispute than a settlement of the order of their priority; yet, if the situation be such that the contract price is not enough to pay all, and the owner may be compelled to determine the order and priority of payment, it is common practice in this state to settle the rights of all the claimants under an interpleader bill": Packard v. Stevens, 58 N. J. Eq. 489, 46 Atl. 250, citing Trenton Schools v. Heath, 15 N. J. Eq. 22; Wakeman v. Kingsland, 46 N. J. Eq. 113, 18 Atl. 680; Lanigan's Adm'r v. Bradley & Currier Co., 50 N. J. Eq. 202, 24 Atl. 505; Board etc. v. Duparquet, 50 N. J. Eq. 234, 24 Atl. 922. See, also, Lowry v. Downing Mfg. Co. (Fla.), 74 South. 525; Beilharz v. Illingsworth, 62 Tex. Civ. App. 647, 132 S. W. 106. But it is to be observed, in such cases, that the claims must be *conflicting*; if there is no doubt as to the order of their priority, there is no ground for interpleader: Ter Knile v. Reddick (N. J. Eq.), 39 Atl. 1062.

<sup>25</sup> Pom. Eq. Jur., § 1323, note. See Thompson v. Ebbets, Hopk. Ch. (N. Y.) 272; Mohawk etc. R. R. Co. v. Clute, 4 Paige (N. Y.), 384, 391; Redfield v. Supervisors, Clarke Ch. (N. Y.) 42; Dorn v. Fox, 61 N. Y. 264; Sherrod v. Dawson, 154 N. C. 525, 70 S. E. 739; but, *per contra*, see Greene v. Mumford, 4 R. I. 313. In Massachusetts such a bill was dismissed although the parties did not object to the jurisdiction, on the grounds that the claims were entirely independent, that there was no privity, that no property was brought into court, and that there was an adequate statutory remedy by suing to recover back the tax paid: Welch v. Boston, 208 Mass. 326, 35 L. R. A. (N. S.) 330, 94 N. E. 271, distinguishing

quently arisen where a vendor seeks to interplead two rival brokers, both claiming commissions by reason of the same sale to the same purchaser;<sup>26</sup> and where an insurance company has issued a policy or certificate on the surrender of a previous policy or certificate, and seeks to interplead rival beneficiaries.<sup>27</sup> In a recent case of much interest it was held that interpleader was proper "when the complainant employs two or more persons to do work upon a common object, under an agreement that each shall be paid according to the amount of the work he may separately do, to be ascertained by measurement when the work shall be completed, and without fault of the complainant a confusion of the work done arises, which prevents an ascertainment of the amount separately done by each, so that the complainant cannot safely pay either."<sup>28</sup>

*Forest River Lead Co. v. City of Salem*, 165 Mass. 193, 42 N. E. 802, as being decided on very special facts; and see *Macy v. Nantucket*, 121 Mass. 351.

<sup>26</sup> See *Shipman v. Scott*, 12 Civ. Proc. Rep. (N. Y.) 109, 14 Daly, 233, and *Brooke v. Smith*, 13 Pa. Co. Ct. R. 557, 2 Pa. Dist. R. 767, 33 Wkly. Not. Cas. 74, holding that the debt was the same, and awarding interpleader; and *McCreery v. Inge*, 63 N. Y. Supp. 158, 49 App. Div. 133, and *Sachsel v. Farrer*, 35 Ill. App. 277, holding that there was a double liability. See, also, not awarding interpleader, *Hartsook etc. v. Chrissman*, 114 Mo. App. 558, 90 S. W. 116; *Maxwell v. Frazier*, 52 Or. 183, 18 L. R. A. (N. S.) 102, 96 Pac. 548.

<sup>27</sup> See *National Life Ins. Co. v. Pingrey*, 141 Mass. 411, holding that the company could not have an order that the defendants interplead, where one important question to be tried was whether, by reason of its own act, it is under a liability to each of them; and compare *Supreme Commandery U. O. G. C. v. Merrick*, 163 Mass. 374, 40 N. E. 183 (distinguishing the last case as one where the contracts of insurance were independent), and *McCormick v. Supreme Council*, 39 N. Y. Supp. 1010, 6 App. Div. 175, where there were two outstanding mutual benefit insurance certificates, but only one insurance effected and one set of premiums paid, and interpleader was, therefore, awarded.

<sup>28</sup> *Packard v. Stevens*, 58 N. J. Eq. 489, 46 Atl. 250.

“In other cases, one defendant claiming rent for certain premises, and the other claiming damages for their use and occupation, the demands were held not to be the same.<sup>29</sup> If the conflicting claims relate to a specific ‘thing’ in the plaintiff’s possession, the identity is clear, and the value alleged is immaterial.”<sup>30</sup>

§ 1468. (§ 47.) **Second: Privity Between the Opposing Claimants.**—“A second requisite is, that the adverse

<sup>29</sup> Pom. Eq. Jur., § 1323, note; *Dodd v. Bellows*, 29 N. J. Eq. 127; *Johnson v. Atkinson*, 2 Anstr. 798. See, also, *Pardee & Curtin Lumber Co. v. Odell*, 78 W. Va. 159, 88 S. E. 419 (suit by vendee; claim by vendor for purchase price, and by adverse claimant to the title).

<sup>30</sup> Pom. Eq. Jur., § 1323, note; *Cady v. Potter*, 55 Barb. 463. In *Lozier’s Ex’rs v. Van Saun’s Adm’rs*, 3 N. J. Eq. 325, a bill of interpleader was sustained, where the controversy was as to which of the defendants was entitled to receive payment of certain notes made by plaintiff’s testator, although the amount to be paid was not ascertained; the amount, it was held, could not vary the rights of the claimants. In *Bassett v. Leslie*, 123 N. Y. 396, 25 N. E. 386, the plaintiff sought to interplead two defendants, both claiming the same amount, but one claiming for goods sold to the plaintiff, and the other claiming upon a draft accepted by the plaintiff on the understanding that its proceeds should be used in payment of the debt for the goods sold; it was held, under the circumstances of the case, that the claims were not identical. Where A’s claim against B is for the price of goods sold, and C’s claim is that these goods were converted by A, the demands are not so identical as to warrant interpleader on B’s petition: *Coleman v. Chambers*, 127 Ala. 615, 29 South. 58; *Sherman v. Partridge*, 11 How. Pr. (N. Y.) 154. An insurance company, there being no assignment of the policy, cannot interplead the widow and the beneficiary, where the latter is suing for interest, damages and attorney’s fees for vexatious delay; *Metropolitan Life Ins. Co. v. Brown* (Mo. App.), 186 S. W. 1155. It was held that where one claimant included in his suit a cause of action with which the other claimant had nothing to do, interpleader was not proper, in *Carroll v. Demarest*, 58 N. Y. Supp. 1028, 42 App. Div. 155. That it is incorrect for a plaintiff to unite in one suit three different issues of interpleader between three different groups of parties merely because of the similarity of the questions involved, see *Wallace v. Sortor*, 52 Mich. 159, 17 N. W. 794, distinguishing *School District v. Weston* (for which case see last paragraph).



title of the claimants must be connected, or dependent, or one derived from the other, or both derived from a common source. It is not every instance of conflicting claims against a person for the same thing, debt, or duty which will entitle him to the remedy of an interpleader. Where there is no privity between the claimants, where their titles are independent, not derived from a common source, but each asserted as wholly paramount to the other, the stakeholder is obliged, in the language of the authorities, to defend himself as well as he can against each separate demand; a court of equity will not grant him an interpleader."<sup>31</sup> "This doctrine, which was left

<sup>31</sup> Pom. Eq. Jur., § 1324. The text is quoted in Runkle's Adm'r v. Runkle's Adm'r, 112 Va. 788, 72 S. E. 695. This section of Pom. Eq. Jur. is cited with approval in Northwestern Mut. Life Ins. Co. v. Kidder, 162 Ind. 382, 70 N. E. 489. See, also, Pearson v. Cardon, 2 Russ. & M. 606, 609-612; Crawshay v. Thornton, 2 Mylne & C. 1, 19-24; Nickolson v. Knowles, 5 Madd. 47; Cooper v. De Tastet, Tam. 177; Pfister v. Wade, 56 Cal. 43; Third Nat. Bank v. Lumber Co., 132 Mass. 410; Kyle v. Mary Lee Coal & R. Co., 112 Ala. 606, 20 South. 851; North Pacific Lumber Co. v. Lang, 28 Or. 246, 52 Am. St. Rep. 780, 42 Pac. 799; Hoyt v. Gouge (Iowa), 101 N. W. 464; City of Montpelier v. Capital Sav. Bank, 75 Vt. 433, 98 Am. St. Rep. 834, 56 Atl. 89. See, further, Davis v. Douglass, 12 Ala. App. 581, 68 South. 528; New Jersey Title Guarantee & Trust Co. v. Rector, 75 N. J. Eq. 423, 72 Atl. 968. *Contra*, see Boyle v. Manion, 74 Miss. 572, 21 South. 530. For a case where privity between the claimants was held to exist, see Fairbanks v. Belknap, 135 Mass. 179, a bill of interpleader by trustees for the benefit of creditors against, on the one hand, certain creditors whose claims were subsequent in time to the conveyance to the plaintiffs, and who assert rights in the property of the debtor as beneficiaries of the trust, and ask its appropriation to the payment of their debts; and, on the other hand, against the assignees in insolvency of the debtor, who claim the debtor's property, discharged from any supposed trust, by virtue of the assignment in insolvency. In Packard v. Stevens, 58 N. J. Eq. 489, 46 Atl. 255, it was held that the objection of lack of privity cannot be maintained where each claimant, with the knowledge or assent of the other, contracted to take employment on the same undertaking, and for payment on the basis of the total work done,

somewhat doubtful by the previous cases, was finally settled by the decision of Lord Brougham in *Pearson v. Cardon*, and of Lord Cottenham in *Crawshay v. Thornton*. It finds its most frequent application in cases of a tenant interpleading his landlord and a third person claiming under paramount title, of a bailee interpleading his bailor and an adverse claimant asserting a paramount title, and of an agent interpleading his principal and an adverse paramount claimant. Examples of these cases are given in subsequent paragraphs.<sup>32</sup>

“Such being the doctrine, it is a manifest imperfection of the equity jurisdiction that it should be so limited. A person may be, and is, exposed to danger, vexation, and loss from conflicting *independent* claims to the same thing, as well as from claims which are dependent; and there is certainly nothing in the nature of the remedy which need prevent it from being extended to both classes of demands.”<sup>33</sup>

and they are in dispute as to the amount of work which each contributed toward the total; though their contracts are several, they are not independent.

32 Pom. Eq. Jur., § 1324, note. See *post*, §§ 54, 55.

33 Pom. Eq. Jur., § 1324, note, quoted with approval in *Crane v. McDonald*, 118 N. Y. 648, 657, 23 N. E. 991. The court in this case declined to decide whether the doctrine exists in New York, holding that the case under consideration fully met the requirements of the rule, and remarking that “our statutory interpleader by order apparently does not recognize the doctrine.” The text is quoted, also, in *McGinn v. Interstate Nat. Bank*, 178 Mo. App. 347, 166 S. W. 345 (bank which issued cashier’s checks in payment of a certified check may interplead claimant of the certified check and an indorsee without consideration of the cashier’s check, since both claims are based on the original check). Professor Pomeroy continues: “It is not surprising, therefore, that courts have sometimes ignored this doctrine in their decisions, or have been ready to admit exceptions to its operation. In the common-law procedure act of 1860, which provides for a summary interpleader by motion in legal actions, it was enacted that the order of interpleader may be made ‘though the titles of the claimants have not a common origin, but are ad-

§ 1469. (§ 48.) **Third: Plaintiff a Mere Stakeholder.** "The person seeking the relief must not have nor claim any interest in the subject-matter. He must occupy the position of a stakeholder. He must stand entirely indifferent between the conflicting claimants, and be ready and willing to surrender the entire thing in dispute, or to pay the entire debt, or render the entire duty, without any charge, deduction, or commission as against the one

verse to and independent of each other.' In *Attenborough v. London etc. Dock Co.*, L. R. 3 C. P. D. 450, which was an interpleader proceeding in a legal action, the court of appeal held that the statute above quoted had abrogated this doctrine as laid down in *Crawshay v. Thornton*, at all events in the proceedings authorized by the statute. Bramwell, L. J., who was one of the commissioners who drew up the statute, said (p. 456): 'From my own knowledge as one of the common-law commissioners, I can say that it was intended to do away with the effect of that decision.' Baggallay, L. J., a very eminent equity lawyer, said (p. 458): 'I may go further, and say that, in my opinion, if, after the common-law procedure act of 1860, a bill of interpleader had been filed, raising facts like those in *Crawshay v. Thornton*, any judge of the court of chancery would have felt himself no longer bound by the somewhat narrow principle, laid down by Lord Cottenham, but would have acted upon the fuller powers contained in that statute.' The Code of Civil Procedure of California, as lately amended, in section 386, goes even further, and provides for an interpleader, 'although the titles or claims have not a common origin, *or are not identical*.' [See this section applied in *Wells, Fargo & Co. v. Miner*, 25 Fed. 533.] This last provision, that the claims need not be identical, is certainly unnecessary and most unreasonable; it violates the whole ground and reason upon which the remedy is based; if interpreted literally by the courts, it would remove almost every limitation upon this kind of suit, and render it a means of vexation and annoyance. There is no valid objection to the requisite that the opposing claims should be identical; the only question has been, What *is* such identity? Experience shows the danger of legislative intermeddling with doctrines long settled and approved by the consenting judgments of able courts." This note is cited, as to the abrogation by statute of the rule of *Crawshay v. Thornton*, in *Anderson v. Red Metal Mining Co.*, 36 Mont. 312, 93 Pac. 44.

rightfully entitled. He cannot mingle up a demand of his own upon the property or fund, with the demand that the other persons shall interplead. As soon as the decree is made that the defendants do interplead, and that he be indemnified, the plaintiff must be wholly without the controversy. . . . To sum up the doctrine, the plaintiff can only obtain the remedy of an interpleader; and the circumstances must be such that the entire rights of both defendants to the thing, fund, debt, or duty can be fully adjusted and determined in the one suit.”<sup>34</sup>

<sup>34</sup> Pom. Eq. Jur., § 1325. This section is cited in *Union Pacific R. Co. v. Belek*, 211 Fed. 699; *Greene v. Davis*, 118 Mo. App. 636, 96 S. W. 318; *Amos v. Angotti*, 78 W. Va. 448, 88 S. E. 1094, 94 S. E. 944. See *Mitchell v. Hayne*, 2 Sim. & St. 63; *Langston v. Boylston*, 2 Ves. 101; *Moore v. Usher*, 7 Sim. 383; *Bignold v. Audland*, 11 Sim. 23; *Hoggart v. Cutts*, *Craig & P.* 197; *Lincoln v. Rutland etc. R. R.*, 24 Vt. 639; *Atkinson v. Manks*, 1 Cow. 691; *Shaw v. Coster*, 8 Paige, 339, 35 *Am. Dec.* 690; *Lozier's Ex'rs v. Van Saun's Adm'rs*, 3 N. J. Eq. 325; *Kerr v. Union Bank*, 18 Md. 396; *Burton v. Black*, 32 Ga. 53; *Adams v. Dixon*, 19 Ga. 513, 65 *Am. Dec.* 608; *Anderson v. Wilkinson*, 10 Smedes & M. 601; *Cullen v. Dawson*, 24 Minn. 66; *Baltimore etc. R. R. v. Arthur*, 90 N. Y. 234; *Stone v. Reed*, 152 Mass. 179, 25 N. E. 49; *Blue v. Watson*, 59 Miss. 19; *Appeal of Bridesburg Mfg. Co.*, 106 Pa. St. 275. See, also, *Statham v. Hall*, 1 Turn. & R. 30; *Groves v. Sentell*, 153 U. S. 465, 38 *L. Ed.* 785, 14 Sup. Ct. 898; *Crass v. Memphis & Charleston R. R. Co.*, 96 Ala. 447, 11 South. 480, quoting and approving the above text; *National Park Bank v. Lananhan*, 60 Md. 477; *Chase v. Ladd*, 155 Mass. 417, 29 N. E. 637; *Atkinson v. Flannigan*, 70 Mich. 639, 38 N. W. 655; *Swan v. Bartlett*, 82 Mo. App. 642. See, also, *Supreme Council of Legion of Honor v. Palmer*, 107 Mo. App. 157, 80 S. W. 699, citing Pom. Eq. Jur.; *Young v. Miller* (Mo. App.), 182 S. W. 822; *Holland Trust Co. v. Sutherland*, 177 N. Y. 327, 69 N. E. 647; *Dodge v. Lawson*, 19 N. Y. Supp. 904, 22 Civ. Proc. R. 112; *Barnstein v. Hamilton*, 49 N. Y. Supp. 932, 26 App. Div. 206; *Dohnert's Appeal*, 64 Pa. St. 311; *Wing v. Spaulding*, 64 Vt. 83, 23 Atl. 615; and see cases cited in the following notes.

**Illustrations.**—A frequent application of the principle is furnished by cases where the plaintiff claims the right to retain a portion of



§ 1470. (§ 49.) **Same; Admission or Waiver of Plaintiff's Claim; Dispute as to His Liability.**—"While the plaintiff cannot set up a claim, charge, or lien upon the fund, which shall enter into the litigation, and form a part of the controversy,<sup>35</sup> it seems this rule is not with-

the fund in controversy as commission or charge for his services rendered in connection with the fund: See, for example, *Mitchell v. Hayne*, 2 Sim. & St. 63, where the plaintiff, an auctioneer, seeking to interplead a vendor and a purchaser who both laid claim to a deposit made by the latter, asserted a right to retain a portion of the sum as his commission; *Baltimore & Ohio R. R. Co. v. Arthur*, 90 N. Y. 234, where the plaintiff, a vendee of merchandise, seeking an interpleader of the claims of his vendor and the latter's receiver, attempted to reserve less than one per cent of the sum in controversy as freight charges.

The plaintiff, trustee of a disputed trust, is not an indifferent stakeholder if he is entitled to a large commission in case the validity of the trust is sustained: *National Park Bank v. Lanahan*, 60 Md. 477; compare *Chase v. Ladd*, 155 Mass. 417, 29 N. E. 637 (executor cannot maintain interpleader to ascertain the respective rights of defendants to property belonging to the estate of the testator, because of his interest in the property; but the bill may be treated as a petition for instructions in the management of the trust). The plaintiff is not an indifferent stakeholder if he has taken an indemnity from some of the defendants: *Statham v. Hall*, 1 Turn. & R. 30; or if one of the claims is made against him by his own procurement: *Swain v. Bartlett*, 82 Mo. App. 642; *Smith v. Grand Lodge A. O. U. W.*, 124 Mo. App. 181, 101 S. W. 662 (plaintiff estopped, at least until he has placed claimant *in statu quo*). He must, of course, admit a liability to some one: *Bernstein v. Hamilton*, 49 N. Y. Supp. 932, 26 App. Div. 206. In a strict bill of interpleader, he can claim no further equitable relief: *Dohnert's Appeal*, 64 Pa. St. 311; and see *post*, § 60, *Bills in the Nature of Bills of Interpleader*.

Since the plaintiff's interest or want of interest is not a mere formal matter, but goes to the very right of maintaining the bill, the objection on this score may be taken at the hearing: *Wing v. Spaulding*, 64 Vt. 83, 23 Atl. 615, relying on *Toulmin v. Reid*, 14 Beav. 499, *Statham v. Hall*, 1 Turn. & R. 30, *Yates v. Tisdale*, 3 Edw. Ch. 71, and *Mount Holly etc. Turnpike Co. v. Ferree*, 17 N. J. Eq. 117.

35 Pom. Eq. Jur., § 1325, note; *Wakeman v. Dickey*, 19 Abb. Pr.

out exceptions. It does not apply where the claim is admitted by both defendants.<sup>36</sup> If the plaintiff has a claim or charge on the fund, he may waive it, and maintain the suit.<sup>37</sup> It necessarily follows from the general doctrine that if the plaintiff expressly denies his liability in whole or in part to one of the defendants, he strikes at the very foundation of the remedy, and shows that he is not indifferent."<sup>38</sup>

(N. Y.) 124; *Crass v. Memphis & C. R. Co.*, 96 Ala. 447, 11 South. 480, holding that a carrier's lien for freight, the correctness of which is not assented to, cannot be litigated in a suit to interplead the consignee's vendor and attaching creditors of the consignee. See, also, cases in the last note and the following notes.

<sup>36</sup> Pom. Eq. Jur., § 1325, note; *Cotter v. Bank of England*, 2 Dowl. Pr. 728; and see *Attenborough v. London etc. Co.*, L. R. 3 C. P. D. 450; *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592; *Webster v. McDaniel*, 2 Del. Ch. 297. In *McFadden v. Swinerton*, 36 Or. 336, 59 Pac. 816, 62 Pac. 12, the claim of the plaintiff, an attorney, on the fund for his fees did not prevent the interpleader; and the same was held of the expenses of an interpleading trustee, which were allowed by statute, in *Novinger Bank v. St. Louis Union Trust Co.*, 196 Mo. App. 335, 189 S. W. 826.

<sup>37</sup> Pom. Eq. Jur., § 1325, note; *Jacobson v. Blackhurst*, 2 Johns. & H. 486; and see *Orient Ins. Co. v. Reed*, 81 Cal. 145, 22 Pac. 484; *Smith v. Grand Lodge A. O. U. W.*, 124 Mo. App. 181, 101 S. W. 662 (amendment allowed where discrepancy small).

<sup>38</sup> Pom. Eq. Jur., § 1325, note; *Moore v. Usher*, 7 Sim. 383; *Greene v. Mumford*, 4 R. I. 313; *Patterson v. Perry*, 14 How. Pr. 505; *Cogswell v. Armstrong*, 77 Ill. 139; *Williams v. Matthews*, 47 N. J. Eq. 196, 20 Atl. 261; *Du Bois v. Union Dime Sav. Inst.*, 89 Hun, 382, 35 N. Y. Supp. 397, 25 Civ. Proc. Rep. 288, 2 N. Y. Ann. Cas. 221. See, further, the recent cases: *Smith v. Mosier*, 169 Fed. 430; *Gonia v. O'Brien*, 223 Mass. 177, 111 N. E. 787; *Greene v. Davis*, 118 Mo. App. 636, 96 S. W. 318; *Smith v. Grand Lodge A. O. U. W.*, 124 Mo. App. 181, 101 S. W. 662; *Pope v. Missouri Pac. R'y Co. (Mo.)*, 175 S. W. 955; *Metropolitan Life Ins. Co. v. Brown (Mo. App.)*, 186 S. W. 1155; *Bowman Bank & Trust Co. v. First Nat. Bank*, 18 N. M. 589, 139 Pac. 148. A denial not in the complaint but made on some previous occasion, is not within this rule: *Orient Ins. Co. v. Reed*, 81 Cal. 145, 22 Pac. 484. As to the effect of a dispute or uncertainty with respect to the amount of the fund or debt for which plaintiff

§ 1471. (§ 50.) **Same; Stakeholder must be Plaintiff; Fund must be in His Custody.**—"The stakeholder—the person in possession of the thing or fund, or from whom the debt or duty is owing, and against whom two or more conflicting claimants assert their demands—must necessarily be the plaintiff. No interpleader suit can be maintained by one of the contestants against the other contestant and the stakeholder.<sup>39</sup> Furthermore, the plaintiff must be in possession of the fund, or have it in his custody, so that he can deliver or pay it in pursuance of the decree. If he has already delivered the thing or paid the fund to one of the contestants, no suit for interpleader can be maintained."<sup>40</sup>

is liable, see *City Bank v. Bangs*, 2 Paige, 570; *Consociated Pres. Soc. v. Staples*, 23 Conn. 544; *Chamberlain v. O'Connor*, 1 E. D. Smith, 665; *Bender v. Sherwood*, 15 How. Pr. 258; *Patterson v. Perry*, 14 How. Pr. 505; *Williams v. Matthews*, 47 N. J. Eq. 196, 20 Atl. 261; *Appeal of Bridesburg Mfg. Co.*, 106 Pa. St. 275; *Diplock v. Hammond*, 2 Smale & G. 141; *Southwestern Tel. & T. Co. v. Benson*, 63 Ark. 283, 38 S. W. 341; *New England Mut. L. Ins. Co. v. Odell*, 50 Hun, 279, 2 N. Y. Supp. 873; *Sibley v. Society*, 3 N. Y. Supp. 8, 15 Civ. Proc. Rep. 316, 56 N. Y. Super. Ct. (24 J. & S.) 274; *Jackson v. Knickerbocker Athletic Club*, 49 App. Div. 107, 62 N. Y. Supp. 1109; *Dodge v. Lawson*, 19 N. Y. Supp. 904, 22 Civ. Proc. Rep. 112. That the defendants are entitled to show that the amount offered by the complainant is not the amount due, see *Williams v. Matthews*, 47 N. J. Eq. 196, 20 Atl. 261; but that a defendant is not to be allowed to defeat interpleader by an unfounded claim of a greater amount than that offered, see *Novinger Bank v. St. Louis Union Trust Co.*, 196 Mo. App. 335, 189 S. W. 826; *Radford v. First Nat. Bank of Union*, 71 Or. 84, 142 Pac. 362.

<sup>39</sup> See *Sprague v. West*, 127 Mass. 471; *Hyman v. Cameron*, 46 Miss. 725; *Hathaway v. Foy*, 40 Mo. 540; *Boyce v. Hamilton*, 21 Mo. App. 520, 525; *Kontjohn v. Seimers*, 29 Mo. App. 271; *Arn v. Arn*, 81 Mo. App. 133; *Wenstrom Electric Co. v. Bloomer*, 85 Hun, 389, 32 N. Y. Supp. 903; *Empire Engineering Corp. v. Mack*, 217 N. Y. 85, 111 N. E. 475.

<sup>40</sup> Pom. Eq. Jur., § 1325, note; *Mount Holly etc. Co. v. Ferree*, 17 N. J. Eq. 117; *Tiernan v. Rescaniere's Adm'rs*, 10 Gill & J. 217; *Vosburg v. Huntington*, 15 Abb. Pr. 254; *Martin v. Maberry*, 1 Dev. Eq. 169; *Burnet v. Anderson*, 1 Mer. 405; *Hechmer v. Gilligan*, 28 W. Va.

§ 1472. (§ 51.) **Same; Plaintiff may have Interest in the Legal Question.**—"The interest, however, which shall defeat the relief must be in the very *thing or fund* itself which is the subject-matter of the controversy and of the suit. An interest in the legal question at issue to be determined by the result of the litigation will not prejudice the plaintiff's right to the relief. If, therefore, the plaintiff has, with respect to other property not the subject-matter of the present suit, an interest that one of the defendants shall succeed, because the decision thus made will be favorable to his own future litigation concerning that other property,—this is no objection to his maintaining a suit for an interpleader."<sup>41</sup>

§ 1473. (§ 52.) **Fourth: No Independent Liability to One Claimant.**—"The party seeking the relief must have incurred no independent liability to either of the claimants. Such an independent liability may be incurred in two classes of cases: 1. In the first place, the agent, depository, bailee, or other party demanding an interpleader, in his dealings with one of the claimants, may have expressly acknowledged the latter's title, or may have bound himself by contract, so as to render himself liable upon such independent undertaking, without reference to his possible liability to the rival claimant upon the general nature of the entire transaction. Under these circumstances, as the plaintiff is liable at all events to one of the defendants, whatever may be their own respective claims upon the subject-matter as be-

750, 758. See, also, *Grant Bros. Auto Co. v. Cotter*, 161 Mich. 521, 126 N. W. 839. Compare *Enterprise Lumber Co. v. First Nat. Bank of Dothan*, 181 Ala. 388, 61 South. 930 (where stakeholder admits its liability for the whole fund, it is of no importance that a part of the fund was in another depository).

<sup>41</sup> Pom. Eq. Jur., § 1325, and note. Quoted in *Wilmer v. Philadelphia & Reading Coal & Iron Co.*, 124 Md. 599, 93 Atl. 157. See *Oppenheim v. Leo Wolf*, 3 Sand. Ch. 571; *McHenry v. Hazard*, 45 Barb. 657; *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592.



tween themselves, he cannot call upon these defendants to interplead. He does not stand indifferent between the claimants, since one of them has a valid legal demand against him at all events.<sup>42</sup> Even if the acknowledg-

42 Pom. Eq. Jur., § 1326. Quoted in *Atkinson v. Carter*, 101 Mo. App. 477, 74 S. W. 502; *Newman v. Commercial Nat. Bank*, 156 Ill. 530, 41 N. E. 156 (affirming 55 Ill. App. 534); and in *Runkle's Adm'r v. Runkle's Adm'r*, 112 Va. 788, 72 S. E. 695. Quoted, in part, in *Hartsook etc. v. Chrissman*, 114 Mo. App. 558, 90 S. W. 116; *McGinn v. Interstate Nat. Bank*, 178 Mo. App. 347, 166 S. W. 345. Cited to this effect in *Northwestern Mut. Life Ins. Co. v. Kidder* (Ind. App.), 69 N. E. 204; S. C., 162 Ind. 382, 70 N. E. 489; *Pratt v. Worrell* (N. J. Eq.), 57 Atl. 450; *Love v. Hartford Life Ins. Co.*, 153 Mo. App. 144, 132 S. W. 335; *More v. Western Grain Co.*, 31 N. D. 369, 153 N. W. 976; *Nixon v. Malone* (Tex. Civ. App.), 95 S. W. 577. See, also, *Crawshay v. Thornton*, 2 Mylne & C. 1, 19-24; *Suart v. Welch*, 4 Mylne & C. 305; *Jew v. Wood*, *Craig & P.* 185; *Lindsay v. Barron*, 60 E. C. L. 291; *Patorni v. Campbell*, 12 Mees. & W. 277; *Standley v. Roberts*, 59 Fed. 836, 8 C. C. A. 305, 19 U. S. App. 407; *Pfister v. Wade*, 56 Cal. 43; *Tyus v. Rust*, 37 Ga. 574, 95 Am. Dec. 365; *Hatfield v. McWhorter*, 40 Ga. 269; *Little & Green v. Davis*, 140 Ga. 212, 78 S. E. 842; *National Security Bank of Boston v. Batt*, 215 Mass. 489, 102 N. E. 691; *Connecticut Mutual Life Ins. Co. v. Cook*, 219 Mass. 222, 106 N. E. 853 (one defendant avers that he was induced to loan on insurance policy on representation of plaintiff company that the assignment of the policy was valid); *Cullen v. Dawson*, 24 Minn. 66; *Wakeman v. Kingsland*, 46 N. J. Eq. 113; *McKinney v. Kuhn*, 59 Miss. 186 (claimants have reduced their demands to judgment); *Ter Knile v. Reddick* (N. J. Eq.) 39 Atl. 1062; *Johnston v. Oliver*, 51 Ohio St. 6, 36 N. E. 458; *Connecticut Mut. L. Ins. Co. v. Tucker*, 23 R. I. 1, 91 Am. St. Rep. 590, 49 Atl. 26; and see cases cited below, and in the following notes. As to the effect produced by the English statute of 1860, interpreted by the decision in *Attenborough v. London etc. Co.*, L. R. 3 C. P. D. 450, and the amendment of section 386 of the California Code of Civil Procedure (applied in *Wells, Fargo & Co. v. Miner*, 25 Fed. 533), see *ante*, in note under § 47.

**Illustrations.**—It is held the plaintiff cannot interplead the claimants after one of them has obtained judgment upon his claim: *Home Ins. Co. v. Caulk*, 86 Md. 385, 38 Atl. 901; *Baker v. Brown*, 64 Hun, 627, 19 N. Y. Supp. 258; *Wabash R. Co. v. Flannigan*, 95 Mo.

ment or promise has been obtained by fraud or mistake, the right of the party thus deceived to be relieved in equity from his liability cannot be considered and sustained in an interpleader suit."<sup>43</sup>

"Another instance of the doctrine is, where the plaintiff, in stating the case in his bill, is obliged to admit himself to be a wrong-doer to either one of the defendants; he thus shows an independent liability to that de-

App. 477, 75 S. W. 691. Where the complainant, a bailee, became surety on the bond of one of the claimants for delivery of the chattels, his right to interpleader was defeated: *Kyle v. Mary Lee Coal & R. Co.*, 112 Ala. 606, 20 South. 851, quoting the above text. Where money was deposited in the N. bank (the plaintiff and appellant) to the credit of the P. bank, a mere notification by the former to the latter of the deposit and credit, before receiving information of a rival claim to deposit, does not constitute an express acknowledgment of the P. bank's title, or an independent undertaking, within the meaning of the text. "The liability of [the plaintiff], whatever and to whosoever it was, arose from the act of deposit and acceptance of the fund. It did not spring from the telegram and letter of notification. Such papers did not constitute the contract, but were mere evidences of it; neither did they increase appellant's liability or affect it in any way": *Platte Valley State Bank v. National Livestock Ass'n*, 54 Ill. App. 483; opinion affirmed and adopted, 155 Ill. 250, 40 N. E. 621. See, also, *Stewart v. Sample*, 168 Ala. 270, 53 South. 182, where an acceptance of an order by plaintiff did not absolutely bind him to pay. A written receipt by the plaintiff, an insurance company, of an assignment of the policy is not an acknowledgment of liability to the assignee: *Morrill v. Manhattan L. I. Co.*, 82 Ill. App. 410; opinion affirmed and adopted, 183 Ill. 260, 55 N. E. 656. In a case of rival sets of beneficiaries, claiming under a benefit insurance certificate, no independent liability on the part of the company to one set of beneficiaries resulted from assessments and dues paid by them, as the payments were made on behalf of the member, and under his contract with the company: *Supreme Commandery, U. O. G. C. v. Merrick*, 163 Mass. 374, 40 N. E. 183.

<sup>43</sup> 43 Pom. Eq. Jur., § 1326. Quoted in *Runkle's Adm'r v. Runkle's Adm'r*, 112 Va. 788, 72 S. E. 695. See *Mitchell v. Northwestern Mfg. & C. Co.*, 26 Ill. App. 295 (acknowledgment obtained by mistake).

fendant, and is not entitled to an interpleader.<sup>44</sup> If the liability has been occasioned by some act of the plaintiff himself, he is not entitled to the remedy."<sup>45</sup>

§ 1474. (§ 53.) **Same; 2. Independent Liability Arising from Nature of Original Relation.**—"In the second class of cases, the independent liability of the plaintiff to one of the defendants arises from the very nature of the original relation subsisting between them, without reference to any collateral acknowledgment of title, or promise to be bound. The most important examples of such relations are those subsisting between a bailee and his bailor, an agent or attorney and his principal, a tenant and his landlord, and the like. In pursuance of the doctrine above stated, if a bailee is sued by his bailor, or an agent by his principal, or a tenant by his landlord, and at the same time a third person asserts a claim of title adverse and paramount to that of the bailor, principal, or landlord, a suit of interpleader cannot, in general, be maintained against the two conflicting claimants, since, from the very nature of the relation, there is an independent personal liability, with respect to the subject-matter, of the bailee to his bailor, of the agent to his principal, and of the tenant to his landlord.<sup>46</sup>

<sup>44</sup> Pom. Eq. Jur., § 1326, note; *Slingsby v. Boulton*, 1 Ves. & B. 334; *Morgan v. Fillmore*, 18 Abb. Pr. 217; *United States v. Victor*, 16 Abb. Pr. 153; *Mount Holly etc. Co. v. Ferree*, 17 N. J. Eq. 117; *Dewey v. White*, 65 N. C. 225; *Hatfield v. McWhorter*, 40 Ga. 269; *Tyus v. Rust*, 37 Ga. 574, 95 Am. Dec. 365; *Coleman v. Chambers*, 127 Ala. 615, 29 South. 58; *Dodge v. Lawson*, 19 N. Y. Supp. 904, 22 Civ. Proc. Rep. 112; *Rauch v. Ft. Dearborn Nat. Bank*, 223 Ill. 507, 11 L. R. A. (N. S.) 545, 79 N. E. 273. See, also, *Stephenson v. Burdett* (W. Va.), 48 S. E. 846.

<sup>45</sup> Pom. Eq. Jur., § 1326, note. See *Desborough v. Harris*, 5 De Gex, M. & G. 439, 455; *Cochrane v. O'Brien*, 2 Jones & L. 380, 8 Ir. Eq. Rep. 241; *Conley v. Alabama Gold Life Ins. Co.*, 67 Ala. 472.

<sup>46</sup> Pom. Eq. Jur., § 1326. Quoted in *Runkle's Adm'r v. Runkle's Adm'r*, 112 Va. 788, 72 S. E. 695. The text is cited to this effect in

“The rule is not, however, of universal application. There are cases in which a bailee, agent, or tenant may interplead his bailor, principal, or landlord and a third person setting up an opposing claim to the thing, fund, or duty. These cases may be described by one general formula, as those in which the title of the opposing claimant is *derivative* under, and not antagonistic and paramount to, that of the bailor, principal, or landlord. An interpleader is allowed wherever the adverse claim originates from some act of the bailor, principal, or landlord, done or suffered after the commencement of the bailment, agency, or tenancy, and causing a dispute as to which of the parties is entitled to the thing, fund, or duty. The claim of the third person, instead of being under an independent, antagonistic, paramount title, must be made under a title *derived* from that of the bailor, principal, or landlord; it must acknowledge, and not deny, such original title.”<sup>47</sup>

§ 1475. (§ 54.) **Same; Bailees and Agents.**<sup>48</sup>—“A bailee or agent cannot maintain an interpleader suit against the bailor or the principal and a third person who asserts an independent, antagonistic, and paramount title to the funds.<sup>49</sup> Nor can an attorney maintain such a suit against his client and a third person who

Hayward etc. v. McDonald, 192 Fed. 890, 113 C. C. A. 368; Johnson v. Adams, 82 Vt. 398, 73 Atl. 1076; Moore v. Western Grain Co., 31 N. D. 369, 153 N. W. 976.

<sup>47</sup> Pom. Eq. Jur., § 1327. Cited in Moore Printing Typewriter Co. v. National Savings & Trust Co., 218 U. S. 422, 54 L. Ed. 1093, 31 Sup. Ct. 64; Hayward etc. v. McDonald, 192 Fed. 890, 113 C. C. A. 368; Love v. Hartford Life Ins. Co., 153 Mo. App. 144, 132 S. W. 335; Maxwell v. Leichtman, 72 N. J. Eq. 780, 65 Atl. 1007; Johnson v. Adams, 82 Vt. 398, 73 Atl. 1076; Atlantic City Nat. Bank v. Thompson, 82 N. J. Eq. 111, 87 Atl. 636; Runkle's Adm'r v. Runkle's Adm'r, 112 Va. 788, 72 S. E. 695.

<sup>48</sup> Pom. Eq. Jur., § 1327, note.

<sup>49</sup> This section is cited in Atlantic City Nat. Bank v. Thompson, 82 N. J. Eq. 111, 87 Atl. 636 (collecting bank is bailee). See Nickol-



claims the money which he has collected, by an independent and antagonistic title.<sup>50</sup> For the same reason, where

son v. Knowles, 5 Madd. 47; Dixon v. Hammond, 2 Barn. & Ald. 310, 313; Cooper v. De Tastet, Tam. 177, 181, 182; Smith v. Hammond, 6 Sim. 10; Pearson v. Cardon, 2 Russ. & M. 606, 609, 610, 612; Crawshay v. Thornton, 2 Mylne & C. 1, 19-24; Cook v. Earl of Rosslyn, 1 Giff. 167; Atkinson v. Manks, 1 Cow. 691, 703-706; United States Trust Co. v. Wiley, 41 Barb. 477; Lund v. Seamen's Bank, 37 Barb. 129; United States v. Vietor, 16 Abb. Pr. 153; Vosburgh v. Huntington, 15 Abb. Pr. 254; First Nat. Bank v. Biningier, 26 N. J. Eq. 345; Tyus v. Rust, 37 Ga. 574, 95 Am. Dec. 365; Hatfield v. McWhorter, 40 Ga. 269; Crane v. Burntrager, 1 Ind. 165; White Water etc. Co. v. Comegys, 2 Ind. 469; Bartlett v. The Sultan, 23 Fed. 257; De Zouche v. Garrison, 140 Pa. St. 430, 21 Atl. 450; Whitbeck v. Whiting, 59 Ill. App. 520; Cromwell v. American L. & T. Co., 57 Hun, 149, 11 N. Y. Supp. 144; Pacific Express Co. v. Williams, 2 Willson (Tex.) Civ. Cas. Ct. App., § 810. See, further, the recent cases: H. C. Schrader Co. v. A. Z. Bailey Grocery Co. (Ala. App.), 74 South. 749 (positive duty of collecting bank, as agent, to remit to principal); Commerce Trust Co. v. Bank of Willow Springs, 161 Mo. App. 431, 143 S. W. 531 (same); New Jersey Title Guarantee & Trust Co. v. Rector, 75 N. J. Eq. 423, 72 Atl. 968 (bailee); Johnson v. Adams, 82 Vt. 398, 73 Atl. 1076 (same); More v. Western Grain Co., 31 N. D. 369, 153 N. W. 976 (same). Compare New Jersey Title Guarantee & Trust Co. v. Rector, 76 N. J. Eq. 587, 75 Atl. 931 (under statute, a warehouseman who gives a receipt for the property may interplead his bailor and a claimant of the property); Lavelle v. Bellin, 121 Mo. App. 442, 97 S. W. 200 (bailee of finder of a \$500 bill may interplead several unconnected claimants, when he knows of bailor's intention to convert the bill, and hence would make himself accessory to a felony by delivering it to bailor).

Lord Brougham declares, in Pearson v. Cardon, 2 Russ. & M. 606, "That an agent should have the power of filing a bill of interpleader, when his principal demands the redelivery of his goods bailed with him, appeared to me so monstrous a proposition, and to involve such frightful consequence in mercantile transactions, that I could not suppose it was meant to contend for any such doctrine. For, in fact, it amounts to this: that an agent may, at any moment, treat his principal to a chancery suit," etc.

<sup>50</sup> Marvin v. Ellwood, 11 Paige, 365; but see, *per contra*, Goddard v. Leech, Wright, 476.

A claims as legatee under a will, and B claims the property by a title paramount to that of the testator, the executor cannot compel them to interplead; he is under a direct liability to the legatee.<sup>51</sup> On the other hand, there are cases in which a bailee or an agent may interplead his bailor or his principal with third persons claiming adversely. Wherever the third person claims the thing, fund, debt, or duty from the bailee or agent under a title *derived from* the bailor or the principal, created by the latter's own act subsequently to the bailment or agency,—such as his assignment, agreement, sale, mortgage, trust, or lien given by him,—the bailee or agent may compel the parties to interplead. There is in such a case no denial of the original title; the only dispute is concerning the effect of the subsequent act, and as to which of the claimants is thereby entitled to the thing or fund. On this general ground an attorney may interplead his client and a person who sets up a derivative claim from such client.<sup>52</sup> And where money is in the hands of an agent, and the principal has created a lien or charge on the fund, in favor of a third person, in respect to which a controversy has arisen, the agent may compel his principal and the other claimant to interplead;<sup>53</sup> and where the principal has assigned the fund in the agent's hands, or the bailor has trans-

<sup>51</sup> *Adams v. Dixon*, 19 Ga. 513, 65 Am. Dec. 603. Another reason is that a *bona fide* defense on the executor's or administrator's part against B's claim will be a complete protection against A, since he defends as representative of the legatees: *Barrett v. Cady*, 78 N. H. 60, 96 Atl. 325.

<sup>52</sup> *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592; *McFadden v. Swinerton*, 36 Or. 336, 59 Pac. 816, 62 Pac. 12; *Sammis v. L'Engle*, 19 Fla. 800; *Hayward etc. v. McDonald*, 192 Fed. 890, 113 C. C. A. 368.

<sup>53</sup> *Smith v. Hammond*, 6 Sim. 10; *Wright v. Ward*, 4 Russ. 215-220.

ferred his interest in the thing bailed.<sup>54</sup> For a like reason an interpleader is permitted where a bailor or principal has given orders for the property to two different persons who set up conflicting claims, since their titles are derivative, and not antagonistic.<sup>55</sup> An interpleader by the bailee is also allowed where a joint bailment has been made, or a transaction in the nature of a joint bailment, to await the happening of some event or the determination of some dispute.<sup>56</sup> It should be remembered that in all such cases if the bailee or agent has recognized the title of the assignee or other holder of a derivative title, and has stipulated to hold the property at his disposal, the independent liability thus assumed will prevent the bailee or agent from compelling the assignee to interplead with the bailor or principal who repudiates the transaction.”<sup>57</sup>

§ 1476. (§ 55.) **Same; Tenant and Landlord.**<sup>58</sup>—“The general doctrine is familiar, that a tenant cannot deny his landlord’s title; he cannot therefore maintain a suit for interpleader against his landlord and a stranger who claims under a title antagonistic and paramount to

<sup>54</sup> *Crawford v. Fisher*, 1 Hare, 436, 440; *Smith v. Hammond*, 6 Sim. 10; *Wright v. Ward*, 4 Russ. 215–220; *Tanner v. European Bank*, L. R. 1 Ex. 261; *Gibson v. Goldthwaite*, 7 Ala. 281, 42 *Am. Dec.* 592.

<sup>55</sup> *Pearson v. Cardon*, 2 Russ. & M. 606, 4 Sim. 218; *Atkinson v. Manks*, 1 Cow. 691. The decision in *Schuyler v. Pelissier*, 3 Edw. Ch. 191, goes too far.

<sup>56</sup> *Suart v. Welch*, 4 Mylne & C. 305; *City Bank v. Skelton*, 2 Blatchf. 14, Fed. Cas. No. 2739; *First Nat. Bank v. West River R. R.*, 46 Vt. 633; *Perkins v. Trippe*, 40 Ga. 225. For special cases, see *Mason v. Hamilton*, 5 Sim. 19; *Crellin v. Levland*, 6 Jur. 733.

<sup>57</sup> See *ante*, § 52; *Tyus v. Rust*, 37 Ga. 574, 95 *Am. Dec.* 365; *Hatfield v. McWhorter*, 40 Ga. 269; *Horton v. Earl of Devon*, 4 Welsb. H. & G. 496.

<sup>58</sup> *Pom. Eq. Jur.*, § 1327, note.

that of the lessor.<sup>59</sup> But the tenant is entitled to interplead his landlord and an opposing claimant whenever there is some privity between the two,—when the title of the other claimant is derivative from that of the lessor,—as, for example, when the relation of mortgagor and mortgagee, trustee and *cestui que trust*, assignor and assignee, etc., has been created between the two. In such a case the tenant does not dispute his landlord's title.<sup>60</sup> So, when both contestants claim under the lessor by different titles; for example, one as heir and the other as devisee."<sup>61</sup>

§ 1477. (§ 56.) **Same; Parties to Contracts.**<sup>62</sup>—"As a general rule, where A and B are bound by express contract, A cannot maintain an interpleader suit against B or a person holding or claiming under him, and a

<sup>59</sup> *Dungey v. Angove*, 2 Ves. 304, 310; *Woolaston v. Wright*, 3 Anstr. 801; *Smith v. Target*, 2 Anstr. 529; *Johnson v. Atkinson*, 3 Anstr. 798; *Cook v. Earl of Rosslyn*, 1 Giff. 137; *Crawshay v. Thornton*, *supra*; *Seaman v. Wright*, 12 Abb. Pr. 304; *Crane v. Burntrager*, 1 Ind. 165; *Snodgrass v. Butler*, 54 Miss. 45; *Standley v. Roberts*, 59 Fed. 836, 8 C. C. A. 305, 19 U. S. App. 407; *Whitewater Valley etc. Co. v. Comegys*, 2 Ind. 469. See, also, *Davis v. Douglass*, 12 Ala. App. 581, 68 South. 528.

<sup>60</sup> *Dungey v. Angove*, 2 Ves. 304, 310, 312; *Metcalf v. Hervey*, 1 Ves. Sr. 248; *Cowtan v. Williams*, 9 Ves. 107; *Clarke v. Byne*, 13 Ves. 383; *Johnson v. Atkinson*, 3 Anstr. 798; *Seaman v. Wright*, 12 Abb. Pr. 304; *Snodgrass v. Butler*, 54 Miss. 45; *Oil Run Petro. Co. v. Gale*, 6 W. Va. 525; *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515; *Van Zandt v. Van Zandt*, 7 N. Y. Supp. 706, 17 Civ. Proc. Rep. 448; *McCoy v. McMurtrie*, 12 Phila. 180 (mortgagor and mortgagee). See, also, *Wilmer v. Philadelphia & Reading Coal & Iron Co.*, 124 Md. 599, 93 Atl. 157, citing the text.

<sup>61</sup> *Jew v. Wood*, 3 Beav. 579; *Badeau v. Tylee*, 1 Sand. Ch. 270; *Glaser v. Priest*, 29 Mo. App. 1. See, also, *Ball v. Madden*, 139 Ga. 727, 78 S. E. 26 (interpleader between assignee of rent notes and landlord's vendee); *Wilmer v. Philadelphia & Reading Coal & Iron Co.*, 124 Md. 599, 93 Atl. 157, citing the text.

<sup>62</sup> Pom. Eq. Jur., § 1327, note.



stranger who asserts and claims under an antagonistic and paramount title. A is under an independent liability to B.<sup>63</sup> For example, a vendee of real or personal property, with respect to his liability to pay the purchase price, cannot interplead his vendor and a third person claiming to own the property by an independent antagonistic title.<sup>64</sup> On the other hand, as in cases of bailees, agents, and tenants, a party to a contract may interplead his co-contractor and other persons in privity with him, or distinct claimants all of whom are in privity with his co-contractor,—that is, may interplead his co-contractor and persons who derive their title under him, or several claimants all of whom thus hold by derivative title.<sup>65</sup> As example: A vendee may interplead his vendor and an attaching creditor of A, alleged to be the real owner, the sale being alleged to have been really made by the vendor as A's agent.<sup>66</sup> One owing a sum of money under a contract may interplead the legal assignee of his co-contractor, and one claiming the fund either by equitable assignment from the co-contractor or by attachment levied upon the fund.<sup>67</sup> A vendor of land may interplead the husband of the deceased vendee and her heirs, where both claimed to be entitled to a convey-

<sup>63</sup> *Ante*, § 52.

<sup>64</sup> Quoted in *Northwestern Mut. Life Ins. Co. v. Kidder*, 162 Ind. 382, 70 N. E. 489. See, also, *James v. Pritchard*, 7 Mees. & W. 216; *Trigg v. Hitz*, 17 Abb. Pr. 436; *Shehan's Heirs v. Barnett's Heirs*, 6 T. B. Mon. 592; *Tynan v. Cadenas*, 7 Civ. Proc. Rep. (N. Y.) 305 (no interpleader by vendee of goods against persons each of whom claim to have sold him the goods).

<sup>65</sup> *Beehtel v. Sheaffer*, 117 Pa. St. 555, 562, 11 Atl. 889.

<sup>66</sup> *Richards v. Salter*, 6 Johns. Ch. 445; *Johnston v. Lewis*, 4 Abb. Pr., N. S., 150.

<sup>67</sup> *Crane v. McDonald*, 118 N. Y. 648, 23 N. E. 991. The titles of both defendants were plainly derivative. And a judgment debtor may interplead the judgment creditor and attorneys claiming a lien for services: *Michigan Trust Co. v. McNamara*, 165 Mich. 200, 37 L. R. A. (N. S.) 986, 130 N. W. 653.

ance.<sup>68</sup> Insurance companies may compel opposing claimants of the insurance money to interplead when they claim by assignment from the assured, or by mortgage, or by attachment, etc.—that is, when they claim *derivatively*.<sup>69</sup> On like ground, corporations may interplead opposing claimants of stock or dividends, whose titles are derivative from a stockholder, by assignment, execution, attachment, trust, etc.<sup>70</sup> A maker of a note may compel claimants holding under the payee by derivative title to interplead; for example, an attach-

<sup>68</sup> Farley v. Blood, 30 N. H. 354.

<sup>69</sup> Nelson v. Barter, 2 Hem. & M. 334; Hamilton v. Marks, 5 De Gex & S. 638; Spring v. South Carolina Ins. Co., 8 Wheat. 268, 5 L. Ed. 614; Prudential Assur. Co. v. Thomas, L. R. 3 Ch. 74; Aetna Nat. Bank v. United States L. Ins. Co., 25 Fed. 531; Heusner v. Mutual Life Ins. Co., 47 Mo. App. 336; Supreme Conclave I. O. H. v. Dailey, 61 N. J. Eq. 145, 47 Atl. 277 (interpleader by a benefit society); Grill v. Globe & R. F. I. Co., 67 N. Y. Supp. 253, 55 App. Div. 612, citing Bacon v. Surety Co., 65 N. Y. Supp. 738, 53 App. Div. 150, and Woolworth v. Insurance Co., 49 N. Y. Supp. 512, 25 App. Div. 629. See, also, the recent cases: Wilser v. Wilser (Modern Woodmen of America), 132 Minn. 167, 156 N. W. 271; Love v. Hartford Life Ins. Co., 153 Mo. App. 144, 132 S. W. 335 (said that the fact that the plaintiff has promised to pay the fund to one of two claimants will not prevent interpleader); Borchers v. Barekers, 158 Mo. App. 267, 138 S. W. 555; Bayerischen National Verband etc. v. Knaus, 75 N. J. Eq. 363, 138 Am. St. Rep. 573, 72 Atl. 952; C. Schmidt & Sons Brewing Co. v. Pittsburgh Life & Trust Co., 256 Pa. St. 363, 100 Atl. 959; Grand Lodge Colored K. of P. of Texas v. Cleo Lodge No. 222 Colored K. of P. (Tex. Civ. App.), 189 S. W. 764; Nixon v. Malone (Tex. Civ. App.), 95 S. W. 577. Compare Connecticut Mut. Life Ins. Co. v. Cook, 219 Mass. 222, 106 N. E. 853, where plaintiff, by representing that the assignment was valid, expressly recognized the title of the assignee.

<sup>70</sup> Salisbury Mills v. Townsend, 109 Mass. 115; Providence Bank v. Wilkinson, 4 R. I. 507, 70 Am. Dec. 160; Cady v. Potter, 55 Barb. 463; American Press Ass'n v. Brantingham, 68 N. Y. Supp. 285, 57 App. Div. 399. See Cheever v. Hodgson, 9 Mo. App. 565; Brugge-man v. Bank, 1 City Ct. R. (N. Y.) 86 (rival claimants to a certified check).

ing creditor of payee and an assignee;<sup>71</sup> the administrator of a deceased guardian to whom the note was made payable, and a new guardian appointed in place of the one deceased.”<sup>72</sup> A very common class of interpleader suits is that where a bank, holding the relation of debtor to its depositor, interpleads the depositor and one claiming under him, or two opposing claimants under the same depositor.<sup>73</sup>

§ 1478. (§ 57.) **Same; by Receiver; by Master of a Vessel; by Sheriff.**<sup>74</sup>—“A receiver has been held entitled to interplead opposing claimants of the fund in his hands.<sup>75</sup> (*Quære*, would not the court direct the proper distribution of the fund by the receiver?) Where suits

<sup>71</sup> *Briant v. Reed*, 14 N. J. Eq. 271; *Bryan v. Salterstall*, 3 J. J. Marsh. 672; *Fabie v. Lindsay*, 8 Or. 474.

<sup>72</sup> *Van Buskirk v. Roy*, 8 How. Pr. 425.

<sup>73</sup> See *Platte Valley State Bank v. National Livestock Bank*, 54 Ill. App. 483, affirmed and opinion adopted, 155 Ill. 250, 40 N. E. 621; *People's Savings Bank v. Look*, 95 Mich. 7, 54 N. W. 629; *Harris Banking Co. v. Miller*, 190 Mo. 640, 1 L. R. A. (N. S.) 790, 89 S. W. 629 (between assignee and executors of holder of certificate of deposit); *McGinn v. Interstate Nat. Bank*, 178 Mo. App. 347, 166 S. W. 345 (between holder of a certified check and holder of a cashier's check given in payment thereof; no independent liability on the cashier's check, for the bank only agreed to pay the person lawfully entitled to the proceeds); *German Exchange Bank v. Commissioners*, 6 Abb. N. C. (N. Y.) 394; *Smith v. Emigrant Industrial Sav. Bank*, 17 N. Y. St. Rep. 852, 2 N. Y. Supp. 617. See *Masten v. Bowery Sav. Bank*, 63 N. Y. Supp. 964, 31 Misc. Rep. 178 (no interpleader when, by statute, a draft does not constitute an equitable assignment). If one of the claimants asserts a title superior to that of the depositor, interpleader is not allowed: *Third National Bank v. Skillings Lumber Co.*, 132 Mass. 410 (claimant asserts that depositor was its agent, and that the draft deposited was its property); *German Sav. Bank v. Friend*, 61 N. Y. Super. Ct. (29 J. & S.) 400, 20 N. Y. Supp. 434; *Runkle's Adm'r v. Runkle's Adm'r*, 112 Va. 788, 72 S. E. 695.

<sup>74</sup> *Pom. Eq. Jur.*, § 1327, note.

<sup>75</sup> *Winfield v. Bacon*, 24 Barb. 154.

by persons claiming to be owners of the cargo are instituted in admiralty against a ship, causing her arrest, the master cannot maintain interpleader against these claimants, because—1. The claims are not against him, but against the ship; and 2. The court of admiralty has full jurisdiction to settle all the questions.<sup>76</sup> Independently of statute, it has generally been held that a sheriff levying on goods by execution against A, which are claimed by B to be his property, cannot compel the execution creditor and B to interplead.<sup>77</sup> Nor can the sheriff compel the opposing claimants of a surplus in his hands after satisfying an execution to interplead; such claims can be adjusted by the courts.<sup>78</sup> Statutes in England and in many of the states have authorized the sheriff to interplead the claimants of property seized by him under process.”

§ 1479. (§ 58.) **Requisites of the Bill or Complaint.**<sup>79</sup> “The bill of complaint must contain allegations which show that all of the requisites entitling the plaintiff to the remedy exist in the case. It must allege positively that conflicting claims to substantially the same thing, fund, debt, or duty are set up by the defendants; that

<sup>76</sup> *Sablicich v. Russell*, L. R. 2 Eq. 441.

<sup>77</sup> *Slingsby v. Boulton*, 1 Ves. & B. 334; *Show v. Coster*, 8 Paige, 339, 35 Am. Dec. 690; S. C., *sub nom.* *Shaw v. Chester*, 2 Edw. Ch. 405; *Quinn v. Green*, 1 Ired. Eq. 229, 36 Am. Dec. 46; *Quinn v. Patton*, 2 Ired. Eq. 48; *Dewey v. White*, 65 N. C. 225. Compare *Kelly v. Howard*, 98 Miss. 543, Ann. Cas. 1913B, 229, and note, 54 South. 10 (where widow sued, but children, under statute, were entitled to share in the proceeds, the rule does not apply to prevent the sheriff from interpleading persons claiming to be children, since children are in effect execution creditors as well as the widow).

<sup>78</sup> *Parker v. Barker*, 42 N. H. 78, 77 Am. Dec. 789; *McDonald v. Allen*, 37 Wis. 108, 19 Am. Rep. 754. But see *Kring v. Green's Ex'rs*, 10 Mo. 195; *Lawson v. Jordan*, 19 Ark. 297, 70 Am. Dec. 596; *Child v. Mann*, L. R. 3 Eq. 806.

<sup>79</sup> Pom. Eq. Jur., § 1328, and notes.



plaintiff claims no interest in the subject-matter; that he is indifferent between the claimants, and is ready and willing to deliver the thing or fund, or pay the debt, or render the duty to the rightful claimant, but that he is ignorant or in doubt which is the rightful one, and is in a real danger or hazard by means of such doubt, from their conflicting demands.<sup>80</sup> The bill need not show

<sup>80</sup> The text is quoted in *Pouch v. Prudential Ins. Co. of America*, 204 N. Y. 281, *Ann. Cas.* 1913C, 1191, 97 N. E. 731; and cited in *United R'ys Co. of St. Louis v. O'Connor*, 153 Mo. App. 128, 132 S. W. 262 (unless a real case of doubt appears, the bill is demurrable); *Love v. Hartford Life Ins. Co.*, 153 Mo. App. 144, 132 S. W. 335; *Rochelle v. Pacific Express Co.*, 56 Tex. Civ. App. 142, 120 S. W. 543. See *Farley v. Blood*, 30 N. H. 354; *Parker v. Barker*, 42 N. H. 78, 77 *Am. Dec.* 789; *Atkinson v. Manks*, 1 Cow. 691; *Wilson v. Duncan*, 11 Abb. Pr. 3; *Lozier's Ex'rs v. Van Saun's Adm'rs*, 3 N. J. Eq. 325; *Briant v. Reed*, 14 N. J. Eq. 271; *Snodgrass v. Butler*, 54 Miss. 45; *Starling v. Brown*, 7 Bush, 164; *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 82; *Pfister v. Wade*, 56 Cal. 43; *Killian v. Ebbinghaus*, 110 U. S. 568, 28 *L. Ed.* 246, 4 Sup. Ct. 232; *Crane v. McDonald*, 118 N. Y. 648, 654, 23 N. E. 991; *Stone v. Reed*, 152 Mass. 179, 25 N. E. 49; *Sullivan v. Knights of F. M.*, 73 Mo. App. 43; *Funk v. Thomasson*, 84 Mo. App. 490; *North Pacific Lumber Co. v. Lang*, 28 Or. 246, 52 *Am. St. Rep.* 780, 42 *Pac.* 799. "The material allegations in a bill of interpleader . . . are: (1) That two or more persons have preferred a claim against the complainant; (2) that they claim the same thing; (3) that the complainant has no beneficial interest in the thing claimed; and (4) that he cannot determine without hazard to himself, to which of the defendants the thing belongs": *Crane v. McDonald*, 118 N. Y. 648, 654, 23 N. E. 991; *Atkinson v. Manks*, 1 Cow. (N. Y.) 691, 703. The claims should be sufficiently set forth to enable the court to determine whether it is doubtful or dangerous for the plaintiff to act: *National Bank of Augusta v. Augusta etc. Co.*, 99 Ga. 286, 25 S. E. 686; *United R'ys Co. of St. Louis v. O'Connor*, 153 Mo. App. 128, 132 S. W. 262; *Novinger Bank v. St. Louis Union Trust Co.*, 196 Mo. App. 335, 189 S. W. 826; sufficiently to give a color of right to each of the defendants: *Robards v. Clayton*, 48 Mo. App. 608; specifically, so that they may appear to be of the same nature and character, and the fit subject for a bill of interpleader: *Varrien v. Berrien*, 42 N. J. Eq. 1, 10 Atl. 875; *Connecticut Mut. Life Ins. Co. v. Lea*, 7 Ohio N. P.

an apparent title in either of the defendants.<sup>81</sup> On the contrary, if the bill should show that plaintiff was fully informed of the defendants' rights and of his own liability, or if it should show that one of the defendants was certainly entitled, on the facts alleged, to the thing, debt, or duty, in either case it would be demurrable; there would be no ground for an interpleader."<sup>82</sup>

399, 10 Ohio S. & C. P. Dec. 39. As to what is a specifically specific description of the claims, see, also, *Crane v. McDonald*, 118 N. Y. 648, 23 N. E. 991. As to *proof* of the claims, it is held that the answers of the defendants may be read against each other to establish the fact that each makes claim to the fund, and further proof of that fact is not necessary: *Morrill v. Manhattan L. I. Co.*, 183 Ill. 260, 55 N. E. 656, affirming and adopting opinion in 82 Ill. App. 410; *Balchen v. Crawford*, 1 Sand. Ch. (N. Y.) 380. That the bill must contain averments showing privity between the claimants, see *Kyle v. Mary Lee Coal & R. Co.*, 112 Ala. 606, 20 South. 851; *Grant Bros. Auto Co. v. Cotter*, 161 Mich. 521, 126 N. W. 839.

<sup>81</sup> The text is quoted in *Supreme Lodge Knights of Honor v. Selby*, 153 N. C. 203, 69 S. E. 51. See *East & W. Ind. Dock Co. v. Littledale*, 7 Hare, 57; *Pfister v. Wade*, 56 Cal. 43; *Supreme Lodge O. M. P. v. Raddatz*, 57 Ill. App. 119; *Stewart v. Fallon* (N. J. Eq.), 58 Atl. 96.

<sup>82</sup> The text is quoted in *Supreme Lodge Knights of Honor v. Selby*, 153 N. C. 203, 69 S. E. 51 (but objection is waived if not raised by demurrer); and cited in *United R'ys Co. of St. Louis v. O'Connor*, 153 Mo. App. 128, 132 S. W. 262. See *Parker v. Barker*, 42 N. H. 78, 77 Am. Dec. 789; *Mohawk etc. R. R. v. Clute*, 4 Paige, 384; *Morgan v. Fillmore*, 18 Abb. Pr. 217; *Wilson v. Duncan*, 11 Abb. Pr. 3; *Briant v. Reed*, 14 N. J. Eq. 271; *Barker v. Swain*, 4 Jones Eq. 220; *Bassett v. Leslie*, 123 N. Y. 396, 25 N. E. 386; *Pusey & Jones Co. v. Miller*, 61 Fed. 401; *Sugar Co. v. Alberger*, 22 Hun, 349, 353; *Shaw v. Coster*, 8 Paige, 339, 35 Am. Dec. 690 (both defendants may demur). Compare *Pulkrabeck v. Griffith* (Tex. Civ. App.), 179 S. W. 282 (a mere expression of opinion in the complaint that the money was due one of the claimants does not prevent interpleader). "When, from complainant's own showing, there can be no doubt in the case, the party entitled to the debt or duty claimed is not to be subjected to the delay and expense of a chancery suit": *Crass v. Memphis & C. R. Co.*, 96 Ala. 447, 11 South. 480. "If the plaintiff denies his liability to either of the defendants, he is not

§ 1480. (§ 59.) **Affidavit of Non-collusion; Payment into Court; Costs.**—"It is the settled practice that the bill of complaint must be accompanied by an affidavit of the plaintiff, stating that the suit is not brought in collusion with either of the defendants; and the omission of such affidavit may generally be taken advantage of by demurrer.<sup>83</sup> The plaintiff must also bring or pay,

entitled to the remedy; he destroys the very foundation on which it rests: *McHenry v. Hazard*, 45 Barb. 657, 45 N. Y. 580 [*Southwark Nat. Bank v. Childs*, 57 N. Y. Supp. 789, 39 App. Div. 560; *ante*, § 49]. If the bill is taken as confessed by one of the conflicting defendants, the fund indisputably belongs to the other. And where in such a case a stranger was afterwards admitted by the lower court, on petition, to contest the interest of the remaining defendant, it was held on appeal that there was no practice allowing a third person thus to come into the cause by petition; that the bill could not be amended to reach him, as it was filed to guard against *known* claims; the order that the remaining defendant and the third person should interplead was irregular: *Michigan etc. Co. v. White*, 44 Mich. 25, 5 N. W. 1086. (*Quære*, would such a proceeding be allowed under the provisions of the Iowa and California codes permitting *Intervention?*)" Pom. Eq. Jur., § 1328, note.

<sup>83</sup> The text is cited to this effect in *Karabacek v. Richards*, 249 Mo. 608, 155 S. W. 777. See *Hamilton v. Marks*, 5 De Gex & S. 638; *Farley v. Blood*, 30 N. H. 354; *Atkinson v. Manks*, 1 Cow. 691; *Beck v. Stephani*, 9 How. Pr. 193; *Mount Holly etc. Co. v. Ferree*, 17 N. J. Eq. 117; *Tyus v. Rust*, 37 Ga. 574, 95 Am. Dec. 365; *Andrews v. Travelers' Ins. Co. of Hartford*, 145 Ga. 472, 89 S. E. 522 (affidavit sufficient); *Snodgrass v. Butler*, 54 Miss. 45; *Starling v. Brown*, 7 Bush, 164; *Biggs v. Kouns*, 7 Dana, 405, 411; *Blue v. Watson*, 59 Miss. 619; *Ammendale Norm. Inst. v. Anderson*, 71 Md. 128, 17 Atl. 1030; *Home Ins. Co. v. Caulk*, 86 Md. 385, 38 Atl. 901; *Bliss v. French*, 117 Mich. 538, 76 N. W. 73; but a contrary practice seems to prevail in Connecticut: *Consociated Pres. Soc. v. Staples*, 23 Conn. 544, 555; *Nash v. Smith*, 6 Conn. 421; and in Indiana the absence of the affidavit is not a ground of demurrer under the code, since demurrers under the code can be sustained for specified causes only, and the want of verification of a pleading is not one of them: *Nofsinger v. Reynolds*, 52 Ind. 218, 224; while in Oregon it is "perhaps sufficient under code practice that the fact [of non-collusion] appear by appropriate allegations in the complaint": *North Pacific Lumber Co. v.*

or offer to bring or pay, the entire thing, fund, or money in controversy into court; an omission to do so renders the bill demurrable.<sup>84</sup> If the bill was properly filed, and if the plaintiff has acted in good faith, he is generally entitled to his costs out of the fund in controversy, which costs, as between the defendants, must ultimately be paid by the unsuccessful party."<sup>85</sup>

Lang, 28 Or. 246, 52 Am. St. Rep. 780, 42 Pac. 799. The plaintiff's affidavit is conclusive; defendants cannot contradict it, even though the plaintiff has filed supplemental affidavits: *Manby v. Robinson*, L. R. 4 Ch. 347; *Langston v. Boylston*, 2 Ves. 101; *Stevenson v. Anderson*, 2 Ves. & B. 407; and see *Fahie v. Lindsay*, 8 Or. 474. If collusion appears on the face of the bill, relief will, of course, be denied: *Marvin v. Ellwood*, 11 Paige, 365; *Kerr v. Union Bank*, 18 Md. 396; *Williams v. Halbert*, 7 B. Mon. 184; *Pom. Eq. Jur.*, § 1328, and note.

<sup>84</sup> The whole fund must be put at the disposal of the court; an offer to bring in what may be found due is not sufficient: *Mohawk etc. R. R. v. Clute*, 4 Paige, 384; *Atkinson v. Manks*, 1 Cow. 691; *Williams v. Walker*, 2 Rich. Eq. 291, 46 Am. Dec. 53; *Snodgrass v. Butler*, 54 Miss. 45; *McGarrah v. Prather*, 1 Blackf. 299; *Starling v. Brown*, 7 Bush, 164; *Ammendale Norm. Inst. v. Anderson*, 71 Md. 128, 17 Atl. 1030; *Home Ins. Co. v. Caulk*, 86 Md. 385, 38 Atl. 901; *Barroll v. Foreman*, 86 Md. 675, 39 Atl. 273 ("this offer is required to prevent an abuse of this proceeding, just as the affidavit that there is no collusion"); *Bliss v. French*, 117 Mich. 538, 76 N. W. 73. *Contra*, as to the omission being a ground for demurrer, *Blue v. Watson*, 59 Miss. 619; *Manx v. Bell*, 6 Sim. 175. It seems that if the petition contains such offer, actual payment of the fund into court is not a condition precedent to an order of interpleader: *Barnes v. Bamberger*, 196 Pa. St. 123, 46 Atl. 303; *Phoenix Ins. Co. v. Carey*, 80 Conn. 426, 68 Atl. 993; *C. Schmidt & Sons Brewing Co. v. Pittsburgh Life & Trust Co.*, 256 Pa. St. 363, 100 Atl. 959. It was held in *Farley v. Blood*, 30 N. H. 354, that in a suit concerning the defendants' rights to a conveyance under a land contract, the plaintiff must offer to convey, and must have the deeds executed ready for delivery: *Pom. Eq. Jur.*, § 1328, and note.

<sup>85</sup> The text is cited to this effect in *Pettus v. Hendricks*, 113 Va. 326, 74 S. E. 191. See *Laing v. Zeden*, L. R. 9 Ch. 736; *Aldridge v. Thompson*, 2 Brown Ch. 149; *Cowtan v. Williams*, 9 Ves. 107; *Farley v. Blood*, 30 N. H. 354; *Manchester Print Works v. Stimson*, 2 R. I.



§ 1481. (§ 60.) **Bill in the Nature of a Bill of Interpleader.**—A bill in the nature of a bill of interpleader is one in which the complainant seeks some relief of an equitable nature concerning the fund or other subject-matter in dispute, in addition to the interpleader of conflicting claimants. The complainant is not required, as in strict interpleader, to be an indifferent stakeholder, without interest in the subject-matter.<sup>86</sup> It is essential,

415; *Atkinson v. Manks*, 1 Cow. 691; *Canfield v. Morgan*, Hopk. Ch. 224; *Aymer v. Gault*, 2 Paige, 284; *Badeau v. Rogers*, 2 Paige, 209; *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614; *Long v. Superior Court*, 127 Cal. 686, 60 Pac. 464; *Glaser v. Priest*, 29 Mo. App. 1. That the complainant is entitled to reasonable attorney's fees, see *Louisiana State Lottery Co. v. Clark*, 16 Fed. 20, 4 Woods, 169; *Franco-American L. & B. Ass'n v. Joy*, 56 Mo. App. 433; *Christian v. National L. I. Co.*, 62 Mo. App. 35; *Supreme Council Legion of Honor v. Palmer*, 107 Mo. App. 157, 80 S. W. 699; *Beilharz v. Illingsworth*, 62 Tex. Civ. App. 647, 132 S. W. 106; but see *contra*, *Helmken v. Meyer* (Ga.), 45 S. E. 450; *Supreme Lodge Knights of Honor v. Selby*, 153 N. C. 203, 69 S. E. 51. If the decree is irregular in not directing payment into court and plaintiff's discharge, the plaintiff should not have costs out of the fund: *Gardiner Sav. Inst. v. Emerson*, 91 Me. 535, 40 Atl. 551. As in all equity suits, costs are within the discretion of the court, and depend somewhat upon the circumstances of each case: *Pom. Eq. Jur.*, § 1328, and note.

<sup>86</sup> The text is quoted in *Chicago, R. I. & P. R. Co. v. Moore*, 92 Ark. 446, 123 S. W. 233; *McKinney v. Daniels*, 135 Ga. 157, 68 S. E. 1095; and cited in *Hayward etc. v. McDonald*, 192 Fed. 890, 113 C. C. A. 368. See *Knickerbocker Trust Co. v. City of Kalamazoo*, 182 Fed. 865; *Hayward etc. v. McDonald*, 192 Fed. 890, 113 C. C. A. 368 (accounting necessary to determine amount of the fund); *Sherman Nat. Bank v. Shubert Theatrical Co.*, 238 Fed. 225 (same); *Nofsinger v. Reynolds*, 52 Ind. 218; *Van Winkle v. Owen*, 54 N. J. Eq. 253, 34 Atl. 400; *Carter v. Cryer*, 68 N. J. Eq. 24, 59 Atl. 233 (plaintiff has lien for storage on chattel); *Metropolitan Life Ins. Co. v. Hamilton* (N. J. Eq.), 70 Atl. 677 (by life insurance company to determine between two conflicting claimants, and in same action to determine the proper reduction because of misstatement of insured's age); and cases cited in following notes. That, aside from the plaintiff's interest in the subject-matter, the bill is governed by the same principles as the strict bill of interpleader, see *Stephenson v.*

however, that the facts on which he relies entitle him to equitable, as distinguished from legal, relief; he is not permitted, under the guise of a bill in equity, to litigate a purely legal claim or interest in the subject-matter.<sup>87</sup> The additional relief most frequently granted is the redemption of a mortgage or other encumbrance on property, when there are conflicting claimants to the debt secured.<sup>88</sup>

§ 1482. (§ 61.) **Interpleader in Legal Actions.**<sup>89</sup>—

“In England and in many of the American states a summary mode of interpleader by motion and order in

Burdett (W. Va.), 48 S. E. 846 (reviewing many cases); but that the affidavit of non-collusion is not required, see *Koppinger v. O'Donnell*, 16 R. I. 417, 16 Atl. 714; *Van Winkle v. Owen*, 56 N. J. Eq. 253, 34 Atl. 400.

<sup>87</sup> *Killian v. Ebbinghaus*, 110 U. S. 568, 28 L. Ed. 246, 4 Sup. Ct. 232 (relief demanded amounts to ejectment); *Aleck v. Jackson*, 49 N. J. Eq. 507, 23 Atl. 760; *Parks v. Jackson*, 11 Wend. 442; *Mohawk etc. R. Co. v. Clute*, 4 Paige, 384; *Bedell v. Hoffman*, 2 Paige 199.

<sup>88</sup> See *Vyvyan v. Vyvyan*, 30 Beav. 65; *Crass v. Memphis etc. R. Co.*, 96 Ala. 447, 11 South. 480; *Wheeler v. Armstrong*, 164 Ala. 442, 51 South. 268 (mortgage); *Robson v. Du Bose*, 79 Ga. 72, 4 S. E. 329 (taxes); *McKinney v. Daniels*, 135 Ga. 157, 68 S. E. 1095 (by vendee, against two claimants of purchase price, and to have title decreed in him on payment); *Newhall v. Kastens*, 70 Ill. 156 (mechanics' liens); *Curtis v. Williams*, 35 Ill. App. 518; *Nofsinger v. Reynolds*, 52 Ind. 218; *Board v. Scoville*, 13 Kan. 17 (mechanics' liens); *Illingworth v. Rowe*, 52 N. J. Eq. 360, 28 Atl. 456 (same); *Van Winkle v. Owen*, 54 N. J. Eq. 253, 34 Atl. 400 (judgment); *Bedell v. Hoffman*, 2 Paige, 199; *Badeau v. Rogers*, 2 Paige, 209; *Parks v. Jackson*, 11 Wend. 442; *Mohawk etc. R. Co. v. Clute*, 4 Paige, 384 (taxes); *Van Loan v. Squires*, 23 Abb. N. Cas. (N. Y.) 230; *Dohnert's Appeal*, 64 Pa. St. 311; *Koppinger v. O'Donnell*, 16 R. I. 417, 16 Atl. 714. See, also, *Union Trust Co. v. Stamford Trust Co.*, 72 Conn. 86, 43 Atl. 555, for a bill of this character authorized by statute.

<sup>89</sup> Pom. Eq. Jur., § 1329, and notes. This section of Pom. Eq. Jur. is cited in *Northwestern Mut. Life Ins. Co. v. Kidder*, 162 Ind. 382, 70 N. E. 489.

certain legal actions is authorized.<sup>90</sup> These statutes substantially provide that in actions specified the defendant may show by affidavit that the same thing or money is claimed by another person besides the plaintiff; that he has sued or threatens to sue; that defendant is not in collusion with him; and that defendant is ready and willing to bring the thing or money into court. The court on motion may order such claimant to be substituted as defendant in the action in place of the original defend-

<sup>90</sup> The English statute of 1 & 2 Wm. IV, c. 58, § 1, allowed this proceeding in actions of assumpsit, debt, trover, and detinue. For cases under this statute see *Frost v. Heywood*, 2 Dowl., N. S., 801; *Dalton v. Railway Co.*, 74 E. C. L. (12 Com. B.) 458; *Baker v. Bank of Australasia*, 1 Com. B., N. S., 515; *Turner v. Kendal*, 13 Mees. & W. 171. For the amendment made by the common-law procedure act of 1860, see *ante*, note 33, § 47. The American statutes mainly differ with respect to the kinds of actions in which the proceeding is allowed. In a few states it is confined to actions on contract for money; *Alabama*: Code 1876, §§ 2906, 2907; Code 1886, §§ 2610, 2611; Code 1896, § 2633; *Jackson v. Jackson*, 84 Ala. 343, 4 South. 174; *Coleman v. Chambers*, 127 Ala. 615, 29 South. 58; *Stewart v. Sample*, 168 Ala. 270, 53 South. 182; or to actions for the recovery of personal property; *Arkansas*: Code 1874, §§ 4483, 4484; *Iowa*: 2 McClain's Stats. 1880, § 2572; *Kauffman v. Phillips*, 154 Iowa, 542, 134 N. W. 575; *Oregon*: Gen. Laws 1872, p. 111, § 39; *Henderson v. Backus*, 56 Or. 550, 109 Pac. 577 (statute does not apply to action to recover a mere sum of money). In several states the proceeding is allowed in actions on contract, and in those for the recovery of specific personal property; *California*: Code Civ. Proc., § 386 (for recent amendment, see *ante*, note under § 47); *Idaho*: Gen. Laws 1880-81, § 201; *Kansas*: Dassel's Comp. Laws 1881, §§ 3564, 3565; *Nebraska*: Brown's Comp. Stats. 1881, pp. 535, 536, § 48; *Ohio*: 2 Rev. Stats. 1880, §§ 5016, 5017; *Mississippi*: Rev. Code, 1880, § 1578, interpleader by garnishee; Code 1880, § 2449; *Dodds v. Gregory*, 61 Miss. 351. In others it embraces actions on contract, and actions for the recovery of real or of personal property; *Dakota*: Rev. Codes 1877, p. 491, § 91; *North Dakota*: Rev. Codes 1905, § 6995; Comp. Laws 1913, § 7414; *McKenzie v. Hopkins*, 29 N. D. 180, 150 N. W. 881; *More v. Western Grain Co.*, 31 N. D. 369, 153 N. W. 976 (does not apply to action for conversion of personal property); *Indiana*: Rev. Stats. 1881, § 273;

ant. It is universally held that these statutes do not at all limit nor affect the equitable jurisdiction by suit; they merely furnish another special, cumulative, and concurrent remedy. The ordinary type of these statutes does not alter the settled doctrines concerning interpleader. The statutory remedy is a mere substitute for the equitable remedy by suit, in the kinds of action to which it applies, and is governed by the same rules.<sup>91</sup> Of course, the statutes may change the equitable doc-

Mansfield v. Shipp, 128 Ind. 55, 27 N. E. 427; *Minnesota*: Stats. 1878, p. 725, § 131; *New York*: Code Civ. Proc. (new code), § 820; Sickles v. Wilmerding, 59 Hun, 375, 13 N. Y. Supp. 43 (what is an "action upon contract" within this section); Laws 1882, c. 409, § 259, Laws 1892, c. 689, § 115, interpleader in action against savings bank); see as to this act, *Progressive Handlanger Union v. German Sav. Bank*, 23 Abb. N. C. 42, 7 N. Y. Supp. 3; affirmed, 57 N. Y. Super. Ct. (25 J. & S.) 594, 8 N. Y. Supp. 545; *Faivre v. Union Dime Sav. Inst.*, 59 N. Y. Super. Ct. (27 J. & S.) 558, 13 N. Y. Supp. 423; *Mahro v. Greenwich Sav. Bank*, 16 Misc. Rep. 275, 38 N. Y. Supp. 126, reversed in 16 Misc. Rep. 537, 40 N. Y. Supp. 29; *North Carolina*. Battle's Rev. 1873, p. 156, § 65; *South Carolina*: Rev. Stats. 1873, p. 597, § 145. In two states it is authorized "in any action": *Virginia*: Code 1873, c. 149, p. 1019; *West Virginia*: 1 Kelly's Rev. Stats. 1879, c. 7, p. 238; *Dickeshied v. Exchange Bank*, 28 W. Va. 340. For the statute in *Connecticut* (Gen. Stats. 1902, § 1019), see *Brown v. Clark*, 80 Conn. 419, 68 Atl. 1001; in *Massachusetts*, see *Nelson v. Piper*, 213 Mass. 531, 100 N. E. 749; in *Pennsylvania* (Act of March 11, 1836, P. L. 76), see *C. Schmidt & Sons Brewing Co. v. Pittsburgh Life & Trust Co.*, 256 Pa. St. 363, 100 Atl. 959; *Huxley v. Pennsylvania Warehousing & Safe Deposit Co.*, 184 Fed. 705, 106 C. C. A. 659. In some other states a similar proceeding is authorized by statute in certain special cases: *Colorado*: King's Code Civ. Proc. 1880, p. 151, § 404.

<sup>91</sup> The text is quoted in *Gonia v. O'Brien*, 223 Mass. 177, 111 N. E. 787; and cited in *Chicago, R. I. & P. R. Co. v. Moore*, 92 Ark. 446, 123 S. W. 233 (bill of interpleader is not superseded by the statutory remedy); *Anderson v. Red Metal Mining Co.*, 36 Mont. 312, 93 Pac. 44 (remedy by motion does not convert the legal action into an equitable one); *Runkle's Adm'r v. Runkle's Adm'r*, 112 Va. 788, 72 S. E. 695. See, also, *Oriental Bank v. Nicholson*, 3 Jur., N. S., 857; *Slaney*



trines; may enlarge their scope of operation; and a few of them have doubtless produced this effect, as in the clauses introduced by amendment into the statutes of England and California, already noticed."<sup>92</sup>

v. Sidney, 14 Mees. & W. 800; Tauton v. Groh, 4 Abb. App. 358; Vosburgh v. Huntington, 15 Abb. Pr. 254; Johnson v. Maxey, 43 Ala. 521; Nelson v. Goree's Adm'r, 34 Ala. 565; Starling v. Brown, 7 Bush, 164; Board of Education v. Scoville, 13 Kan. 17; Pfister v. Wade, 56 Cal. 43; Coleman v. Chambers, 127 Ala. 615, 29 South. 58; Davis v. Douglass, 12 Ala. App. 581, 68 South. 528; Fox v. Sutton, 127 Cal. 515, 59 Pac. 939; Hartford Life Ann. Co. v. Cummings, 50 Neb. 236, 69 N. W. 782; American Trust & S. Bank v. Thalheimer, 51 N. Y. Supp. 813, 29 App. Div. 170; Pouch v. Prudential Ins. Co. of America, 204 N. Y. 281, Ann. Cas. 1913C, 1191, 97 N. E. 731; Brock v. Southern Ry. Co., 44 S. C. 444, 22 S. E. 601 (approving above text); Kinney v. Hynds, 7 Wyo. 22, 49 Pac. 403, 52 Pac. 1081. That the statutory remedy is concurrent, and has not done away with interpleader by suit in equity, see, also, New England Mut. L. I. Co. v. Keller, 7 Civ. Proc. Rep. (N. Y.) 109; Cronin v. Cronin, 9 Civ. Proc. Rep. (N. Y.) 137, 3 How. Pr., N. S., 184; Lane v. New York L. Ins. Co., 56 Hun, 92, 9 N. Y. Supp. 52; Dubois v. Union Dime Sav. Inst., 89 Hun, 382, 35 N. Y. Supp. 397; First Nat. Bank v. Beebe, 62 Ohio St. 41, 56 N. E. 485. That the statutory remedy is governed by the same principles as the remedy in equity, see Pustet v. Flannelly, 60 How. Pr. 67; Lawrence v. Watson, 8 Hun, 593; Schell v. Lowe, 75 Hun, 43, 23 Civ. Proc. Rep. 300, 26 N. Y. Supp. 991; Dinley v. McCullagh, 92 Hun, 454, 36 N. Y. Supp. 1007; Windecker v. Mut. L. Ins. Co., 43 N. Y. Supp. 358, 12 App. Div. 73; Burritt v. Press Pub. Co., 19 App. Div. 609, 25 App. Div. 141, 46 N. Y. Supp. 95, 49 N. Y. Supp. 201. As to the discretionary nature of the order, see Burritt v. Press Pub. Co., 25 App. Div. 141, 49 N. Y. Supp. 201.

<sup>92</sup> See *ante*, § 47, note 33; Tanner v. European Bank, L. R. 1 Ex. 261; Wells, Fargo & Co. v. Miner, 25 Fed. 533; Dickeshied v. Exchange Bank, 28 W. Va. 340. As to actions under codes of procedure adopting the reformed procedure, see Cady v. Potter, 55 Barb. 463; Washington etc. Ins. Co. v. Lawrence, 28 How. Pr. 435; St. Louis Life Ins. Co. v. Alliance Mut. L. Ins. Co., 23 Minn. 7; Board of Education v. Scoville, 13 Kan. 17; Pfister v. Wade, 56 Cal. 43.

## CHAPTER III.

## APPOINTMENT OF RECEIVERS.

## ANALYSIS.

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§ 1483. (§ 62.) **Definition of Receiver; a Provisional Remedy.**—"A receiver is a person standing indifferent between the parties, appointed by the court as a *quasi* officer or representative of the court, to hold, manage, control, and deal with the property which is the subject-matter of or involved in the controversy, under the direction of the court, during the continuance of the litigation."<sup>1</sup> As is said in a leading case, "By means of

<sup>1</sup> Pom. Eq. Jur., § 1330, continuing: "either where there is no person entitled competent to thus hold it—as, for example, in the case of an infant, or in the interval before an executor or administrator of a deceased owner is appointed; or where two or more litigants are equally entitled, but it is not just and proper that either of them should retain it under his control—as, for example, in some suits between partners; or where a person is legally entitled, but there is danger of his misapplying or misusing it—as, for example, in some suits against an executor or administrator, or, under some particular circumstances, in suits for the enforcement of a mortgage; or he is appointed in like manner and under like circumstances for the purpose of carrying into effect a decree of the court concerning the property—as, for example, a decree for the winding up and settlement of a corporation, or the decree in a creditor's suit." This classification of the objects for which a receiver may be appointed has been adopted in the present work. "A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues or profits of land or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the

the appointment of a receiver, a court of Equity takes possession of the property which is the subject of the suit, preserves it from waste or destruction, secures and collects the proceeds or profits, and ultimately disposes of them according to the rights and priorities of those entitled.<sup>2</sup>

“The receiver appointed is the officer and representative of the court, subject to its orders, accountable in such manner and to such persons as the court may direct, and having in his character of receiver no personal interest, but that arising out of his responsibility for the correct and faithful discharge of his duties. It is of no consequence to him how, or when, or to whom, the court may dispose of the funds in his hands, provided the order or decree of the court furnishes to him a sufficient protection.”<sup>3</sup>

“The order of appointment is in the nature, not of an attachment, but of a sequestration; it gives in itself no advantage to the party applying for it over other

complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is *in custodia legis* for whoever can make out a title to it. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court”: *Booth v. Clark*, 17 How. 322, 331, 15 L. Ed. 164. See the following cases, among others, for definitions of the nature and purpose of the receiver's office and general statements as to the motives that influence the court in making or refusing the appointment: *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, 13 Ann. Cas. 1155, 52 L. Ed. 528, 28 Sup. Ct. 406; *Gayle v. Johnson*, 80 Ala. 388; *Ashurst v. Lehman, Durr & Co.*, 86 Ala. 370, 5 South. 731, and cases cited; *Baker v. Baekus's Adm'r*, 32 Ill. 79, 96; *Jackson v. King*, 9 Kan. App. 160, 58 Pac. 1013; *Corey v. Long*, 12 Abb. Pr., N. S., 427; *Skinner v. Maxwell*, 66 N. C. 45; *Battle v. Davis*, 66 N. C. 252.

<sup>2</sup> *Beverley v. Brooke*, 4 Gratt. (Va.) 187, 208.

<sup>3</sup> *Beverley v. Brooke*, 4 Gratt. (Va.) 187, 208.

claimants; and operates prospectively upon rents and profits which may come to the hands of the receiver, as a lien in favor of those interested, according to their rights and priorities in or to the principal subject out of which those rents and profits issue.”<sup>4</sup>

§ 1484. (§ 63.) **The Appointment Discretionary.**—“The appointment of a receiver is, as a general rule, discretionary.<sup>5</sup> The discretion is not arbitrary or ab-

<sup>4</sup> *Beverley v. Brooke*, 4 Gratt. (Va.) 187, 208. “A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody, as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property”: *Union Nat. Bank of Chicago v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341, 10 Sup. Ct. 1013, per Gray, J. For further statements of the doctrine that the appointment of the receiver *does not affect the title* of either party, see *Howell v. Hough*, 46 Kan. 152, 26 Pac. 436; *Jackson v. King*, 9 Kan. App. 160, 58 Pac. 1013; *Chase’s Case*, 1 Bland (Md.), 206, 17 Am. Dec. 277; *Ellicott v. Warford*, 4 Md. 85; *Ellis v. Boston H. & E. R. R. Co.*, 107 Mass. 1, 28; *Mays v. Rose, Freem. Ch. (Miss.)* 718; *Bank of Mississippi v. Duncan*, 52 Miss. 740, 743; *Battle v. Davis*, 66 N. C. 252, 256; *Harman v. McMullin*, 85 Va. 187, 7 S. E. 349; *Krohn v. Weinberger*, 47 W. Va. 127, 34 S. E. 746; *Mead v. Burk*, 156 Ind. 577, 60 N. E. 338; *Bitting v. Ten Eyek*, 85 Ind. 357; *Ex parte Walker*, 25 Ala. 81, 104.

<sup>5</sup> The passage quoted is from *Pom. Eq. Jur.*, § 1331; its language has been frequently adopted by the courts. See, also, *Pennsylvania Co. v. Jacksonville T. & K. W. R. Co.*, 55 Fed. 131, 2 U. S. App. 606; *Moore v. Bank of British Columbia*, 106 Fed. 574 (citing *Pom. Eq. Jur.*, § 1331); *Crane v. McCoy*, 1 Bond, 422, Fed. Cas. No. 3354; *Forsaith Mach. Co. v. Hope Mill Lumber Co.*, 109 N. C. 576, 13 S. E. 869; *Warren v. Pitts*, 114 Ala. 65, 21 South. 494; *Provident Life Ins. Co. v. Keniston*, 53 Neb. 86, 73 N. W. 216; *Woodward v. Woodward*, 17 Ky. Law Rep. 464, 31 S. W. 734 (though the appointing power was given by statute); *Fluker v. Emporia R. R. Co.*, 48 Kan. 587, 30 Pac. 18; *Simmons Hardware Co. v. Waibel*, 1 S. D. 488, 36 Am. St. Rep. 755, 11 L. R. A. 267, 47 N. W. 418, 814 (citing *Pom. Eq. Jur.*, § 1331); *Pullan v. Cincinnati etc. R. R. Co.*, 4 Biss. 47, Fed.

solute; it is a sound and judicial discretion, taking into account all the circumstances of the case,<sup>6</sup> exercised for the purpose of promoting the ends of justice, and of protecting the rights of *all* the parties interested in the controversy and the subject-matter,<sup>7</sup> and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding." Therefore, the discretion of the court in appointing a receiver will not be interfered with by an appellate court, unless it is clear that it has been abused or exercised in a manner inconsistent with well-established rules governing such application.<sup>8</sup>

Cas. No. 11,461; *Chicago etc. Oil & Min. Co. v. United States Petroleum Co.*, 57 Pa. St. 83 (possession under lease not disturbed). It has been held that a receiver may be appointed on the court's own motion without request of either party: *Crawford v. Crawford* (Tex. Civ. App.), 163 S. W. 115.

<sup>6</sup> *Owen v. Homan*, 4 H. L. Cas. 997; *Norris v. Lake*, 89 Va. 513, 16 S. E. 663; *Meyer v. Thomas et al.*, 131 Ala. 111, 30 South. 89; *Vose v. Reed*, 1 Woods, 647, Fed. Cas. No. 17,011; *McClure v. McGee*, 128 Ky. 464, 108 S. W. 341; *Hanna v. Hanna*, 89 N. C. 68 (allowing receiver for necessary part); *May v. Rase* (Miss.), Freem. Ch. 703 (sale in fraud of creditors). In *Vose v. Reed*, 1 Wood, 650, Fed. Cas. No. 17,011, the court said: "But all the circumstances of the case are to be taken into consideration, and if the case be such that a greater injury would ensue from the appointment of a receiver than from leaving the property in the hands now holding it, or if any consideration of propriety or convenience render the appointment of a receiver improper or inexpedient, none will be appointed."

<sup>7</sup> *American Biscuit & Mfg. Co. v. Klotz*, 44 Fed. 721 (will not aid improper or illegal scheme); *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. 262 (probability of injury to defendant); *Fort Payne Furnace Co. v. Fort Payne Coal Co.*, 96 Ala. 472, 38 Am. St. Rep. 109, 11 South. 439 (corporation not divested of lands it intended selling; in commenting on the exercise of the court's discretion in appointing receivers, the court quotes Pom. Eq. Jur., § 1331, with approval; *Sales v. Lusk*, 60 Wis. 490, 19 N. W. 362 (subsequent mortgagees protected)).

<sup>8</sup> *Mead v. Burk*, 156 Ind. 577, 60 N. E. 338 ("there must be a plain abuse, to the prejudice of the complaining party"); *Rider v.*



§ 1485. (§ 64.) **Principles Governing the Court's Discretion; Imminent Danger.**—The general principles which should govern the court in the exercise of its discretion have been thus formulated in a leading case: The plaintiff must show, first, either that he has a clear right to the property itself, or that he has some lien upon it; or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim; and secondly, that the possession of the property by the defendant was obtained by fraud; or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct or insolvency of the defendant.<sup>9</sup> The element of danger is an import-

Bagley, 84 N. Y. 461 (fraud on lower court); Bagley v. Seudder, 66 Mich. 97, 33 N. W. 47 (approved in Dutton v. Thomas, 97 Mich. 93, 56 N. W. 229); Fluker v. Emporia R. R. Co., 48 Kan. 587, 30 Pac. 18 (discretion not abused); Naylor v. Sidener, 106 Ind. 179, 6 N. E. 345 (weight of evidence insufficient); Crawford v. Ross, 39 Ga. 44 (not unless illegal); Heinze v. Butte & Boston Consolidated Min. Co., 126 Fed. 1, 11, 61 C. C. A. 63 (citing Beaumont v. Beaumont, 166 Pa. St. 615, 31 Atl. 336; Nimocks v. Shingle Co., 110 N. C. 230, 14 S. E. 684; Sanders v. Slaughter, 89 Ga. 34, 14 S. E. 903); Woods v. Grayson, 16 App. D. C. 174. But see *contra*, Meyer v. Thomas, 131 Ala. 111, 30 South. 89; Pelzer v. Hughes, 27 S. C. 408, 3 S. E. 781; De Walt v. Kinard, 19 S. C. 286; Simmons Hardware Co. v. Waibel, 1 S. D. 488, 36 Am. St. Rep. 755, 11 L. R. A. 267, 47 N. W. 814 (lower court refused to take possession of copy of secret code); Perrin v. Lepper, 56 Mich. 351, 23 N. W. 39. "The discretion is not so absolute that it may not be reviewed, and its exercise, if improper, reversed": 4 Pom. Eq. Jur., § 1331, note 1, citing La Société Française v. District Court, 53 Cal. 495; Milwaukee R. R. v. Soutter, 2 Wall. 521, 17 L. Ed. 860. See Smith v. Brown, 50 Wash. 240, 96 Pac. 1077. The power is governed as to its exercise by established principles, violation or departure from which amounts to an abuse of discretion: Sult v. A. Hochstetter Oil Co., 63 W. Va. 317, 61 S. E. 307.

<sup>9</sup> May v. Rose, Freem. Ch. (Miss.) 703, 718; Steele v. Aspy, 128 Ind. 367, 27 N. E. 739; State v. Union Nat. Bank, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585. See, also, Lehman v. Trust Co. of America, 57 Fla. 473, 49 South. 502; Hayes v. Jasper Land Co., 147

ant consideration; a remote or past danger will not suffice as a ground for the relief, but there must be a well-grounded apprehension of immediate injury. Nor will the court act upon a possible danger only; the dan-

Ala. 340, 41 South. 909; Gray's Harbor Commercial Co. v. Fifer, 97 Wash. 380, 166 Pac. 770. "As a general rule, a receiver will be appointed for the purpose of protecting the fund when the complainant has an equitable interest in the subject, and the defendant having possession of the property is wasting it, or removing it out of the jurisdiction of the court": Vose v. Reed, 1 Woods, 647, Fed. Cas. No. 17,011, per Bradley, J. See, also, Lancaster v. Asheville St. R'y Co., 90 Fed. 129, 133; Ryder v. Bateman, 93 Fed. 16. "The power to appoint a receiver is most usually called into action either to prevent fraud, save the subject of litigation from material injury, or rescue it from threatened destruction": Baker v. Backus's Adm'r, 32 Ill. 79, 96. That the plaintiff cannot have a receiver when he has parted with his entire interest in the property, see Steele v. Aspy, *supra*; Smith v. Wells, 20 How. Pr. 158.

In Pom. Eq. Jur., § 1331, note, are the following quotations and comment: "In Bainbrige v. Baddeley, 3 Macn. & G. 413, 419, the court, speaking of the general grounds for the appointment of a receiver, said: 'There are, I apprehend, two grounds, and two only: 1. That there is a reasonable probability of success on the part of the plaintiff; and 2. That the property, the subject of the suit, is in danger.' In Blondheim v. Moore, 11 Md. 365, the following rules controlling the exercise of the discretion were laid down, which have been frequently quoted as a correct generalization: '1. That the power of appointment is a delicate one, and is to be exercised with great circumspection; 2. That it must appear the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve the property; 3. That there is no case in which the court appoints a receiver merely because the measure can do no harm; 4. That fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved; and 5. That unless the necessity be of the most stringent character, the court will not appoint a receiver until the defendant is first heard in response to the application.' These rules, however, must be taken with some reservations; they are certainly too strong to be of universal application, especially the fourth. There are classes of cases in which a receiver is appointed almost as a matter of course, although no fraud nor *imminent* danger is proved."

ger must be great and imminent, and demanding immediate relief.<sup>10</sup>

It has been truly said that a court will never appoint a receiver merely on the ground that it will do no harm.<sup>11</sup> This would seem to follow naturally from the rule that the appointment is primarily to prevent imminent injury.<sup>12</sup>

§ 1486. (§ 65.) **Same; Insolvency of Defendant.**—While insolvency, alone, is not a ground for the appointment of a receiver, unless it has been so declared by stat-

<sup>10</sup> *Lancaster v. Asheville St. R'y Co.*, 90 Fed. 129, 133. See, also, *Mead v. Burk*, 156 Ind. 577, 60 N. E. 338; *Kean v. Colt*, 5 N. J. Eq. 365; *Orphan Asylum v. McCartee*, Hopk. Ch. (N. Y.) 429; *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781; *City Nat. Bank v. Dunham*, 18 Tex. Civ. App. 184, 44 S. W. 605; *Morris v. Lake*, 89 Va. 513, 16 S. E. 663; *Beecher v. Bininger*, 7 Blatchf. 170, Fed. Cas. No. 1222; *Kelley v. Boettcher*, 89 Fed. 125; *Fort Payne Furnace Co. v. Fort Payne Coal etc. Co.*, 96 Ala. 473, 38 Am. St. Rep. 109, 11 South. 439, and cases cited. "It is well settled that when there is reasonable ground to apprehend that pending litigation the property may be so disposed of as to deprive the complaining party of the fruit of his victory when had, a court of equity will secure the property, or in a proper case have it sold and secure the fund arising from it by the appointment of a receiver, or by an injunction, and when need be, by both": *Ellett v. Newman*, 92 N. C. 519, 523. That the requirement of imminent danger is not universal, see end of last note.

<sup>11</sup> *Orphan Asylum Society v. McCartee et al.*, 1 Hopk. Ch. 429; approved in *Clark v. Ridgely*, 1 Md. Ch. 70; *Blondheim v. Moore*, 11 Md. 365; *Owen v. Homan*, 4 H. L. Cas. 997 (unless the property is not in the enjoyment of either party); *Lehman v. Trust Co. of America*, 57 Fla. 473, 49 South. 502. The text is cited to this effect in *Smith v. United States*, 142 Fed. 225.

<sup>12</sup> Yet, the assurance that no harm will follow tends to aid the appointment, where there are other proper grounds: *Nimocks v. Grimm*, 110 N. C. 230, 14 S. E. 684 (refusing to discharge receiver); *American Biscuit & Mfg. Co. v. Klotz*, 44 Fed. 721 (appointing receiver of "trust monopoly").

ute,<sup>13</sup> "the solvency or insolvency of the party to be affected is an important consideration with a court of equity, in all cases guiding, if it does not govern, its discretion, in the appointment of receivers."<sup>14</sup> "The insolvency of a defendant in possession of property involved in litigation in any case necessarily intensifies the probability of loss to the complainant, and will serve, at least, to show that his remedy at law, for any loss or injury that may be sustained, would be inadequate."<sup>15</sup>

§ 1487. (§ 66.) **Same; Probability of Plaintiff's Success in the Suit.**—While it is true, as a general rule, that in making or refusing the appointment of a receiver, the court will not forestall or anticipate the decision which may be made on final hearing, yet the primary inquiry is whether there is shown a reasonable probability that the plaintiff asking the appointment will ultimately succeed in obtaining the general relief sought by the suit.

<sup>13</sup> *Lawrence Iron-Works Co. v. Rockbridge Co.*, 47 Fed. 755; *McCreery v. Berney Nat. Bank*, 116 Ala. 224, 67 Am. St. Rep. 105, 22 South. 577.

<sup>14</sup> *Warren v. Pitts*, 114 Ala. 65, 21 South. 494; *Thompson v. Tower Mfg. Co.*, 87 Ala. 733, 6 South. 928; *Irwin v. Everson*, 95 Ala. 64, 10 South. 320; *Stillwell v. Savannah Grocery Co.*, 88 Ga. 100, 13 S. E. 963; *Chase's Case*, 1 Bland (Md.), 206, 213, 17 Am. Dec. 277.

<sup>15</sup> *Mead v. Burk*, 156 Ind. 577, 60 N. E. 338. In this case the court holds that "insolvency of a person in the possession or enjoyment of the use of property for which a receiver is sought is not, as a general rule, indispensable to a successful prosecution of the application. . . . The probability of a fierce and long-continued litigation in respect to the rights of property will sometimes justify a court in withdrawing it from the operation of such prolonged contest by placing it for preservation or security in charge of a receiver for the benefit of all parties concerned therein, until there can be a full and final adjudication of their rights"; citing *Crane v. McCoy*, 1 Bond, 422, Fed. Cas. No. 3354. To the effect that the insolvency of the debtor is necessary to justify the appointment, when the collection of a debt is the sole purpose of the suit, see *Joseph Dry Goods Co. v. Hecht*, 120 Fed. 760, 57 C. C. A. 64.



If ultimate success is a matter of grave doubt, or if it be clear that the general relief sought cannot be obtained, the appointment ought not to be made.<sup>16</sup> This principle, however, does not involve the necessity that the pleadings be drawn with technical accuracy. The bill may be subject to demurrer for the want of proper parties, or because of defects of form or the absence of substantial allegations,—insufficiencies curable by amendment. These insufficiencies, of themselves, do not form an impediment to the appointment of a receiver; if a case be made by a party having interests to be protected and preserved entitling him to the general relief which is prayed.<sup>17</sup>

§ 1488. (§ 67.) **Caution Observed in Making the Appointment.**—The appointment of a receiver is one of the most responsible duties which a court of equity is called upon to perform; and while resting within the sound, judicial discretion of the court, the power is, or should

<sup>16</sup> Pom. Eq. Jur., § 1331; *Bank of Florence v. United States Savings & Loan Co.*, 104 Ala. 297, 16 South. 110; *Randle v. Carter*, 62 Ala. 95. See, to the same effect, *Owen v. Homan*, 3 Maen. & G. 378, 412, affirmed 4 H. L. Cas. 997, quoted in 4 Pom. Eq. Jur., § 1331, note 2; *Bainbrigge v. Baddeley*, 3 Maen. & G. 413; *Kelley v. Boettcher*, 89 Fed. 125, 129; *Hurt v. Hurt*, 157 Ala. 126, 47 South. 260; *Phillips v. Birmingham Industrial Co.*, 171 Ala. 445, 54 South. 603; *Whitley v. Bradley*, 13 Cal. App. 720, 110 Pac. 596; *People v. Weigley*, 155 Ill. 491, 40 N. E. 300; *Mead v. Burk*, 156 Ind. 577, 60 N. E. 338; *Sheridan Brick Works v. Marion Trust Co.*, 157 Ind. 292, 87 Am. St. Rep. 207, 61 N. E. 666; *Bacon v. Engstrom*, 129 Minn. 229, 152 N. W. 264, 537; *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781; *Norris v. Lake*, 89 Va. 513, 16 S. E. 663; *Beecher v. Beninger*, 7 Blatchf. 170, Fed. Cas. No. 1222; *Chase's Case*, 1 Bland (Md.), 206, 213, 17 Am. Dec. 277.

<sup>17</sup> *Bank of Florence v. United States Savings and Loan Co.*, 104 Ala. 297, 16 South. 110; *Ex parte Walker*, 25 Ala. 81; *Hurt v. Hurt*, 157 Ala. 126, 47 South. 260.

be, exercised with great caution and circumspection.<sup>18</sup> It is well said by the supreme court of Alabama:<sup>19</sup> "Property is not taken from a party in possession, claiming in good faith<sup>20</sup> the right to it, before judgment in actions at law, without first exacting from him at whose suit it is done ample security for the protection of his adversary against injury. In courts of equity, writs of injunction and equitable attachment are allowed only upon like conditions. And whenever the plaintiff's rights are disputed, the court should rarely appoint a receiver to take the property from the defendant; receivers being ordinarily appointed without bonds of indemnity from those procuring the appointment to be made, and only upon the bond of the receiver for his fidelity as such. There has been, indeed, too much facility on the part of

<sup>18</sup> Ashurst v. Lehman, 86 Ala. 370, 5 South. 731 (receiver allowed in case of mortgaged crops); Hayes v. Jasper Land Co., 147 Ala. 340, 41 South. 909; Wright v. Wright, 180 Ala. 343, 60 South. 931; note to Cameron v. Groveland Imp. Co., 72 Am. St. Rep. 34; Corbin v. Thompson, 141 Ind. 128, 40 N. E. 533 ("the power is one of the highest vested in a court of chancery and is only exercised where justice would in all probability be defeated by withholding it"); Rollins v. Henry, 77 N. C. 469 (same); Gilbert v. Block, 51 Ill. App. 516; Williamson v. Wilson, 1 Bland (Md.), 418; Holmes v. Stix, 104 Ky. 351, 47 S. W. 243 (this applies in the extreme when the property is held jointly).

<sup>19</sup> Briarfield Iron Works v. Foster, 54 Ala. 622. This is quoted approvingly in Fort Payne Furnace Co. v. Fort Payne Coal & Iron Co., 96 Ala. 472, 38 Am. St. Rep. 109, 11 South. 439 (refusing to take possession of lands of a corporation). To same effect, Moritz v. Miller, 87 Ala. 331, 6 South. 269 (refusing a receiver on information and belief); approved in Lindsay v. American Mtg. Co., 97 Ala. 412, 11 South. 770.

<sup>20</sup> Where the one against whom the remedy is sought is *acting fraudulently*, it is a common ground of equitable interference: Brundage v. Home Savings etc. Ass'n, 11 Wash. 277, 39 Pac. 666 (mortgaged property); Mays v. Rose, Freem. Ch. (Miss.) 703; Furlong v. Edwards, 3 Md. 99 (fraud must be clearly proved); Williamson v. Wilson, 1 Bland (Md.), 418.

chancellors and registers in the exercise of this authority." The reason for the necessity of exercising such great caution is clearly stated by Baldwin, J., in *Beverley v. Brooke*:<sup>21</sup> "In the exercise of this summary jurisdiction, a court of equity reverses, in a great measure, its ordinary course of administering justice; beginning at the end, and levying upon the property a kind of equitable execution, by which it makes a general, instead of a specific, appropriation of the issues and profits, and afterwards determining who is entitled to the benefit of its *quasi*-process. But, acting, as it often must of necessity, before the merits of the cause have been fully developed, and not infrequently, where the proper parties in interest are not all before the court, it proceeds with much caution and circumspection, in order to avoid disturbing, unnecessarily or injuriously, legal rights and equitable priorities." McKay, J., in *Crawford v. Ross and Ross*, 39 Ga. 44, said: "The exercise of the extraordinary powers granted to the Chancellor of the appointment of receivers is a very delicate and responsible duty. It is a serious interference, without the verdict of a jury and without a regular hearing, with the *prima facie* rights of the citizen, and should only be granted to prevent manifest wrong."<sup>22</sup>

<sup>21</sup> *Beverley v. Brooke*, 4 Gratt. (Va.) 187.

<sup>22</sup> *Crawford v. Ross*, 39 Ga. 44. See, also, *Blondheim et al. v. Moore*, 11 Md. 365 (information and belief insufficient); *Mays v. Rose et al.* (Miss.), Freem. Ch. 703 (rights of both parties considered); *Furlong v. Edwards*, 3 Md. 99 (mortgage); *Fox v. Curtis*, 34 Atl. 952, 176 Pa. St. 52 (partnership creditors); *State v. Ross*, 122 Mo. 435, 23 L. R. A. 534, 25 S. W. 947 (rights in the insolvency of railroad corporation). Atkinson, J., in *Dozier v. Logan*, 101 Ga. 173, 28 S. E. 612, says: "The appointment of a receiver is recognized as one of the harshest remedies which the law provides for the enforcement of rights, and is allowable only in extreme cases, and under circumstances where the interest of the creditors is exposed to manifest peril. The courts, of late years, are drifting away from the

§ 1489. (§ 68.) **Applicant must Come With "Clean Hands" and Without Laches.**—The rule that one who comes into equity must come with clean hands applies to an applicant for a receiver.<sup>23</sup> An applicant for a re-

landmark which in former years marked the line of division between the power of chancery courts to seize the property of an individual through the instrumentality of a receiver, and the right of the individual himself to retain possession until, by the judgment of the court, his property could be judicially appropriated to purposes inconsistent with his individual possession. In the exercise of the great discretionary power conferred upon our brethren of the circuit bench, with respect to such matters, they cannot be too cautious, and unless there is immediate and present necessity for such action, the appointment of a receiver should be refused." See, also, *American Investment Co. v. Ferrar*, 87 Iowa, 437, 54 N. W. 361 (receiver of mortgaged property refused); *Clark v. Raymond*, 86 Iowa, 61, 53 N. W. 354 (same); *Roberts v. Washington Nat. Bank*, 9 Wash. 12, 37 Pac. 26 ("the court should restrict, rather than extend, the growing tendency" to appoint receivers); *Whitehead v. Hale*, 118 N. C. 601, 24 S. E. 360.

*The rights of both parties* should be carefully considered: *Vose v. Reed*, 1 Woods, 650, Fed. Cas. No. 17,011; *Provident Life & T. Co. v. Keniston*, 53 Neb. 86, 73 N. W. 216 (mortgaged premises); *Lancaster v. Asheville St. R'y Co.*, 90 Fed. 129 (railroad corporation; apprehension of danger to plaintiff must be well grounded, and of "immediate" injury); *Pullan v. Cincinnati etc. R. R. Co.*, 4 Biss. 47, Fed. Cas. No. 11,461 (a receiver should never be appointed in case of mortgage foreclosure, where the property is certain to produce the amount on sale). The statement set forth in the text has been repeatedly quoted as expressing the proper view: See *Latham v. Chaffee*, 7 Fed. 525; note to *Cameron v. Groveland Imp. Co.*, 72 Am. St. Rep. 34.

<sup>23</sup> Thus, failure, on the part of executors, to have a sale recorded, allowing the vendee in the meantime to expend money in improvements, will defeat their right to a receiver; *Bennallack v. Richards*, 125 Cal. 427, 58 Pac. 651. Where the object of the applicant is illegal: *American Biscuit & Mfg. Co. v. Klotz*, 44 Fed. 721; *Cameron v. Havemeyer*, 12 N. Y. Supp. 126, 25 Abb. N. C. 438 (trust adjudged illegal, the stockholders have a right to a receiver).



ceiver must not be guilty of laches before bringing<sup>24</sup> his bill, or pending the application.<sup>25</sup>

§ 1490. (§ 69.) **Inadequacy of Legal Remedy.**—It is one of the fundamental principles on which receivers are granted that the applicant shall have no plain, adequate, and complete remedy at law.<sup>26</sup> Therefore, as “equity will not help those who have power to help themselves,”<sup>27</sup> he must, as a usual thing, have exhausted his legal remedies prior to his application for equitable relief.<sup>28</sup> This applies both to the original chancery practice and to the reformed procedure.<sup>29</sup> The objection to

24 Thus, where the injury occurred two years before suit brought, appointment was refused: *Kean v. Colt*, 5 N. J. Eq. 365.

25 An application having been allowed to sleep for six years, was dismissed, though evidence had been taken in the meantime: *Hood v. First Nat. Bank of Fremont*, 29 Fed. 55; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 33 L. Ed. 1021, 10 Sup. Ct. 604 (not allowed to contest receiver's right to appointment after nine months); *Tibbals v. Sargeant*, 14 N. J. Eq. 449 (delay of two years after notice).

26 *Fort Payne Furnace Co. v. Ft. Payne Coal & Iron Co.*, 96 Ala. 472, 38 Am. St. Rep. 109, 11 South. 439; approved, *Etowah Min. Co. v. Wills Valley Min. & Mfg. Co.*, 106 Ala. 492, 17 South. 522 (corporation creditors); *Bennallack v. Richards et al.*, 125 Cal. 427, 58 Pac. 65 (“a departure from the rule can only be justified upon strong grounds of judicial necessity”); *McClure v. McGee*, 128 Ky. 464, 103 S. W. 341; *Spooner v. Bay St. Louis Syndicate*, 44 Minn. 401, 46 N. W. 848 (corporation creditors); *Rice v. St. Paul etc. R. R. Co.*, 24 Minn. 467 (receiver of railroad); *Cahn v. Johnson*, 12 Tex. Civ. App. 304, 33 S. W. 1000; *Bergman Clay Mfg. Co. v. Bergman*, 73 Wash. 144, 131 Pac. 485; *Street Grading District No. 60 v. Hagadorn*, 186 Fed. 451, 108 C. C. A. 429.

27 *Sollory v. Learer*, L. R. 9 Eq. Cas. 22; *Importers' Nat. Bank v. Quackenbush*, 143 N. Y. 567, 38 N. E. 728.

28 *Importers' etc. Nat. Bank v. Quackenbush*, 143 N. Y. 567, 38 N. E. 728; *Sallee v. Soules*, 168 Ind. 624, 81 N. E. 587.

29 *Spooner v. Bay St. Louis Syndicate*, 44 Minn. 401, 46 N. W. 848 (corporation creditors).

the appointment being made on these grounds should be taken before the appointment.<sup>30</sup>

§ 1491. (§ 70.) **Bill Fully Denied by Answer.**—It is a well-established rule that where the equities of the bill have been fully met and denied in every material part by the defendant's sworn answer, the plaintiff is not entitled to the appointment of a receiver, unless he overcomes the denials by such further proof as will tend to establish his bill.<sup>31</sup> The usual weight allowed to answers in chancery is due the defendant in this class of cases.<sup>32</sup> and they are conclusive until overcome by testimony.<sup>33</sup>

§ 1492. (§ 71.) **Must be a Suit Pending.**—The appointment of a receiver being made merely to assist in the ultimate disposition of the property in controversy, a receiver will not ordinarily<sup>34</sup> be appointed unless there is

<sup>30</sup> *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 33 L. Ed. 1021, 10 Sup. Ct. 604 (where a bill was suffered to be taken *pro confesso*, defendant could not object nine months later).

<sup>31</sup> *Sweeny v. Mayhew*, 6 Idaho, 455, 56 Pac. 85; *Joyce v. Ragan*, 117 Md. 38, 82 Atl. 992; *Crombie v. Order of Solon*, 157 Pa. St. 588, 27 Atl. 710 (bill alleging illegality of corporation election); *Henn v. Walsh*, 2 Edw. Ch. (N. Y.) 129 (partnership); *Whitehouse v. Point Defiance T. & E. R'y Co.*, 9 Wash. 558, 38 Pac. 152 (stating the reason to be that "the plaintiff, having addressed himself to the conscience of the defendant, has made him a witness, and must take his answer as true, unless he can overcome it"); *Wilson v. Maddox*, 46 W. Va. 641, 33 S. E. 775; *Sult v. A. Hochstetter Oil Co.*, 63 W. Va. 317, 61 S. E. 307.

<sup>32</sup> *Thompson v. Diffenderfer*, 1 Md. Ch. 489 (though the truth of the answer is attacked by the plaintiff).

<sup>33</sup> *Voshell & Heaton v. Hyman & Gross*, 26 Ala. 83. It has been said that in such a case "the question is no longer addressed to the discretion of the court; but it is a judicial error to appoint a receiver when the charges are thus met": *Wilson v. Maddox*, 46 W. Va. 641, 33 S. E. 775; *Sweeny v. Mayhew*, 6 Idaho, 455, 56 Pac. 85.

<sup>34</sup> The case of receivers appointed over the estates of lunatics and infants is an exception.

a suit pending, concerning the subject-matter in regard to which the receiver is sought.<sup>35</sup> Thus an application by "a debtor for the appointment of a receiver to manage and carry on its business, so that the creditors cannot enforce their legal rights in the courts of the country, and not a petition stating a cause of action, either in law

<sup>35</sup> The suit must be one of equitable cognizance: *Miller v. Perkins*, 154 Mo. 629, 55 S. W. 874 ("jurisdiction to appoint a receiver cannot be acquired simply by a petition therefor, nor by the appointment of one"). In *American Loan & Trust Co. v. Toledo etc. Co.*, 29 Fed. 416, it is said: "Whatever may be the powers of a court of equity to construct railroads or manage them through receivers, in form, at least, these powers must be exercised as an adjunct to the jurisdiction of enforcing some of the well-understood equitable rights of the parties in relation to these contracts." See *Zuber v. Micmac Gold Min. Co.*, 180 Fed. 625; *Cassells Mills v. First Nat. Bank*, 187 Ala. 325, 65 South. 820; *Howell etc. v. Harris-Cortner & Co.*, 168 Ala. 383, 52 South. 935, *Ann. Cas.* 1912B, 234 (appointment prior to filing of bill is void); *Barber v. International Co. of Mexico*, 73 Conn. 587, 48 Atl. 758; *Guy v. Doak*, 47 Kan. 236, 27 Pac. 968; *Burnes v. City of Atchison*, 48 Kan. 507, 29 Pac. 579 (a receiver will not be appointed merely to bring suit); *State v. Union Nat. Bank*, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585; *In re Hancock*, 27 Hun, 575 (the suit must be pending in the court where the application is made); *Elmore County Irrigated Farms Ass'n v. Stockslager*, 22 Idaho, 420, 126 Pac. 616; *Red River Potato Growers' Ass'n v. Bernardy*, 126 Minn. 440, 148 N. W. 449; *Martin v. Harnage*, 26 Okl. 790, 110 Pac. 781, 38 L. R. A. (N. S.) 228 (suit must be pending in same court; citing text); *Stacy v. McNicholas*, 76 Or. 167, 144 Pac. 96, 148 Pac. 67; *Kokemot v. Roos* (Tex. Civ. App.), 189 S. W. 505; *Republic Trust Co. v. Taylor* (Tex. Civ. App.), 184 S. W. 772; *Hermann v. Thomas* (Tex. Civ. App.), 143 S. W. 195; *Crawford v. Crawford* (Tex. Civ. App.), 163 S. W. 115; *Grays Harbor Commercial Co. v. Fifer*, 97 Wash. 380, 166 Pac. 770; *Baltimore Bargain House v. St. Clair*, 58 W. Va. 565, 52 S. E. 660; *Popp v. Daisy Gold Min. Co.*, 27 Utah, 83, 74 Pac. 426 (no suit pending); *Grand Island Electric L. & C. S. Co. (Neb.)*, 94 N. W. 136 (not in suit brought merely for appointment); *Hay v. McDaniel*, 26 Ind. App. 683, 60 N. E. 729 (same). What constitutes the pendency of an action is largely a question of practice; but see *Hellebush v. Blake*, 119 Ind. 349, 21 N. E. 976, where the right to a receiver in a legal proceeding being given by

or equity, in which, as incident thereto, a receiver be appointed," was dismissed.<sup>36</sup>

§ 1493. (§ 72.) **The Supreme Court of Judicature Act, in England.**—In England, since 1873, the appointment of receivers is regulated by § 25, par. 8, of this act: "A *mandamus* or an injunction may be granted, or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just

statute, it was held that though the notice or service was defective, and the defendant had entered only a special appearance, the action was pending. As to service generally, where the property is within the jurisdiction of the chancery court, see *Quarl v. Abbott*, 102 Ind. 233, 52 **Am. Rep.** 662, 1 N. E. 476; *Pennoyer v. Neff*, 95 U. S. 729, 24 **L. Ed.** 565. See *Hardy v. McClellan*, 53 Miss. 507 (in case of *ex parte* application); *Merchants' & Mfg. Nat. Bank of Detroit v. Kent Circuit Judge*, 43 Mich. 292, 5 N. W. 627 (suit must concern the property); approved in *Jones v. Schall*, 45 Mich. 379, 4 N. W. 68 (criticising the appointment of receivers on *ex parte* application); *Arnold v. Bright*, 41 Mich. 210, 2 N. W. 16 (same); note to *Cortelyou v. Hathaway*, 64 **Am. Dec.** at 482; *Pressley v. Harrison*, 102 Ind. 19, 1 N. E. 188; approved in *Sullivan Election etc. Co. v. Blue*, 142 Ind. 407, 41 N. E. 805; *Winchester etc. Co. v. Gordon*, 143 Ind. 681, 42 N. E. 914. That subsequent filing of the bill, and giving of the requisite bond by the receiver, cannot impart validity to the void act of his appointment before the bill was filed, see *Harwell v. Potts*, 80 Ala. 70. Clearly, a receiver should not be appointed after the action is dismissed: *Dale v. Kant*, 58 Ind. 584.

<sup>36</sup> *State v. Ross*, 122 Mo. 435, 25 S. W. 947; approved in *Miller v. Perkins*, 154 Mo. 629, 55 S. W. 874. See *Jones v. Bank of Leadville*, 10 Colo. 464, 17 Pac. 272: "To hold that courts of equity can entertain jurisdiction to appoint a receiver of property, as the substantive ground, and ultimate object of the suit, on the petition of the owner of the property to be controlled and protected, would be to make them the administrators of every estate, the owners of which were either incapable or unwilling of administering themselves." The necessary implication from the cases seems to be that, "a receiver being appointed for all the parties, he whose property is to be taken from him and placed in the power of a receiver, should be a party to the pending suit": *Baker v. Backus's Adm'rs*, 32 Ill. 79.



or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just." The liberal terms of this statutory provision render the recent English decisions on the appointment of receivers of little value as precedents to the American practitioner. A few of them are cited in the note, by way of illustration merely.<sup>37</sup>

§ 1494. (§ 73.) **Statutory Provisions in the United States.**—"In the states adopting the reformed procedure, the codes of procedure generally contain provisions regulating the appointment of receivers." As these general provisions vary somewhat in detail, and as a knowledge of the precise terms of the statute is frequently necessary to an estimate of the value as a precedent of the decisions based thereon, they are given in full in the note. Reference is also made to many of the statutes author-

<sup>37</sup> *Cummins v. Perkins*, [1899] 1 Ch. 16; *Smith v. Port Dover etc. R. Co.*, 12 Ont. App. 288; *Mason v. Westoby*, L. R. 32 Ch. Div. 206; but see 42 Ch. Div. 590 (receiver of mortgaged property); *Bryant v. Bull*, L. R. 10 Ch. Div. 153 (married women's contracts); *Taylor v. Eckersley*, L. R. 2 Ch. Div. 302 (specific performance of agreement to execute bill of sale of chattels; receiver appointed on evidence of immediate danger of the chattel being disposed of). Receivers in aid of judgment creditors, by way of "equitable execution," etc.: *Anglo-Italian Bank v. Davies*, L. R. 9 Ch. Div. 275 (to reach rents and profits of mortgaged lands); *Salt v. Cooper*, L. R. 16 Ch. Div. 544 (appointment by motion in the original action); *Westhead v. Riley*, L. R. 25 Ch. Div. 413 (to collect debts payable to judgment debtor); *In re Coney*, L. R. 29 Ch. Div. 993 (to reach equitable interest of judgment debtor who is out of the jurisdiction); *Manchester etc. Banking Co. v. Parkinson*, L. R. 22 Q. B. Div. 173 (no receiver when no impediment to execution in the ordinary way); *Holmes v. Millage*, [1893] 1 Q. B. 551 (ordinarily, no receiver of future earnings of the judgment debtor); *Harris v. Beauchamp*, [1894] 1 Q. B. 801 (receiver only where impediment to execution); *Cadogan v. Lyric Theatre*, [1894] 3 Ch. 338; *Tyrrell v. Painton*, [1895] 1 Q. B. 202 (reversionary interest in personality).

izing the appointment in special cases, as on the dissolution or insolvency of corporations. In a few of the states, however, these statutes are so detailed and elaborate that a statement of them would transcend the limits of this treatise. Several of the states have general legislation, briefly referred to below, on matters other than the appointment; as, declaring who is ineligible (see *e. g.*, Arizona, Arkansas, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Wyoming); describing his powers in general terms (Arizona, Arkansas, California, Indiana, Iowa, Kansas, Kentucky, New York, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Washington, Wyoming); authorizing suits against him without leave of court (see Alabama, Texas, Virginia); authorizing suits by him in his own name (Arkansas, California, and, generally, the states in which the statute defines his powers); providing for the investment of funds (California, Kansas, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Wyoming); regulating the priority of certain claims (Indiana, New Jersey, Oregon, Texas, Utah, Washington, Wisconsin); regulating his compensation (Mississippi, New York, North Carolina, West Virginia).<sup>38</sup>

<sup>38</sup> See 4 Pom. Eq. Jur., § 1335.

Alabama.—Civ. Code, 1896.

§ 429: An appeal may be taken from an order appointing or refusing a receiver.

§ 799: May be appointed by chancellor in term time or in vacation, and by register in vacation. In vacation reasonable notice must be given of application, or good cause shown for failure to give notice.

§ 801: Complainant must give bond before appointment.

§ 803: Receiver "may be sued in respect to any act or transaction of his, in carrying on the business connected with such property in this state," without previous leave of court.

§ 1294: "Upon decree of dissolution [of a corporation], the chancellor shall appoint a receiver of all the property and assets of the

corporation. The chancellor shall direct the receiver to collect, by suit or otherwise, all the debts due the corporation, and sell property, real or personal, belonging to the corporation, and how he shall make title thereto to the purchaser; the chancellor may, in his discretion, authorize the receiver to proceed, without suit, to sell any or all of the debts and assets of the corporation at public sale for cash, or on such terms as in his judgment the interests of the parties may require."

§ 1295: How selected on dissolution; bond.

§ 1296: Receiver must pay debts in full or ratably. If contested, determined as other contested claims in chancery. Residue must be paid to stockholders.

§ 821: In creditors' bill, if answer shows that defendant has any property, court may appoint a receiver "with authority to demand, sue for and recover, or otherwise to reduce to possession such property, moneys, effects, or choses in action; and may require the debtor to make to such receiver all conveyances, assignments, or transfers, which may be necessary and proper to enable him to receive, or to sue for and recover such property."

§ 2580: Court may appoint a receiver for an insolvent domestic insurance company.

Arizona.—Rev. Stats. 1901, §§ 1532-1541.

§ 1532: "Judges of the district courts, in term time or in vacation, may appoint a receiver in suits pending in said courts, when no other adequate remedy is given by law for the protection and preservation of property, or the rights of parties therein pending litigation in respect thereto."

§ 1533: Application must be in writing, supported by affidavit.

§ 1534: Notice must be given to adverse party.

§ 1535: Receiver's bond.

§ 1536: "No party, attorney or other person interested in a suit shall be appointed receiver therein."

§ 1537: Oath and bond.

§ 1539: "The receiver shall have power, subject to the control of the court, to bring and defend suits, to take and keep possession of the property, to receive rents, to collect debts and generally to do such acts respecting the property as may be authorized by the court."

§ 1540: May be removed at any time and another appointed.

§ 1541: Rules of equity govern when not inconsistent with statutory provisions.

**Arkansas.**—Sandel's & Hill's Digest of Statutes (1894), §§ 5964-5979. The important provisions relating to the appointment are:

§ 5964: "Whenever it shall not be forbidden by law, and shall be deemed fair and proper in any case in equity, the court, judge or chancellor shall appoint," etc.

§ 5965: "Such receiver may be appointed either before or after answer or after a decree."

§ 5975: "In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of plaintiff or of any party whose right to or interest in the property or fund or the proceeds thereof is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured, the court may appoint a receiver to take charge thereof during the pendency of the action, and may order and coerce the delivery of it to him."

§ 5976: "In an action by a mortgagee for the foreclosure of his mortgage and the sale of the mortgaged property, a receiver may, in like manner, be appointed where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt."

§ 5977: "No party or attorney, or person interested in an action, shall be appointed receiver therein."

§ 5968: Receiver may sue in his own name, shall have power to employ attorneys and make to them a reasonable allowance for services.

§ 5970: Receiver of corporation, partnership, or joint stock company, when the order places in his hands all the rights and interests, etc., of the same, shall, until further order of the court, etc., "have full possession, custody and control thereof, and shall be vested with the title, so far as it shall be necessary to collect debts, preserve the assets and property for the benefit of creditors and all persons interested, and may and shall bring and prosecute and defend all suits in his own name that may be necessary for that purpose."

§ 5971: Receiver mentioned in last section may be substituted in pending suits by or against the corporation, etc.

§ 5973: May be removed for failure to discharge any duty incumbent upon them, or for other sufficient cause.

§ 5974: Must report every six months, or oftener, if required by court. Confirmation of accounts—conclusive as against all persons, except in case of actual fraud.



§ 5979: Powers.—Same as in California, except no provisions as to suing or defending in his own name, or as to compounding for and compromising debts.

California.—Code Civ. Proc., § 564: "A receiver may be appointed by the court in which an action is pending, or by the judge thereof:

"1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured;

"2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt;

"3. After judgment, to carry the judgment into effect;

"4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

"5. In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

"6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

§ 565: Appointment of receivers on dissolution of corporations.

§ 566 authorizes the court to require on an *ex parte* application, an undertaking from the applicant to pay all damages the defendant may sustain by reason of the appointment of the receiver in case the applicant shall have procured the appointment wrongfully, maliciously or without sufficient cause.

§ 567: Oath and bond by receiver.

§ 568: Powers of receiver.—"The receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize."

§ 569: Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order can be made, except upon the consent of all the parties to the action.

§ 963: An appeal lies from an order appointing a receiver.

§ 1270: May be appointed for escheated estates.

§ 1348: Corporation may be appointed receiver.

**Colorado.**—Mills's Statutes (1891), § 497, receiver in dissolution of corporation (like Illinois); § 3387 (to prevent waste by surviving partner).

Code of Procedure (1890), §§ 163, 164, 165.—§ 163: "A receiver may be appointed by the court in which the action is pending, or by a judge thereof, or, pending proceedings in the supreme court upon an appeal or writ of error, by the court from whose final judgment such appellate proceedings are prosecuted or by the judge of such court: First, before judgment, provisionally, on application of either party, when he establishes a *prima facie* right to the property, or to an interest in the property, which is the subject of the action, and which is in the possession of an adverse party, and the property, or its rents and profits, are in danger of being lost, or materially injured and impaired. Second, after judgment to dispose of the property according to the judgment, or to preserve it during the pending of an appeal; and, third, in such other cases as are in accordance with the practice of courts of equity jurisdiction."

**Connecticut.**—Gen. Stats. 1888, § 1322: "Receivers of a corporation, appointed by judicial authority, shall have the right to the possession of all its books, papers and property, and power in their own names, or in its name, to commence and prosecute suits for and on behalf of said corporation; to defend all suits brought against it or them; to demand and receive all evidences of debt and property belonging to it, and to do and execute in its name, or in their names, as such receivers, all other acts and things which shall be necessary or proper in the execution of their trust; and shall have all the power for any of said purposes possessed by said corporation." § 1942 (receivers in winding up of corporations on petition of stockholders); §§ 1313–1317 (receivers of dissolved partnerships); § 1313 (appointment); § 1314 (orders of court as to the partnership property); § 1315 (all the property of the partnership vests in the receiver on his appointment); §§ 1316, 1317 (proceedings when property is attached for claim against individual partner); §§ 1833–1852 (receivers of banks, savings banks, and trust companies); §§ 2869–2879 (receivers of life insurance companies); §§ 1172–1177 (receivers of turnpike and toll bridge companies).

**Delaware.**—Rev. Stats. 1852, as Am. 1893, p. 686, c. 90, § 3: Receiver may be appointed when surviving member of partnership fails to file the certificate required by law.

Page 718, c. 96, § 21: "If a minor have real, or personal property, and no guardian, the court may appoint a receiver to take charge of such property during its pleasure; and may make such regulations touching this matter, as shall be deemed proper.

"It may enforce any order made upon a receiver. Such receiver shall be required to account annually, or oftener, and shall deposit any balance, appearing in his hands, to be invested, or otherwise disposed of, for the minor's benefit."

**Florida.**—Rev. Stats. 1892.

§ 1211: May be appointed on application of judgment creditor, for corporation, when execution returned unsatisfied in whole or in part.

§ 2107: May be appointed for estate of infant when property has been managed by one not a guardian, and there is no legal guardian.

§ 2157: May be appointed on voluntary dissolution of insolvent corporation, at suit of three creditors.

§ 2192: May be appointed at suit of comptroller when bank insolvent, or officers violate law.

**Georgia.**—Code 1895, §§ 1970, 1971 (receivers of banks); §§ 2324, 2325 (liability of railroad receivers for injury to employees; see 91 Ga. 781); § 2333 (duties of railroad receivers); §§ 2716-2722 (receivers for insolvent traders); §§ 4900-4912 (receivers in general).

The general provisions relating to the appointment are:

§ 4900: "When any fund or property may be in litigation, and the rights of either or both parties cannot otherwise be fully protected, or when there may be a fund or property having no one to manage it, a receiver of the same may be appointed (on a proper case made) by the judge," etc.

§ 4901: "Courts of equity shall have authority to appoint receivers to take possession of and protect trust or joint property and funds, whenever the danger of destruction and loss shall require such interference."

§ 4904: "A court of equity may appoint a receiver to take possession of, and hold subject to the direction of the court, any assets charged with the payment of debts, where there is manifest danger of loss, or destruction or material injury to those interested. Under extraordinary circumstances, a receiver may be appointed before and without notice to the trustee or other person having charge of the assets. The terms on which a receiver is appointed shall be in the discretion of the chancellor."

See, also, § 2855 (receiver of excess of homestead applicant's real estate); § 1886 (receivers on dissolution of corporations).

**Idaho.**—See Code of Civil Procedure (1901), §§ 3318-3323 (general provisions); § 3947 (receivers in insolvency proceedings).

The grounds of appointment are the same as in the California Code.

**Illinois.**—Hurd's Revised Statutes (1899), c. 32, § 25 (receivers of corporations); c. 73, § 15 (receiver on dissolution of insurance companies); c. 62, § 24 (receiver in garnishments); c. 32, § 127 (of co-operative associations).

**Indiana.**—Horner's Rev. Stats. (1896), §§ 1222-1231 (general provisions); § 3012 (on expiration of charter of corporation); § 3736 (of insurance company); § 1270 (receiver, in replevin, of property having a peculiar value); §§ 6049, 6050 (receiver of partnership on death of partner); § 5134 (receiver in wife's suit for support).

The provisions relating to grounds of appointment are somewhat fuller than those usually found in the codes, and the interpretation put upon them by the courts is liberal; in fact, such an effect is given to subdivision seventh of § 1222 as frequently to render the Indiana cases unsafe authority in other jurisdictions.

§ 1222: "A receiver may be appointed by the court, or the judge thereof in vacation in the following cases:

*"First.* In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim.

*"Second.* In actions between partners, or persons jointly interested in any property or fund.

*"Third.* In all actions, when it is shown that the property, fund, or rents and profits in controversy is in danger of being lost, removed, or materially injured.

*"Fourth.* In actions by a mortgagee for the foreclosure of a mortgage and the sale of the mortgaged property, when it appears that such property is in danger of being lost, removed, or materially injured; or when such property is not sufficient to discharge the mortgaged debt—to secure the application of the rents and profits accruing before a sale can be had.

*"Fifth.* When a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights.

*"Sixth.* To protect or preserve, during the time allowed for redemption, any real estate or interest therein sold on execution or order of sale, and to secure to the person entitled thereto the rents and profits thereof.

*"Seventh.* And in such other cases as may be provided by law; or where, in the discretion of the court, or the judge thereof in vacation, it may be necessary to secure ample justice to the parties."



§ 1228: Powers of receiver.—Like Arkansas, except that after “debts” is added, “in his own name.”

§ 5206: Debts owing laborers or employees are preferred debts.

**Iowa.**—Annotated Code (1897), §§ 3822–3825 (general provisions); § 3904 (for joint or partnership property taken under attachment); § 3978 (for same, taken under execution); § 3988 (for mortgaged personal property taken under execution); § 4077 (in proceedings, auxiliary to execution); § 1640 (receiver on dissolution of corporations); § 1731 (on dissolution of insurance companies); §§ 1777–1795 (on dissolution of life insurance companies); § 1877 (of insolvent bank).

The general provision relating to the appointment is:

§ 3822: “On petition of either party to a civil action or proceeding, wherein he shows that he has a probable right to, or interest in, any property which is the subject of the controversy, and that such property, or its rents or profits, are in danger of being lost or materially injured or impaired, and on such notice to the adverse party as the court or judge shall prescribe, the court, or, in vacation, the judge thereof, if satisfied that the interests of one or both parties will be thereby promoted, and the substantial rights of neither unduly infringed, may appoint a receiver to take charge of and control such property under its direction during the pendency of the action, and may order and coerce the delivery of it to him. Upon the hearing of the application, affidavits, and such other proof as the court or judge permits, may be introduced, and upon the whole case such order made as will be for the best interest of all parties concerned.”

§ 3824: Powers of receivers.—Similar to Arkansas.

§ 3825: Priority of liens.—Persons having liens upon the property placed in the hands of a receiver shall, if there is a contest as to their priority, submit them to the court for determination.

**Kansas.**—Rev. Stats. 1901, §§ 4701–4707; Code, §§ 254–260.

§ 254: *Appointment of receivers.*—Similar to California provision, with following exceptions: The fifth subdivision reads as follows: “In the cases provided in this code, or by special statutes, when a corporation has been dissolved, or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights.” An additional subdivision, numbered 7, providing for the appointment of a receiver at suit of the state or of an officer for the collection of a tax from a toll-bridge company, is added.

§ 255: Oath and bond.

§ 257: Powers.—Same as in California.

§ 258: Investment of funds.—Same as in California (Cal. Code Civ. Proc., § 569).

§ 207: Receiver may be appointed to take charge of attached property in custody of the sheriff.

**Kentucky.**—Carroll's Code (1888), §§ 298-302 (general provisions); § 218 (to take charge of attached property); Bullitt & Feland's General Statutes (1887), p. 675 (receiver of property conveyed in contemplation of insolvency); p. 852 (receiver where waste is committed pending an action to recover or charge land); p. 719 (receiver of estate of female under sixteen years of age, who marries without consent of parent, etc.).

The general provisions relating to the appointment are:

§ 298: "On the motion of any party to an action who shows that he has, or probably has, a right to, a lien upon, or an interest in, any property or fund, the right to which is involved in the action, and that the property or fund is in danger of being lost, removed, or materially injured, the court, or the judge thereof during vacation, may appoint a receiver to take charge of the property or fund during the pendency of the action, and may order and coerce the delivery of it to him."

§ 299: Receiver in mortgage foreclosure; similar provision to that of California.

§ 302: Powers of receiver.—Like Arkansas.

**Maine.**—Rev. Stats. 1903, p. 447 (receivers on dissolution of corporation); pp. 497, 498 (receivers for casualty companies); pp. 485, 506 (receivers for insurance company); pp. 529, 530 (receivers for railroads); p. 460 (receivers for savings banks); p. 468 (receivers for loan and building associations).

**Maryland.**—Pub. Gen. Laws, 1904, p. 226, art. 5, § 27 (order appointing or refusing receiver is appealable); pp. 697-699, art. 23, § 381 ff (receivers upon dissolution of corporations).

**Massachusetts.**—Rev. Laws, 1902, c. 144, p. 1304 ff (receivers may be appointed to take charge of property of absentees); c. 167, § 126, p. 1517 (appointment of receiver dissolves attachment); c. 109, §§ 54 ff, p. 957 (receivers upon dissolution of corporations); c. 118, § 7, p. 1123 (receivers for insolvent insurance corporations); c. 113, § 6, p. 1066 (receivers for insolvent savings banks); c. 116, § 18, p. 1112 (trust companies may act as receivers).

**Michigan.**—Comp. Laws, 1897, §§ 7091, 7249, 7282-7283, 7301, 7316, 7331, 7396, 7518, 7600, 9552, 9765-9770, 9963, 10859-10888 (receivers for various corporations).

Minnesota.—Kelly's Stats. (1891), § 5044: "A receiver may be appointed:

"*First.* Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired, except in cases where judgment upon failure to answer may be had without application to the court;

"*Second.* After judgment, to carry the judgment into effect;

"*Third.* After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment;

"*Fourth.* In the cases provided by law, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; and, in like cases, of the property, within this state, of foreign corporations;

"*Fifth.* In such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided herein."

See, also, § 4263 (act 1881, c. 148, § 2), (receiver of insolvent debtor); § 4966 (receiver in proceedings supplementary to execution); § 4968 (action by such receiver against an adverse claimant; § 5341 (receiver on judgment of exclusion from corporate rights); § 3138 (receiver on dissolution of corporation); § 5575 (on forfeiture of charter of banking and insurance companies); § 5572 (on application of judgment creditors of corporation).

Mississippi.—Annotated Code, 1892.

§ 574: Receiver not appointed without notice, "unless it shall appear that an immediate appointment is necessary, or good cause be shown for not giving notice."

§ 575: Bond upon appointment of *ex parte* receiver.

§ 576: Removal.

§ 577: "Receivers shall be subject to the orders, instructions and decrees of the court, and of the chancellor in vacation; and they, or any party in interest, may apply therefor in term time, or to the chancellor in vacation, or for modifications of previous orders or instructions; and obedience thereto may be enforced by attachment."

§ 578: Bond in lieu of receiver.

§ 579: Bond of receiver.

§ 581: "In all cases in which it may be thought to be necessary for the protection of estates of decedents, minors and persons of unsound

mind, a receiver may be appointed, either by the court or by the chancellor in vacation, subject to the foregoing conditions."

§ 582: "Receivers shall be entitled to have such compensation for their services as the court shall allow, and shall have a lien upon the property in their hands for the payment thereof, and of their necessary expenses. The court shall make such order to compel the payment thereof as may be just and necessary, and may decree the payment thereof by any of the parties as a portion of the costs of suit."

**Missouri.**—Rev. Stats. (1899), §§ 753–755. Power is given to appoint "whenever such appointment shall be deemed necessary."

§ 754: "Such receiver shall give bond, and have the same powers and be subject to all the provisions, as far as they may be applicable, enjoined upon a receiver appointed by virtue of the law providing for suits by attachment."

**Montana.**—Code of Civil Procedure (1895), §§ 950, 956, same as California; Civil Code (1895), § 727 (receiver of accident insurance company); §§ 830, 832 (for building, loan and savings company).

**Nebraska.**—Code of Civil Procedure (1899), §§ 266–276.

§ 266: Like Montana, omitting (party) "whose right to, or interest in, the property or fund, is probable." Also, omitting "in proceedings in aid of execution," etc.; and "in cases where a corporation has been dissolved," etc.

§§ 267, 268: Suit must be pending; notice of the application required; sheriff to take possession of the property when delay is hazardous.

§ 269: Applicant required to give bond.

§ 272: The order of appointment to contain special directions as to his powers and duties.

§ 273: "Every receiver shall be considered the receiver of any party to the suit, and no others."

§ 274: Appointment without notice is void.

§ 275: Effect of decree not finally determining the rights of the parties; and appeal.

See, also, §§ 213–217 (receiver in attachment); §§ 542, 543 (in proceedings supplementary to execution); Compiled Statutes (1899), c. 8, §§ 34, 35 (receivers of banks); c. 28, § 16a (compensation of receivers).

**New Jersey.**—Gen. Stats. 1895.

Page 918: Receivers may be appointed to wind up corporation.

Pages 2688, 2689: May be appointed for railroad which fails to run its trains for ten days.

Page 974: Receiver of railroad may operate the road; "and all expenses incident to the operation of said railroad shall be a first lien on the receipts, to be paid before any other incumbrance whatever."



Page 974: Leases by railroad receivers.

Page 2688: "That whenever the chancellor shall appoint a receiver of any railroad company, said receiver shall apply all unnumbered personal effects and all moneys which may be transferred to him at the time of entering upon his duties as such receiver, toward the payment of wages at that time due the employees of said company, and the chancellor may, from time to time, make such orders as he may deem proper to equitably carry out the provisions of this section; *provided*, that no such payments shall be made for more than two months' wages."

Page 353: Receivers for cemetery associations.

Page 1755: Receivers for life insurance corporations.

Page 3011: Receivers for savings banks.

**New York.**—Stover's Annotated Code of Civil Procedure, 1902.

§ 713: "In addition to the cases, where the appointment of a receiver is specially provided for by law, a receiver of property, which is the subject of an action, in the supreme court or a county court, may be appointed by the court, in either of the following cases:

"1. Before final judgment, on the application of a party who establishes an apparent right to, or interest in, the property, where it is in the possession of an adverse party, and there is danger that it will be removed beyond the jurisdiction of the court or lost, materially injured or destroyed.

"2. By or after the final judgment, to carry the judgment into effect, or to dispose of the property, according to its directions.

"3. After final judgment, to preserve the property, during the pendency of an appeal. The word 'property,' as used in this section, includes the rents, profits, or other income, and the increase, of real or personal property."

§ 714: Notice of application must be given, unless defendant has failed to appear or service of summons is by publication.

§ 715: Bond of receiver.

§ 716: "A receiver, appointed by or pursuant to an order or a judgment, in an action in the supreme court, or a county court, or in a special proceeding for the voluntary dissolution of a corporation, may take and hold real property, upon such trusts and for such purposes as the court directs, subject to the direction of the court, from time to time, respecting the disposition thereof."

§ 1772: May be appointed in action for divorce to enforce payment of alimony.

§ 1788: May be appointed in action to dissolve corporation.

§ 1789: Powers of such receiver.

§ 1810: "A receiver of the property of a corporation can be appointed only by the court, and in one of the following cases:

"1. An action, brought as prescribed in article second, third, or fourth of this title. [Actions against directors, etc., for misconduct; actions to dissolve; actions by the people to annul.]

"2. An action brought for the foreclosure of a mortgage upon the property, of which the receiver is appointed, where the mortgage debt, or the interest thereupon, has remained unpaid, at least thirty days after it was payable, and after payment thereof was duly demanded of the proper officer of the corporation; and where either the income of the property is specifically mortgaged, or the property itself is probably insufficient to pay the mortgage debt.

"3. An action brought by the attorney-general, or by a stockholder, to preserve the assets of a corporation, having no officer empowered to hold the same.

"4. A special proceeding for the voluntary dissolution of a corporation.

"Where the receiver is appointed in an action, otherwise than by or pursuant to a final judgment, notice of the application for his appointment, must be given to the proper officer of the corporation."

§ 1877: May be appointed in judgment creditor's action.

§§ 2464-2471: Receivers in supplementary proceedings.

§ 3320: "A receiver, except as otherwise specially prescribed by statute, is entitled, in addition to his lawful expenses, to such commissions, not exceeding five per centum upon the sums received and disbursed by him, as the court by which, or the judge by whom he is appointed, allows."

**North Carolina.**—Clark's Code of Civil Proc.

§ 379: "A receiver may be appointed:

"(1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured and impaired, except in cases where judgment upon failure to answer may be had on application to the court.

"(2) After judgment, to carry the judgment into effect.

"(3) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

"(4) In cases . . . when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights, and in like cases of the property within this state of foreign corporations. Receivers of the property within this state of foreign or other corporations shall be allowed such commissions as may be fixed by

the judge appointing them, not exceeding five per cent. on the amount received and disbursed by them."

Appointment of receiver may be refused when the subject of the action is the recovery of a money demand and a bond is tendered.

§ 383: Bond of receiver.

§ 494: Appointment in proceedings supplementary to execution.

**North Dakota.**—Revised Code, 1899.

§ 5403: *Appointment of receivers.*—Same as Cal. Code Civ. Proc., § 564, but adding to subdivision 5, "and in like cases within this state, of foreign corporations."

§ 5404: "No party or person interested in an action can be appointed receiver therein without the written consent of the party filed with the clerk." If appointed upon *ex parte* application court may require a bond of the party seeking its aid.

§ 5405: Oath and bond of receiver.

§ 5406: Powers.—Same as Cal. Code Civ. Proc., § 568.

§ 5407: Investment of funds.—Same as Cal. Code Civ. Proc., § 569.

§§ 5765, 5770, 5779, 5780: Receivers for corporations.

§§ 5568–5570: Receivers in supplemental proceedings.

**Ohio.**—Bates Ann. Stats. (4th ed.).

§ 5587: Appointment of receivers.—Same as Cal. Code Civ. Proc., § 564.

§ 5588: "No party, attorney, or person, interested in an action, shall be appointed receiver therein, except by consent of the parties."

§ 5589: Oath and undertaking by receiver.

§ 5590: Powers.—Same as Cal. Code Civ. Proc., § 568.

§ 5591: Investment of funds.—Same as Cal. Code Civ. Proc., § 569.

§§ 5539 ff: Receivers for attached property.

§§ 5656 ff: Receivers on dissolution of corporations.

§ 5705: Receiver of husband's property in action for divorce.

§§ 3821, e, f: Trust company may act as receiver.

**Oklahoma.**—Rev. Stats. 1903.

§ 4441: Appointment of receivers.—Same as Cal. Code Civ. Proc., § 564.

§ 4442: "No party or attorney, or person interested in an action, shall be appointed receiver therein."

§ 4443: Oath and bond of receiver.

§ 4444: Powers of receiver.—Same as Cal. Code Civ. Proc., § 568.

§ 4445: Investment of funds.—Same as Cal. Code Civ. Proc., § 569.

§§ 4398–4402: Receivers for attached property.

§§ 4683 ff: Appointment in proceedings in aid of execution.

**Oregon.**—Bellinger & Cotton's Codes & Stats.

§ 1080. Definition of receiver.

§ 1081: "A receiver may be appointed in any civil action, suit, or proceeding, other than an action for the recovery of specific personal property,

"1. Provisionally, before judgment or decree, on the application of either party, when his right to the property, which is the subject of the action, suit, or proceeding, and which is in the possession of an adverse party, is probable, and the property or its rents or profits are in danger of being lost or materially injured or impaired;

"2. After judgment, or decree, to carry the same into effect;

"3. To dispose of the property according to the judgment or decree, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the debtor refuses to apply his property in satisfaction of the judgment or decree;

"4. In cases provided in this code, or by other statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its rights;

"5. In the cases provided in this code when a debtor has been declared insolvent."

§ 1082: Oath and undertaking of receiver.

§ 1083: Claims for wages for services performed within six months before receivership are preferred claims. Employees of receiver must be paid at least once in every thirty days.

**Rhode Island.**—Gen. Laws, 1896.

Pages 536, 537: Appointment of receivers on dissolution of corporations.

Page 937: May be appointed to receive rents and profits of estates owned by joint tenants and tenants in common, upon application of any party interested.

**South Carolina.**—Code of Laws, 1902.

Code Civ. Proc., § 265: Appointment.—Similar to Oregon. Not appointed without notice. Bond required when application made before judgment.

§ 318: Appointment in supplementary proceedings.

Civil Code, § 1869: Appointment on dissolution of corporation.

**South Dakota.**—Revised Codes, 1903.

Code Civ. Proc., § 227: Appointment.—Same as California.

§ 228: Receivers on dissolution of corporations.

§ 229: No party or person interested can be appointed, without written consent. Applicant for *ex parte* receiver must give an undertaking.

§ 230: Oath and bond of receiver.

§ 231: Powers.—Same as Cal. Code Civ. Proc., § 568.



§ 232: Investments.—Same as Cal. Code Civ. Proc., § 569.

§ 404: Appointment in supplementary proceedings.

**Tennessee.**—Code, 1896.

§ 5182: Appointment of receiver on dissolution of corporation.

**Texas.**—Sayles' Stats.

Art. 1469: Appointment.—Same as California, but omitting the third and fourth subdivisions of the California provision.

Art. 1469: Oath and bond of receiver.

Art. 1470: Powers.—Same as Cal. Code Civ. Proc., § 568.

Art. 1471: Investments.—Same as Cal. Code Civ. Proc., § 569. Claims are entitled to priority as follows: (1) Court costs; (2) Wages of employees of receiver; (3) Debts for materials and supplies furnished during receivership; (4) Debts for betterments and improvements made during receivership; (5) Personal injury and damage claims accruing during the receivership; (6) Judgments recovered before receivership.

Art. 1477: "The discharge of a receiver does not work an abatement of the suit against a receiver, nor shall it in any way affect the right of the party to sue the receiver if he sees proper."

Art. 1483: Receiver may sue and be sued without leave.

Art. 1490: "All judgments, claims, or causes of action when determined, existing against any corporation at the time of the appointment of a receiver, shall be paid out of the net earnings of such corporation while in the hands of the receiver, to the exclusion of mortgage action; and the same shall be a lien on such earnings."

Art. 1491: Receivership of corporations is limited to three years.

Art. 2595: May be appointed for estate of minor, person of unsound mind, or habitual drunkard, when there is no guardian.

**Utah.**—Rev. Stats. 1898.

§ 3114: Appointment.—Same as California.

§ 3115: Appointment on dissolution of corporation.

§ 3116: Party in interest appointed only on consent. Undertaking on *ex parte* application.

§ 3117: Oath and undertaking of receiver.

§ 3118: Powers.—Same as Cal. Code Civ. Proc., § 568.

§ 3119: Investments.—Same as Cal. Code Civ. Proc., § 569.

§ 424: Certain corporations may act as receivers.

§ 1344: Wages of employees for labor performed within one year before receivership are entitled to preference.

**Vermont.**—Stats. 1894.

§§ 3700-3703: Appointment of receivers on dissolution of corporations.

§§ 4057-4059: Receivers for insolvent banks.

**Virginia.**—Pollard's Ann. Code, 1904.

§ 1105e: Receivers on dissolution of corporations.

§ 1169: Bank receivers.

§ 2291: Appointment for estate of married woman who is a minor.

§ 3415a: Suits against corporation receivers in respect of acts done by them in carrying on business may be maintained without leave of court. No execution shall issue, but the court in which the receivers were appointed shall order the payment of judgments.

**Washington.**—Pierce's Code.

§ 574: "A receiver is a person appointed by a court or judicial officer to take charge of property during the pending of a civil action or proceeding, or upon a judgment, decree or order therein, and to manage, and dispose of it as the court or officer may direct."

§ 575: "A receiver may be appointed by the court in the following cases:

"1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim;

"2. In an action between partners, or other persons jointly interested in any property or fund;

"3. In all actions where it is shown that the property, fund or rents and profits in controversy are in danger of being lost, removed or materially injured;

"4. In an action by a mortgagee for the foreclosure of a mortgage and the sale of the mortgaged property, when it appears that such property is in danger of being lost, removed, or materially injured; or when such property is insufficient to discharge the debt, to secure the application of the rents and profits accruing, before a sale can be had;

"5. When a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights;

"6. And in such other cases as may be provided for by law, or when, in the discretion of the court it may be necessary to secure ample justice to the parties, provided that no party or attorney or other person interested in an action shall be appointed receiver therein."

§ 576: Oath and bond of receiver.

§ 580: "The receiver shall have power, under control of the court, to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts and generally to do such acts respecting the property as the court may authorize."

§ 524: Receiver may be appointed for property under attachment.

§§ 904 ff: Receivers in proceedings supplementary to execution.

§ 925: Notice of application in supplementary proceedings must be given to other creditors.

§§ 927-930: Powers and duties of receivers appointed in supplementary proceedings.

§ 6137: "Whenever a receiver or assignee is appointed for any person, company or corporation, the court shall require such receiver or assignee to pay all claims for which a lien could be filed under this act [laborers' claims], before the payment of any other debts or claims, other than operating expenses."

**West Virginia.**—Code, 1899, c. cxxxiii.

Pages 892 ff: A general receiver may be appointed by the court, to receive, take charge of and invest moneys paid into court.

Page 893: Bond of receiver.

Page 893: "He shall receive as compensation for his services such per centum of the amount received and invested or paid out by him in each case as the court may direct, for receiving, investing or paying out the same."

Page 895: "A court of equity may in any proper case pending therein, in which the property of a corporation, firm or person is involved, and there is danger of the loss or misappropriation of the same or a material part thereof, appoint a special receiver of such property or the rents, issues and profits thereof, or both, who shall give bond. . . . But no such receiver shall be appointed of any real estate, or of the rents, issues or profits thereof until reasonable notice of the application therefor has been given to the owner or tenant thereof."

Page 808: Appointment of receivers upon dissolution of corporation.

**Wisconsin.**—Stats. 1898.

§ 2787: "A receiver may be appointed:

"1. Before judgment, on the application of either party, when he establishes an apparent right to or interest in property which is the subject of the action and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially impaired;

"2. By the judgment, or after judgment, to carry the judgment into effect or to dispose of the property according to the judgment;

"3. After judgment, to preserve the property during the pendency of an appeal; or when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment, or in an action by a creditor under section 3029;

"4. In cases provided by any statute when a corporation has been dissolved or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights;

"5. In such cases as are now provided by law or may be in accordance with the existing practice except as otherwise provided in this chapter."

§ 1495. (§ 74.) **Class I: (1) Infants' Estates.**—"The cases in which a receiver may be appointed, subject to the general rules regulating the exercise of the judicial discretion, may be reduced to four general classes. The first class contains those cases where there is no person entitled to the property who is at the same time competent to hold and manage it during the judicial proceeding. In instances of this class a receiver is appointed more readily and without proof of imminent danger, perhaps, than in any other."<sup>39</sup>

"A court of equity exercises control over the property of its infant ward, where there is no trustee, by means of a receiver, even though there is a guardian. The main reason for appointing a receiver, in the absence of a trustee, was that the guardian at common law had not full power of control and management. The necessity of a receiver in such cases may have been obviated

§ 2787a: Wages of employees accruing within three months of receivership are preferred claims.

§ 1769: Wages of railroad employees accruing within six months before receivership are preferred claims.

§ 3036: Notice of application must be given to plaintiff in supplementary proceedings.

§§ 3216 ff: Receivers for insolvent corporations.

§ 1791g: Trust company may act as receiver.

**Wyoming.**—Rev. Stats. 1899.

§ 4054: Appointment of receivers.—Practically the same as Cal. Code Civ. Proc., § 564.

§ 4055: "No party, attorney, or person interested in an action shall be appointed receiver therein except by consent of the parties."

§ 4056: Oath and undertaking of receiver.

§ 4057: Powers of receiver.—Practically the same as Cal. Code Civ. Proc., § 568.

§ 4058: Investment of funds.—Same as Cal. Code Civ. Proc., § 569.

§ 3952: Appointment in aid of execution.

§§ 4006 ff: Receivers for attached property.

<sup>39</sup> 4 Pom. Eq. Jur., § 1332.



in many states by statutes enlarging the powers of guardians."<sup>40</sup>

§ 1496. (§ 75.) (2) **Lunatics' Estates.**—"The control of the court over the property of a lunatic is ordinarily exercised by means of a committee; but instead of a committee, and especially where no person will act as a committee, the court may appoint a receiver."<sup>41</sup> "Where a suit was brought by the committee of a lunatic to set aside a conveyance of land alleged to have been obtained by defendant from the lunatic by fraud and undue influence, and defendant was in possession receiving the rents and profits, and was alleged to be insolvent, the

<sup>40</sup> Pom. Eq. Jur., § 1332, and note, citing *Gardner v. Blane*, 1 Hare, 381; *Butler v. Freeman*, Amb. 301, 303; *Duke of Beaufort v. Berty*, 1 P. Wms. 703. See, also, *Ex parte Whitfield*, 2 Atk. 315, per Lord Hardwicke. A statute in North Carolina provides for a receiver in case of the removal of a guardian for certain specified causes. See *Temple v. Williams*, 91 N. C. 82.

The recent case of *Keister v. Cubine*, 101 Va. 768, 45 S. E. 285, is of considerable interest. A mother, M. C., deeded a house to her daughter, R. C., in consideration of a "proper and comfortable home" for life. On the death of the daughter the property descended to her infant children. M. C. was compelled by the widower of R. C. to abandon the home. Rescission of the deed as against the infant owners was refused, since they were not at fault; but a receiver was appointed to administer and, if necessary, sell, the property, primarily for the support of the grantor, M. C., and after that to hold the property or its proceeds for the infant owners.

<sup>41</sup> Pom. Eq. Jur., § 1332. The appointment of a receiver pending an inquisition of lunacy, or a statutory inquiry into insanity, to prevent mismanagement or waste, rests in the sound discretion of the court: *In re Misselwitz*, 177 Pa. St. 359, 35 Atl. 722; *In re Pountain*, L. R. 37 Ch. D. 609. See, also, *Beall v. Stokes*, 95 Ga. 357, 22 S. E. 637 (lunatic committed to asylum in another state, but having an estate in Georgia, receiver appointed at suit of wife); *In re Hybart*, 119 N. C. 359, 25 S. E. 963 (practice in appointing receiver of lunatics' estate, under statutes of North Carolina).

appointment of a receiver during the litigation was held proper."<sup>42</sup>

§ 1497. (§ 76.) (3) **Estates of Decedents.**—"During the litigation concerning the admission of a will to probate, and during the interval before an executor or administrator is appointed, a court of equity has power to appoint a receiver of the personal property and of the rents and profits of the real estate, while there is any danger of their loss, misuse, or misapplication.<sup>43</sup> The necessity of such a receiver has been greatly lessened by modern statutes authorizing the probate court to appoint

<sup>42</sup> Pom. Eq. Jur., § 1332, note; *Mitchell v. Barnes*, 22 Hun, 194. For the appointment of a receiver in a suit under the inherent jurisdiction of equity to protect the property of a person of weak or unsound mind, who cannot be adjudged to be *non compos mentis* (Pom. Eq. Jur., § 1314), see *Edwards v. Edwards*, 14 Tex. Civ. App. 87, 36 S. W. 1080.

<sup>43</sup> Pom. Eq. Jur., § 1332. See *Whitworth v. Whyddon*, 2 Maen. & G. 52, 55; *King v. King*, 6 Ves. 172; *Atkinson v. Henshaw*, 2 Ves. & B. 85; *Ball v. Oliver*, 2 Ves. & B. 96; *Watkins v. Brent*, 1 Mylne & C. 97, 102; *Anderson v. Guichard*, 9 Hare, 245; *Rendall v. Rendall*, 1 Hare, 152; *Wood v. Hitchings*, 2 Beav. 289; *Reed v. Harris*, 7 Sim. 639; *Robinson v. Taylor*, 42 Fed. 803; *Underground Electric R'ys Co. v. Owsley*, 176 Fed. 26, 99 C. C. A. 500; *Flagler v. Blunt*, 32 N. J. Eq. 518, 523 (property liable to be removed from the state); *McCarter v. Clavin*, 72 N. J. Eq. 642, 66 Atl. 599; *Long v. Richardson*, 26 Tex. Civ. App. 197, 62 S. W. 964. For a good statement of the right in Alabama, see *Hurt v. Hurt*, 157 Ala. 126, 47 South. 260. See, also, *Merrell v. Moore*, 47 Tex. Civ. App. 200, 104 S. W. 514. For cases where the court refused to exercise the power, see *Whitworth v. Whyddon*, 2 Maen. & G. 52 (property of small value); *Richards v. Chave*, 12 Ves. 462 (no danger shown); *Jones v. Goodrich*, 10 Sim. 327. A receiver may be appointed of the estate of a lunatic after his death, since the functions of the lunatic's committee cease with the death of the lunatic; but such receivership should be discontinued on the appointment of an administrator *in litem*: *In re Colvin's Estate*, 3 Md. Ch. 278. But see *Curtis's Estate v. Piersol*, 117 Md. 170, 83 Atl. 87.

an administrator *ad litem*, and enlarging his powers.”<sup>44</sup> “The recent English decisions hold that the jurisdiction will not be exercised if the probate court has already appointed an administrator *ad litem*;<sup>45</sup> but if no such temporary administrator has been appointed, the court of equity will still appoint a receiver” in a proper case.<sup>46</sup> The death of one of two executors and the refusal of the other to act has also been considered a good reason for the appointment of a receiver of the estate;<sup>47</sup> and the appointment might be made, on a case of strong presumption, pending a suit in the ecclesiastical court to recall probate.<sup>48</sup>

§ 1498. (§ 77.) **Class II: In General.**—“The second class of cases is based upon the fact that all of the parties are equally entitled to the possession of the property which is the subject-matter of the controversy, but it is not just and proper, from the nature of the dispute and of their relations with each other, that either one of them should be allowed to retain possession and control during the litigation. While the foundation of the remedy is, of course, the danger, yet it is not always essential that there should be any element of actual fraud or breach of trust.”<sup>49</sup> The most important instances which do or

<sup>44</sup> 4 Pom. Eq. Jur., § 1332. The text is quoted in *Underwood v. Electric R'ys Co. v. Owsley*, 176 Fed. 26, 99 C. C. A. 500, affirming 169 Fed. 671; and cited in *McCarter v. Clavin*, 72 N. J. Eq. 642, 66 Atl. 599. See *Goodman v. Kopperl*, 169 Ill. 136, 48 N. E. 172 (receiver not appointed on application of a creditor of decedent, as he has a right to take out administration of the estate); *Colvin's Case*, 3 Md. Ch. 278 (receiver must surrender the property when an administrator *pendente lite* is appointed).

<sup>45</sup> *Veret v. Duprez*, L. R. 6 Eq. 329; *Hitchen v. Birks*, L. R. 10 Eq. 471.

<sup>46</sup> 4 Pom. Eq. Jur., § 1332, note; *Parkin v. Siddons*, L. R. 16 Eq. 34.

<sup>47</sup> *Palmer v. Wright*, 10 Beav. 234.

<sup>48</sup> *Rutherford v. Douglas*, 1 Sim. & St. 111, note.

<sup>49</sup> 4 Pom. Eq. Jur., § 1333.

may belong to this class are: 1. Suits between partners; 2. Suits for partition between co-owners. 3. Suits between conflicting claimants of land, so far as they afford occasion for the appointment of a receiver, may conveniently be discussed in connection with this class, though not strictly falling within its definition.

§ 1499. (§ 78.) (1) **Receivers in Settlement of Partnership Affairs: In General.**—The power of a court of equity to appoint receivers in the settlement of partnership affairs, where a dissolution is sought or has occurred, is well established.<sup>50</sup> The power is, however, always exercised with great carefulness and caution.<sup>51</sup>

<sup>50</sup> Pom. Eq. Jur., § 1333. See notes, *Slemmer's Appeal*, 98 Am. Dec. 269-271; *Cameron v. Groveland Imp. Co.*, 72 Am. St. Rep. 80-85. The power is inherent in the court, and is not dependent upon any statute: *Cox v. Volkert*, 86 Mo. 505, 511. A receiver should not ordinarily be appointed when dissolution of the partnership is not sought: *Campbell v. Rich Oil Co.*, 29 Ky. Law Rep. 716, 96 S. W. 442; *Bilder v. Robinson*, 73 N. J. Eq. 169, 67 Atl. 828.

*Right of creditor to receiver.*—A creditor, in order to have a receiver appointed, must show that he has no adequate remedy at law, that is, that he cannot enforce his claim by judgment and execution. He must allege and prove not only insolvency of the partnership as such, but insolvency of each of its members: *Whilden v. Chapman*, 80 S. C. 84, 61 S. E. 249.

*Joint undertakings.*—See *Whipple v. Lee*, 46 Wash. 266, 89 Pac. 712; *Annon v. Brown*, 65 W. Va. 34, 63 S. E. 691; *Bernitt v. Smith-Powers Logging Co.*, 184 Fed. 139.

<sup>51</sup> Pom. Eq. Jur., § 1333. "It is a high power, never exercised where it is likely to produce irreparable injustice or injury to private rights, or where there exists any other safe or expedient remedy": *Speights v. Peters*, 9 Gill (Md.), 475. Where the time limited for the partnership has not expired, it is a familiar rule that the court will not interfere by the extreme measure of a receiver, except for the purpose of preservation of the assets in the face of a real danger of loss: *Warwick v. Stockton*, 55 N. J. Eq. 61, 36 Atl. 488. See, also, *Heflebower v. Buck*, 64 Md. 15, 20 Atl. 991; *Bard v. Bingham*, 54 Ala. 463.



The appointment is only made in connection with a pending suit.<sup>52</sup> Upon a preliminary application for a receiver, the court does not determine the questions arising between the partners, the only question for consideration being whether, upon the facts disclosed, there is an apparent necessity for a receiver to protect the assets of the partnership until the rights of the partners can be definitely determined upon full hearing of the case.<sup>53</sup> As a general rule, the court will not order the business to be continued by the receiver; the object of the court in appointing a receiver is the care of the partnership property until the cause shall be decided, not the conducting of the business of the partnership.<sup>54</sup> In some exceptional cases, however, the management of the business may be continued by the receiver, during the pendency of the action for dissolution, for the purpose of preserving the good-will of the business, or when the property is liable to injury from remaining idle.<sup>55</sup>

<sup>52</sup> *Jones v. Schall*, 45 Mich. 379, 8 N. W. 68; *Webb v. Allen*, 15 Tex. Civ. App. 605, 40 S. W. 342. And he should be appointed only in a case involving equitable and not merely legal rights: *First Nat. Bank v. Superior Court*, 12 Cal. App. 335, 107 Pac. 322. The appointment is ancillary to the main relief sought: *Style v. Lantrip* (Tex. Civ. App.), 171 S. W. 786.

<sup>53</sup> *Blakeney v. Dufour*, 15 Beav. 40; *Heflebower v. Buck*, 64 Md. 15, 20 Atl. 991; *Norton v. Sperry*, 113 Minn. 447, 129 N. W. 843. But where the case is ready for final hearing upon the proofs, it is error to appoint a receiver without adjudging the merits upon which the right or the propriety of the appointment necessarily depends: *Morey v. Grant*, 48 Mich. 326, 12 N. W. 202, per Cooley, J.

<sup>54</sup> *Wolbert v. Harris*, 7 N. J. Eq. 621; *Martin v. Van Schaick*, 4 Paige (N. Y.), 479; *Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198; and see *Waters v. Taylor*, 15 Ves. 10; *Taylor v. Neate*, 39 Ch. D. 538.

<sup>55</sup> *Marten v. Van Schaick*, 4 Paige (N. Y.), 479 (a newspaper); *Allen v. Hawley*, 6 Fla. 164, 63 Am. Dec. 198 (a steamboat); *Jackson v. De Forest*, 14 How. Pr. 81 (a livery-stable). Under the present English practice, on a dissolution by notice pursuant to the articles of partnership, where a sale of the business as a "going concern" is

§ 1500. (§ 79.) **Existence of Partnership must be Proved; and Necessity for Dissolution must be Shown.**—In a suit for dissolution and appointment of a receiver, the court should not intervene if the existence of the partnership is denied by the defendant, and there is a substantial doubt involving that issue;<sup>56</sup> especially where the party in possession of the property is solvent, and able to respond fully to any measure of relief that can be decreed to the complainant.<sup>57</sup> If the partnership is still in existence, the showing made on application for a receiver must be such as to leave no doubt that the com-

directed as being the most beneficial mode of realization, the court will appoint a receiver and manager for the purpose, in the meantime, of preserving the assets by carrying into effect existing contracts, and entering into such new contracts as are necessary for the purpose of carrying on the business in the ordinary way, but so as not to impose, by speculative dealing or otherwise, onerous liabilities on the partners: *Taylor v. Neate*, 39 Ch. D. 538.

<sup>56</sup> *Irwin v. Everson*, 95 Ala. 64, 10 South. 320; *Goulding v. Bain*, 4 Sand. 716; *Popper v. Scheider*, 7 Abb. Pr., N. S., 56; *McCarty v. Stanwix*, 16 Misc. Rep. 132, 38 N. Y. Supp. 820; *Guild v. Meyer*, 56 N. J. Eq. 183, 38 Atl. 959; *Hobart v. Ballard*, 31 Iowa, 521 (right to participate in profits the test of existence of a partnership). See, also, *Taylor v. Bliley*, 86 Ga. 154, 12 S. E. 210; *Leeds v. Townsend*, 74 Ill. App. 444; *Davis v. Niswonger*, 145 Ind. 426, 44 N. E. 542; *Norton v. Sperry*, 113 Minn. 447, 129 N. W. 843; *J. A. Wotring & Son v. Indemnity Imp. Co.*, 45 Tex. Civ. App. 300, 100 S. W. 358; *Smith v. Brown*, 50 Wash. 240, 96 Pac. 1077. The burden of proof rests on the plaintiff: *Hobart v. Ballard*, 31 Iowa, 521. That an issue may be directed to a jury to determine whether a partnership exists, or whether the plaintiff has an interest in the profits, see *Peacock v. Peacock*, 16 Ves. 49; *Fairburn v. Pearson*, 2 Macn. & G. 144. The mere denial of partnership in the answer does not conclude the matter: *Rische v. Rische*, 46 Tex. Civ. App. 23, 101 S. W. 849. That the same equitable principles apply, whether the relation between the parties is that of *joint adventurers*, or of partners, see *Wilcox v. Pratt*, 125 N. Y. 688, 25 N. E. 1091; *Warwick v. Stockton*, 55 N. J. Eq. 61, 36 Atl. 488.

<sup>57</sup> *Irwin v. Everson*, 95 Ala. 64, 10 South. 320; *Goulding v. Bain*, 4 Sand. 716.

plainant will be entitled to a dissolution, if the facts shown are proved at the hearing.<sup>58</sup>

§ 1501. (§ 80.) **Mere Right to Dissolution not Sufficient.**—But the mere right to a dissolution of the partnership is not sufficient to warrant the appointment of a receiver; there must be some breach of the duty of a partner, or of the contract of partnership, and a necessity of preservation of the assets in the face of a real danger of loss.<sup>59</sup> Such facts as the unprofitable nature of the business,<sup>60</sup> or the refusal of the defendant partner to co-operate in its management,<sup>61</sup> furnish no grounds for a

<sup>58</sup> *Goodman v. Whitcomb*, 1 Jacob & W. 589; *Smith v. Jeyes*, 4 Beav. 503; *Roberts v. Eberhardt*, Kay, 148; *Hall v. Hall*, 3 Maen. & G. 79; *Const v. Harris*, Turn. & R. 517; *Garretson v. Weaver*, 3 Edw. Ch. (N. Y.) 385. A receiver cannot be appointed where the bill contains no prayer for a dissolution: *Pirtle v. Penn*, 3 Dana (Ky.), 247, 28 Am. Dec. 70.

<sup>59</sup> *Harding v. Glover*, 18 Ves. 281, per Lord Eldon; *Warwick v. Stockton*, 55 N. J. Eq. 61, 36 Atl. 488; *Nathan v. Bacon*, 75 N. J. Eq. 401, 72 Atl. 359; *Weissenborn v. Sieghortner*, 21 N. J. Eq. 483, reversing 20 N. J. Eq. 172; *Randall v. Morrell*, 17 N. J. Eq. 343; *Cox v. Peters*, 13 N. J. Eq. 39; *Wilson v. Fitcher*, 11 N. J. Eq. 71; *Birdsall v. Colie*, 10 N. J. Eq. 63; *Renton v. Chaplain*, 9 N. J. Eq. 62 (the relief refused to a purchaser of one partner's interest at a sheriff's sale). This is true of partnerships determinable at the will of one partner: *Birdsall v. Colie*, and *Cox v. Peters*, *supra*; though Chancellor Walworth is credited with the statement that in such cases a receiver is a matter of course, if the articles of partnership have made no provision for closing up the concern; see *Law v. Ford*, 2 Paige, 310.

<sup>60</sup> *Shoemaker v. Smith*, 74 Ind. 71.

<sup>61</sup> *Roberts v. Eberhardt*, Kay, 148. See the frequently quoted remarks of Lord Eldon on the subject of disagreement among the partners as a ground of dissolution: "Where partners differ, as they sometimes do, when they enter into another kind of partnership, they should recollect that they enter it for better and worse, and this court has no jurisdiction to make a separation between them because one is more sullen or less good-tempered than the other. Another court, in the partnership to which I have alluded, cannot, nor can this court in this kind of partnership, interfere, unless there is a cause of separation

receiver. But if the conduct of the defendant partner has been such as justly to destroy all confidence in him, this is an important fact to be considered by the court;<sup>62</sup> and where the firm is admitted to be insolvent, and each partner charges the other with threatened waste of the partnership property and an intent to give an unlawful preference to certain creditors;<sup>63</sup> or where willful acts of fraud by the defendants are shown, and application of the partnership funds to their own use;<sup>64</sup> or when the petition shows insolvency, dissension between the partners, probability of waste, and a necessity for an accounting and dissolution—in such cases sufficient grounds are presented for a receiver.<sup>65</sup>

which, in the one case, must amount to downright cruelty, and in the other must be conduct amounting to an entire exclusion of the partner from his interest in the partnership. Whether a dissolution may ultimately be decreed I will not say, but trifling circumstances of conduct are not sufficient to authorize the court to award a dissolution": *Goodman v. Whitecomb*, 1 Jacob & W. 589.

<sup>62</sup> *Smith v. Jeyes*, 4 Beav. 503; *Todd v. Rich*, 2 Tenn. Ch. 107; *Williamson v. Wilson*, 1 Bland (Md.), 418. Thus, where one partner charges that the other is insolvent and has committed a breach of trust, a receiver may be appointed. And it is immaterial that the defendant holds the legal title to the property: *Brooke v. Tucker*, 149 Ala. 96, 43 South. 141.

<sup>63</sup> *Williamson v. Wilson*, *supra*.

<sup>64</sup> *Barnes v. Jones*, 91 Ind. 161; *Shannon v. Wright*, 60 Md. 520; *Jones v. Weir*, 217 Pa. St. 321, 10 Ann. Cas. 692, 66 Atl. 550.

<sup>65</sup> *Veith v. Ress*, 60 Neb. 52, 82 N. W. 116. See, also, *Reid v. Freed*, 100 Miss. 48, 56 South. 278 (receiver may be appointed on bill for dissolution where one partner had purchased timber without consent of others, had caused expenses to be largely in excess of income, had used funds improperly, had operated a store without consent and at a loss, did not furnish proper pay-rolls, etc.); *Whilden v. Chapman*, 80 S. C. 84, 61 S. E. 249 (where suit is brought by creditor, receiver may be appointed on application of one of the defendants who sets up waste and mismanagement). Under the Texas statute, a receiver may be appointed where, because of disagreement between the partners, there is danger that the business cannot successfully be carried on: *Southwell v. Church*, 51 Tex. Civ. App. 547, 111 S. W. 969.



§ 1502. (§ 81.) **Exclusion from Management as Ground.**—The exclusion of one partner from his full share of participation in the business of the partnership is considered one of the strongest grounds for the appointment of a receiver.<sup>66</sup> When the application is made on this ground, it is not always a necessary condition of the action of the court that the property should be in imminent peril;<sup>67</sup> but if there is in addition to the exclusion, a showing of fraudulent conduct on the defend-

<sup>66</sup> *Const v. Harris*, Turn. & R. 517, 24 Rev. Rep. 108, per Lord Eldon; *Wilson v. Greenwood*, 1 Swanst. 471 (exclusion of assignees of bankrupt partner); *Butchart v. Dresser*, 4 De Gex, M. & G. 542; *Einstein v. Schnebly*, 89 Fed. 540, 552; *Gillett v. Higgins*, 142 Ala. 444, 4 Ann. Cas. 459, 38 South. 664 (exclusion of partner raises a *prima facie* case for appointment of receiver without notice); *Robbins v. Reed*, 174 Ind. 291, 91 N. E. 921; *Katz v. Brewington*, 71 Md. 79, 20 Atl. 139 (although the plaintiff may have an interest only in the profits, and not in the capital); *Speights v. Peters*, 9 Gill (Md.), 475; *Wolbert v. Harris*, 7 N. J. Eq. 621; *Nathan v. Bacon*, 75 N. J. Eq. 401, 72 Atl. 359 (may be appointed when one partner takes exclusive control and seeks to make the other sell to him); *Wileox v. Pratt*, 125 N. Y. 688, 25 N. E. 1091, affirming 52 Hun, 340, 5 N. Y. Supp. 361; *Rische v. Rische*, 46 Tex. Civ. App. 23, 101 S. W. 849; *Holder v. Shelby* (Tex. Civ. App.), 118 S. W. 590; *Cole v. Price*, 22 Wash. 18, 60 Pac. 153; *Redding v. Anderson* (Wash.), 79 Pac. 628; *Martin v. Wilson*, 84 Wash. 625, 147 Pac. 404. Otherwise, if, by agreement, the business was to be conducted by the defendant alone: *Warwick v. Stockton*, 55 N. J. Eq. 61, 36 Atl. 488; and a receiver in behalf of an excluded partner was refused, in a case where the partner in possession, prior to the formation of the partnership, had owned all the property and conducted the business, and the complainant purchased a half interest in the property and business on long credit, mortgaging it back to secure the debt; the complainant did not aver or show that the partner in possession was insolvent, or that the property was endangered in his custody; nor did he aver or show any willingness or ability to make the payments as they fell due, or that his interest was equal to the amount due: *Bard v. Bingham*, 54 Ala. 463.

<sup>67</sup> *Speights v. Peters*, *supra*.

ant's part, and a dissolution is inevitable, the court will unhesitatingly appoint a receiver.<sup>68</sup>

§ 1503. (§ 82.) **After Dissolution; Partner Liquidating Under Agreement.**—Where dissolution of the partnership has already occurred, and an agreement has been made that one or more of the partners shall have charge of its properties and wind up the concern, "their possession is not to be interfered with on slight grounds. There must be some palpable breach of conduct or of duty, or some misconduct amounting to fraud, or such as will endanger the property and the rights of the partner who has withdrawn, in order to justify the court's interference. It does not follow that the complainant has a right to intercept their proceeding, under a mere apprehension of such loss, or because he may think the defendants have not acted discreetly or judiciously in some particulars."<sup>69</sup> But where such an agreement gives the continuing partners the exclusive right to the possession of the partnership property, and holds the retiring partner harmless, a receiver may be appointed for the pres-

<sup>68</sup> The text is quoted in *Gaddie v. Mann*, 147 Fed. 960. See *Cole v. Price*, 22 Wash. 18, 60 Pac. 153; *Haight v. Burr*, 19 Md. 130; *Shannon v. Wright*, 60 Md. 520; *Fitzgerald v. Flynn* (R. I.), 69 Atl. 921; *Barnes v. Jones*, 91 Ind. 161. Thus, in the last case, the complaint showed willful acts of fraud by the defendants, the application by them of the partnership funds to their own use, the making by them of false entries upon the books, the preventing of the plaintiff from having access to such books, and the willful concealment from him of the condition of the partnership business.

<sup>69</sup> *Walker v. Trott*, 4 Edw. Ch. 38. To the same effect, see *Waters v. Taylor*, 15 Ves. 10, 19; *Bufkin v. Boyce*, 104 Ind. 53, 3 N. E. 615; *Heflebower v. Buck*, 64 Md. 15, 20 Atl. 991; *Simon v. Schloss*, 48 Mich. 233, 12 N. W. 196; *Weston v. Watts*, 1 N. Y. St. Rep. 763; *Alcott v. Vulter*, 33 App. Div. 245, 53 N. Y. Supp. 474; *Meyer v. Reimers*, 30 Misc. Rep. 307, 63 N. Y. Supp. 681, affirmed 49 App. Div. 638, 63 N. Y. Supp. 1112. See, however, *Bennett v. Smith*, 108 Ga. 466, 34 S. E. 156.

ervation of the assets, on a showing that the continuing partners are wasting or misapplying them, or that by reason of their insolvency the retiring partner is in danger of being sued for the debts of the firm;<sup>70</sup> and a receiver is also warranted by the fact that after dissolution the remaining partners continue to carry on the business on their own account with the partnership effects.<sup>71</sup>

§ 1504. (§ 83.) **After Dissolution; No Agreement for Liquidation.**—In the absence of any provision or agreement by the partners as to the division of the property or the manner of closing its affairs, a receiver will readily be appointed, after dissolution, in case of a disagreement between the partners. This rule is based on the principle that each partner has an equal right to the possession and control of the partnership effects.<sup>72</sup>

<sup>70</sup> *Allen v. Cooley*, 53 S. C. 414, 31 S. E. 634; *West v. Chasten*, 12 Fla. 315; *Drury v. Roberts*, 2 Md. Ch. 157.

<sup>71</sup> *Harding v. Glover*, 18 Ves. 281. See, also, *Joselove v. Bohrman*, 119 Ga. 204, 45 S. E. 982 (insolvent continuing partner contracts new liabilities in firm name; injunction and receiver).

<sup>72</sup> *McElvey v. Lewis*, 76 N. Y. 373; *Law v. Ford*, 2 Paige, 310; *Marten v. Van Schaick*, 4 Paige, 479; *Whitman v. Robinson*, 21 Md. 43; *Sloan v. Moore*, 37 Pa. St. 217; *Fleming v. Carson*, 37 Or. 252, 62 Pac. 374; *Martin v. Hurley*, 84 Mo. App. 670; *Mitchell v. Lister*, 21 Ont. 22; and see *McIntosh v. Perkins*, 13 Mont. 143, 32 Pac. 653. See, also, *Miller v. Miller*, 80 N. J. Eq. 47, 82 Atl. 513; *Adams v. Carmony*, 44 Ind. App. 291, 87 N. E. 708, 89 N. E. 327; *News-Register Co. v. Rockingham Pub. Co.*, 118 Va. 140, 86 S. E. 874. Some of the cases speak of the receivership being almost a matter of course under such circumstances. See the New York cases above cited; and *Pini v. Roncoroni*, [1892] 1 Ch. 633; but compare the New Jersey cases cited *ante*, in note to § 80. By the rule in New Jersey, a receiver, after dissolution, is appointed only when necessary to protect the interests of the parties; but the circumstance of the insolvency of one of the partners, in addition to the fact of the dissolution of the firm, would, under ordinary circumstances, induce the court to assume the administration of the partnership affairs: *Randall v. Morrell*, 17 N. J. Eq. 343, 346.

§ 1505. (§ 84.) **Receiver on Death of Partner.**—The surviving partner being the one in whom the deceased himself reposed confidence, and being in law entitled to the possession and control of the firm assets, control should not be wrested from him, by the appointment of a receiver, without a clear showing of mismanagement or improper conduct, and of danger of ultimate loss to the estate of the deceased partner.<sup>73</sup> But where the surviving partner is acting negligently or faithlessly—as,

While in cases of this character a receiver is not a matter of absolute right, one will be appointed where the defendant partner “has withdrawn from the partnership funds a very large sum, and has so brought about its insolvency. That is a good ground for saying that the plaintiff can no longer trust him”: *Pini v. Roncoroni*, [1892] 1 Ch. 633. In this case, the jurisdiction to appoint a receiver was not ousted by a very broad arbitration clause, requiring the submission of all differences; so, too, where the articles provide that on dissolution the partners should appoint a person to collect the accounts and settle the partnership affairs, on their failure to agree on any person the court will appoint a receiver: *Mitchell v. Lister*, 21 Ont. 22.

**Dissolution by Bankruptcy of Partner.**—In England, “the usual course where disputes as to the management of partnership affairs arise between the trustees of a bankrupt partner and the solvent partners, and there is no reason for distrusting the latter, is that the court will appoint one of them receiver of the partnership property, directing him to give security, to pass his accounts, and to furnish the trustee with proper accounts, and to allow him at all reasonable times to inspect the partnership books”: *Lindley, Partn.* (5th ed.), p. 670, quoted in *Collins v. Barker*, [1893] 1 Ch. 578.

<sup>73</sup> *Painter v. Painter* (Cal.), 36 Pac. 865, 875; *Huggins v. Huggins*, 117 Ga. 151, 43 S. E. 759 (not appointed when survivor solvent, and no special circumstances); *Walker v. House*, 4 Md. Ch. 39, 44; *Comstock v. McDonald*, 113 Mich. 626, 71 N. W. 1087; *Mason v. Dawson*, 15 Misc. Rep. 595, 37 N. Y. Supp. 90 (survivors entitled to wind up the affairs of the partnership by virtue of an express provision in the articles; mere delay, slightly in excess of that permitted by the articles, not sufficient ground for receiver); *Dickens v. Dickens*, 154 Ala. 440, 45 South. 630 (not appointed on mere allegation that it was apprehended that surviving partner had disposed of his personal assets).



by failing to take an account of stock, and to keep an account of sales;<sup>74</sup> or by refusing to close up the firm business within a reasonable time, and by continuing to manage it in his own name and for his own benefit;<sup>75</sup> or by conducting the firm business for the purpose of continuing and enlarging it, and not to close it<sup>76</sup>—if there is danger that the estate of the deceased co-partner will suffer, a receiver may be appointed on the application of the legal representatives of the latter.<sup>77</sup> On the death of both partners, it has been held that a receiver should be appointed on the ground that no relation of confidence exists between their representatives.<sup>78</sup>

§ 1506. (§ 85.) **Miscellaneous.**—Where both partners have assigned their respective interests in the firm, the jurisdiction may be exercised between the assignees upon the same principles which govern the jurisdiction as between partners themselves.<sup>79</sup> Where each partner has attempted separately to make an assignment of the partnership assets for the benefit of creditors, a receiver is proper.<sup>80</sup>

There can be no ground for a receiver in behalf of a partner who is himself in possession.<sup>81</sup>

The fact that a motion for a receiver was denied in a former suit for the settlement of the partnership affairs, which suit was dismissed without prejudice, constitutes no bar to the relief in another action.<sup>82</sup>

<sup>74</sup> *Word v. Word*, 90 Ala. 81, 7 South. 412.

<sup>75</sup> *Holden's Adm'rs v. McMakin*, Par. Eq. Cas. (Pa.) 270.

<sup>76</sup> *Dawson v. Parsons*, 66 Hun, 628, 21 N. Y. Supp. 212.

<sup>77</sup> *Clegg v. Fishwick*, 1 Maen. & G. 294.

<sup>78</sup> In the early case of *Phillips v. Atkinson*, 2 Bro. C. C. 272; but see *Perrin v. Lepper*, 56 Mich. 351, 23 N. W. 39.

<sup>79</sup> *Maynard v. Railey*, 2 Nev. 133.

<sup>80</sup> *Fox v. Curtis*, 176 Pa. St. 52, 34 Atl. 952, 38 Wkly. Not. Cas. 321.

<sup>81</sup> *Smith v. Lowe*, 1 Edw. Ch. 33.

<sup>82</sup> *Anderson v. Powell*, 44 Iowa, 20.

A receiver will generally be refused where the equities of the plaintiff in the bill are fully met and denied by the answer;<sup>83</sup> and where the appointment would destroy the value of the business without benefit to either party.<sup>84</sup> In some cases, the necessity of a receiver has been obviated by a bond executed by the defendant for the satisfaction of any decree that might be rendered in favor of the plaintiff.<sup>85</sup>

It is said that the receiver should be directed to take charge of all the partnership property, not of a portion merely, where the suit is for a final accounting; and where the ownership of some of the property is in dispute, that the order should furnish the means of distinguishing the private property of the defendant from the partnership property.<sup>86</sup>

§ 1507. (§ 86.) (2) **In Partition and Other Suits Between Co-owners.**—"In suits between co-owners of mines and collieries the English courts grant a receiver upon the same grounds and under the same circumstances as in those between partners," since "the working of a mine by co-owners is necessarily a business analogous to a partnership."<sup>87</sup>

<sup>83</sup> *Williamson v. Monroe*, 3 Cal. 383; *Coddington v. Tappan*, 26 N. J. Eq. 141. The mere denial of the existence of a partnership does not preclude the court from appointing a receiver if satisfied that the relation exists: *Rische v. Rische*, 46 Tex. Civ. App. 23, 101 S. W. 849.

<sup>84</sup> *Slemmer's Appeal*, 58 Pa. St. 168, 98 Am. Dec. 255.

<sup>85</sup> See *Popper v. Scheider*, 7 Abb. Pr., N. S., 56; *Saverios v. Levy*, 1 N. Y. St. Rep. 758; *Buchanan v. Comstock*, 57 Barb. 568; *Philipp v. Von Raven*, 26 Misc. Rep. 552, 57 N. Y. Supp. 701 (under Code Civ. Proc., § 1947); *Word v. Word*, 90 Ala. 81, 7 South. 412; *Devereux v. Fleming*, 47 Fed. 177; *Cary Bros. v. Dalhoff Const. Co.*, 126 Fed. 584, and see *Fleming v. Carson*, 37 Or. 252, 62 Pac. 374 (bond refused).

<sup>86</sup> *Morey v. Grant*, 48 Mich. 326, 12 N. W. 202, per Cooley, J.

<sup>87</sup> 4 Pom. Eq. Jur., § 1333, and note 2; *Jefferys v. Smith*, 1 Jacob & W. 298, per Lord Eldon. In this case there was a dispute as to the management of the property among a large number of owners

In all ordinary suits, including suits for partition, between legal co-owners of land, a receiver is not usually appointed unless some of the parties are in sole possession, to the exclusion of the others.<sup>88</sup> Beyond this state-

of a colliery. "Here there are twenty shares; and if each owner may employ a manager and a set of workmen, you destroy the subject altogether; it renders it impossible to carry it on." In *Parker v. Parker*, 82 N. C. 165, where co-tenants in possession of a gold mine were of doubtful responsibility to respond in damages for gold appropriated by them, a receiver was held to be proper *pendente lite*, instead of an injunction, as the public had an interest in the continued working of the mine. But mere colorable ouster on the part of a tenant in common who is in possession of a mining claim by the consent of a co-tenant who has brought a suit for partition, and the mere fact that the care of the property involves considerable expense, will not authorize the appointment of a receiver: *Heinze v. Kleinschmidt*, 25 Mont. 89, 63 Pac. 927. In *Heinze v. Butte & Boston Consolidated Min. Co.*, 61 C. C. A. 63, 126 Fed. 1, 7-11, a receiver was appointed, in a partition suit, to receive the share of ore pertaining to an interest the ownership of which was in dispute; and the subsequent extension of the receivership to the entire property, under directions to operate the mine, on a showing of fraud by the co-tenants in possession in withholding such share from the receiver, was held not to be an abuse of discretion on the part of the trial court. This decision was based in part, however, upon conduct of the co-tenant in possession showing acquiescence in the order extending the receivership; and *Ross*, Cir. J., dissented (at pp. 28, 29) both as respects the appointment and the extension. In general, as to receivers of mining property, see next section.

<sup>88</sup> Pom. Eq. Jur., § 1333; *Milbank v. Revett*, 2 Mer. 405; *Cassetty v. Capps*, 3 Tenn. Ch. 524; *Vaughan v. Vincent*, 88 N. C. 116; *Kill v. Murdock*, 4 Ohio N. P. 244; *Lamaster v. Elliott*, 53 Neb. 424, 73 N. W. 925 (mere ill-will and hostility between joint owners does not warrant the appointment of receiver); *Bilder v. Robinson*, 73 N. J. Eq. 169, 67 Atl. 828. See, also, *Reas v. Clemence*, 173 Cal. 106, 159 Pac. 432. A receiver was appointed in *Christ Church v. Fishburne*, 83 S. C. 304, 65 S. E. 238. The appointment will not be made solely because one of the co-tenants is occupying all of the common property without paying rent; he has a right so to occupy it, unless his occupation is a virtual ouster of the complainant: *Varnum v. Leek*, 65 Iowa, 751, 23 N. W. 151. That a notice to under-tenants not to pay rent to

ment it is difficult to formulate any rule that will be supported by authority.<sup>89</sup> In a well-considered case in Georgia it was held "that a court of equity has jurisdiction to appoint a receiver, at the instance of one tenant

co-tenants entitled thereto by agreement does not amount to an exclusion, see *Tyson v. Fairclough*, 2 Sim. & St. 142.

<sup>89</sup> *Freeman on Co-tenancy and Partition*, § 327: "In most of the early cases, the circumstances inducing the action of the court cannot be ascertained from the reports. No conclusion can, therefore, be drawn from these cases as to the grounds which warrant the interposition of the court. Most of the recent cases were so curtly disposed of as to leave us without any knowledge of the reasons which, in their own minds, justified the action of the judges. We therefore find it impossible to state with precision the general principles upon which the action of courts of equity have been or will be predicated in disposing of applications for the appointment of receivers of undivided estates. It is certain, however, that the application will be denied, except in extreme cases." In New York it has been held that a receiver may be appointed to preserve the property during the pendency of an action for partition, where it is shown that a portion of the property cannot be rented, and that the rents of the remaining portions cannot be collected, because of the refusal of one of the co-tenants to unite with the others: *Pignolet v. Bushe*, 28 How. Pr. 9; or where there was a strong feeling of hostility between the co-tenants, and a probability of future injury to the interests of both parties: *Goldberg v. Richards*, 26 N. Y. Supp. 335, 5 Misc. Rep. 419. In *Bender v. Van Allen*, 28 Misc. Rep. 304, 59 N. Y. Supp. 885, a receiver was refused where one defendant in an action of partition claimed as tenant by the curtesy, since none of the heirs were entitled to possession during the life of such tenant, if his claim should be established; and in *Darcin v. Wells*, 61 How. Pr. 259, and *Bathmann v. Bathmann*, 79 Hun, 447, 29 N. Y. Supp. 959, also actions of partition, no grounds existed for the appointment. In Illinois, it was held that the appointment on a bill for partition by infants of a receiver for a long term of years, on the application of adult co-tenants, without the consent of the infants or their guardians, was unauthorized: *Ames v. Ames*, 148 Ill. 321, 340, 36 N. E. 110. In New Jersey a receiver may be appointed to take charge of land held in common where it is alleged that one co-tenant has misappropriated rents, an accounting is sought, and the receiver is ancillary to the main relief: *Bilder v. Robinson*, 73 N. J. Eq. 169, 67 Atl. 828. In Ohio Fuel Oil



in common against his co-tenants, who are in possession of undivided valuable property, receiving the whole of the rents and profits and excluding their companion from the receipt of any portion thereof, when such tenants are insolvent."<sup>90</sup> Courts are averse to appointing a receiver over *personal* property at the suit of one co-owner against the other; and in a suit for the partition of such property will refuse a receiver if the defendant in exclusive possession will give adequate security against the deterioration or destruction of the property and to compensate the plaintiff for its use.<sup>91</sup>

Co. v. Burdett, 72 W. Va. 803, **Ann. Cas.** 1915D, 1033, 79 S. E. 667, a receiver was appointed in a suit for partition of an oil lease, the jurisdiction being upheld on the ground of the necessity for preserving the property. In *Hodgin v. Hodgin*, 175 Ind. 157, 93 N. E. 849, a receiver was appointed where it appeared that defendant had excluded defendant from possession, was permitting taxes and assessments to run against the estate, and was not making proper and necessary repairs. In general, see *Jones v. Abbott*, 228 Ill. 34, 119 **Am. St. Rep.** 412, 81 N. E. 791. The court has no power to appoint a receiver over other lands of the co-tenant not involved in the suit, in order to collect a judgment for rents: *Branner v. Webb*, 10 Kan. App. 217, 63 **Pac.** 274.

Under the broad power to appoint receivers conferred by the Supreme Court of Judicature (see *ante*, § 72), the English courts now hold that a receiver may be appointed until the hearing, although the co-owner is not in exclusive possession: *Porter v. Lopes*, L. R. 7 Ch. D. 358, per Jessel, M. R. And in Indiana, under § 1222 of Revised Statutes of 1881, the appointment is a matter solely within the discretion of the court or judge, and the defendant cannot defeat the appointment by showing the collector of the rents to be amply responsible or by offering to indemnify and secure the plaintiff against loss: *Rapp v. Reehling*, 122 Ind. 255, 23 N. E. 68.

<sup>90</sup> *Williams v. Jenkins*, 11 Ga. 595, citing *Street v. Anderton*, 4 Bro. C. C. 415, and *Milbank v. Revett*, 2 Mer. 405.

<sup>91</sup> *Low v. Holmes*, 17 N. J. Eq. 148. But in California it was held that where a tenant in common of a growing crop was in sole possession thereof, and denied the right of his co-tenant to any part thereof, and threatened to sell the entire crop and appropriate the proceeds to his own use, the co-tenant might maintain an action for the par-

§ 1508. (§ 87.) (3) "In Suits Between Conflicting Claimants of Land, especially between parties claiming under legal titles, a receiver will not ordinarily be appointed. The remedy, however, may be granted under special circumstances, in cases of gross fraud or great danger, or where possession is maintained by violence, and the like. In such cases the court acts with great caution, only where the plaintiff's rights are reasonably certain, and the danger is apparent."<sup>92</sup> The insolvency

tion of the crop, and that in such an action a receiver *pendente lite* was authorized by Code of Civil Procedure, § 564: *Baughman v. Reed*, 75 Cal. 319, 7 Am. St. Rep. 170, 17 Pac. 222. For a case where a receiver was appointed at the suit of certain part owners of a vessel, where the defendant part owners had been acting in fraud of the plaintiff's rights, see *Brennan v. Preston*, 2 De Gex, M. & G. 813. See, also, *Thompson v. Silverthorne*, 142 N. C. 12, 115 Am. St. Rep. 727, 54 S. E. 782, where a receiver was appointed for logs.

<sup>92</sup> Pom. Eq. Jur., § 1333. See *Owen v. Homan*, 4 H. L. Cas. 997, 3 Macn. & G. 378; *Bainbrigge v. Baddeley*, 3 Macn. & G. 413; *Earl Talbot v. Hope Scott*, 4 Kay & J. 96; *Lloyd v. Passingham*, 16 Ves. 68; *Clark v. Dew*, 1 Russ. & M. 103 (suit by devisee against heir at law); *Ryder v. Bateman*, 93 Fed. 16; *St. Louis etc. R. R. Co. v. Dewees*, 23 Fed. 519; *Baker v. Starling* (Ala.), 39 South. 775; *Miller v. Oliver*, 174 Cal. 407, 163 Pac. 355; *Bateman v. Superior Court*, 54 Cal. 285; *Scott v. Sierra Lumber Co.*, 67 Cal. 71, 76, 7 Pac. 131; *San Jose Safe Deposit Bank v. Bank of Madera*, 121 Cal. 543, 54 Pac. 85; *Bennallack v. Richards*, 125 Cal. 427, 58 Pac. 65; *Gray v. Council of Town of Newark*, 9 Del. Ch. 171, 79 Atl. 735, 739; *Kelly v. Steele*, 9 Idaho, 141, 72 Pac. 887; *Mapes v. Scott*, 4 Ill. App. 268; *Cofer v. Echerson*, 6 Iowa, 502; *Tarvin v. Walker's Creek etc. Co.*, 109 Ky. 579, 60 S. W. 185; *Squire v. Hewlett*, 141 Mass. 597, 6 N. E. 779; *State v. Second Judicial Dist. Ct.*, 13 Mont. 416, 34 Pac. 609; *Smith v. White*, 62 Neb. 56, 86 N. W. 930; *Corey v. Long*, 12 Abb. Pr., N. S., 427; *Thompson v. Sherrard*, 35 Barb. 593, 22 How. Pr. 155; *Gregory v. Gregory*, 1 Jones & S. (33 N. Y. Super. Ct.) 1; *McCool v. McNamara*, 19 Abb. N. C. 344; *Guernsey v. Powers*, 9 Hun, 78; *Willis v. Corlies*, 2 Edw. Ch. 281; *Rollins v. Henry*, 77 N. C. 467; *Twitty v. Logan*, 80 N. C. 69; *Bryan v. Moring*, 94 N. C. 694; *Emerson's Appeal*, 95 Pa. St. 258; *De Walt v. Kinard*, 19 S. C. 286; *Pearson v. Gillenwaters*, 99 Tenn. 446, 63 Am. St. Rep. 844, 42 S. W.

of a defendant in possession does not of itself warrant the court in appointing a receiver, but, in addition, it must appear that the plaintiff has a probable right to

9; *Davis v. Reaves*, 2 Lea (Tenn.), 649; *Sengfelder v. Hill*, 16 Wash. 355, 58 *Am. St. Rep.* 36, 47 Pac. 757; *Spokane v. Amsterdamsch Trustees Kantoor*, 18 Wash. 81, 50 Pac. 1088; *Union Boom Co. v. Samish River Boom Co.*, 33 Wash. 144, 74 Pac. 53; *Freer v. Davis*, 52 W. Va. 35, 94 *Am. St. Rep.* 910, 43 S. E. 172.

In *Talbot v. Hope Scott*, *supra*, Vice-Chancellor Woods says: "That there may be a possible case in which this court would interfere to prevent absolute destructive waste, where the value of the property would be destroyed if no steps were taken, I can understand; but I have found nothing that bears any resemblance to the doctrine contended for, that at the instance of a person alleging a mere legal title, this court will interfere against another who is in possession, to deprive him of that possession. . . . The ground of the rule adopted by the court, in this respect, I conceive to be extremely sound; the general ground being that the court cannot interfere with a legal title of any description, unless there be some equity by which it can affect the conscience of the defendant. Where there is an entire want of privity between the plaintiff and the defendant, and the defendant is simply a wrong-doer at law, this court does not take upon itself to interpose, unless in very exceptional cases." In *Carrow v. Ferrior*, L. R. 3 Ch. App. 719, the same judge points out the distinction between the interference of the court to protect real property, and its interference to protect personal estate pending a litigation as to probate. "It may be true, on the highest general principles, that there ought to be no difference in this respect between real and personal property, but our law clearly regards them very differently, and looks upon the person in possession of real estate as entitled to keep it until someone else shows a better title. Unless the person in possession of real estate is affected by some equity, this court will not interfere. The consideration is not unimportant that personal estate may be made way with altogether, if this court does not interfere, but only the rents of real estate can be lost. But, in my opinion, the leading principle governing the case is that this court does not interfere unless there is an equity."

Under the provision of the Judicature Act of 1873, § 25, paragraph 8, permitting the appointment of a receiver "in all cases where it shall appear to the court to be just or convenient," *Talbot v. Hope Scott* and *Carrow v. Ferrior* are no longer law in England, but the

recover in the end.<sup>93</sup> If the object of the receiver is to

court has power to appoint a receiver, pending an action to recover possession of land, although the plaintiff's title is legal and the defendant is in possession: *Berry v. Keen*, [1882] 51 L. J. (Ch.) 912; *Foxwell v. Van Greeten*, [1897] 1 Ch. 64 (insufficient grounds); *John v. John*, [1898] 2 Ch. 573. In the last case it was said that the discretion of the court must be exercised with a view to all the circumstances of the case; that it is important to bear in mind the position of the tenants, who, if the defendant is not a person of undoubted solvency, and remains in receipt of the rents, may be called upon to pay twice over if the plaintiff succeeds; and that the court has also to consider the probability of the plaintiff's succeeding, and the length of the defendant's possession, and whether he has any *prima facie* title.

In *Folk v. United States*, 233 Fed. 177, 147 C. C. A. 183, plaintiff brought a suit in equity to avoid the legal title of a defendant in possession. The court laid down the rule that in general such relief will not be granted. To bring the case within the exceptions it must appear: (1) That there is imminent danger that the property or its proceeds will be deteriorated in value or wasted during the pendency of the action; (2) that plaintiff will suffer irreparable injury thereby (and this can rarely happen if defendant is solvent or will give a bond); and (3) that there is a strong probability on the pleadings that plaintiff ultimately will recover on the merits.

<sup>93</sup> *Ryder v. Bateman*, 93 Fed. 16; *Gregory v. Gregory*, 33 N. Y. Super. Ct. (1 Jones & S.) 1; *Cofer v. Echerson*, 6 Iowa, 502. See, also, as to probability of plaintiff's recovery, *ante*, § 66; *Owen v. Homan*, 3 Macn. & G. 378, 412, 4 H. L. Cas. 997; *Bainbrigge v. Baddeley*, 3 Macn. & G. 413, 419. In the latter case the contest was as to the validity of a will, under which the defendant in possession of the property claimed title. The chancellor, Lord Truro, says: "When the parties are litigating the right to property, and the litigation depends upon questions then to be decided at law, what are the circumstances in which the jurisdiction is to be exercised and is properly applicable in granting a receiver? There are, I apprehend, two grounds, and two only: First, that there is a reasonable probability of success on the part of the plaintiff; and second, that the property, the subject of the suit, is in danger. . . . I apprehend I ought to presume, until I have the case so before me as to enable me judicially to form an opinion upon the subject, that the will is good. This court ought not, in any case, to disturb the possession of a party who stands upon his legal title, without a reasonable probability that the



preserve the rents and profits, there must be danger that they will be squandered and lost by reason of the insolvency of the party in possession, who will be unable to respond to a final decree.<sup>94</sup>

In accordance with the rule as above stated, receivers have been appointed in suits to cancel conveyances obtained by fraud or undue influence, where there was a strong probability of the plaintiff's success in the suit;<sup>95</sup> or where the plaintiff shows a right to the immediate possession of the land, together with the insolvency of the defendant in possession and imminent danger to the property;<sup>96</sup> or where the land is claimed by both parties,

plaintiff will ultimately succeed. . . . I do not see any such reasonable probability here; not at all using that expression to prejudice the plaintiff's title, or to express any opinion of it. His case may be the strongest that ever was presented; it may, when it comes to be laid before the proper tribunal, entitle him to a verdict without any doubt or hesitation; but I have not the materials before me to warrant me in coming to that conclusion." In *Phillips v. Birmingham Industrial Co.*, 171 Ala. 445, 54 South. 603, a second mortgagee bought the property on a foreclosure sale. He then brought suit in ejectment, and asked for a receiver, alleging insolvency, non-residence of the mortgagor, and collusion on the part of the defendants to convert rents and profits pending suit. It was held that he was entitled to the relief.

<sup>94</sup> *Vause v. Woods*, 46 Miss. 120; *Bryan v. Moring*, 94 N. C. 694. See, also, *Vizard v. Moody*, 117 Ga. 67, 43 S. E. 426, where a receiver was appointed. But even in such a case, a bond to account for the rents in a sum to be designated by the court, may obviate the necessity of a receiver: *Spokane v. Amsterdamsch Trustees Kantoor*, 18 Wash. 81, 50 Pac. 1088.

<sup>95</sup> *Huguenin v. Basely*, 13 Ves. 105; *Stilwell v. Wilkins*, Jacob, 280. But a receiver should not be appointed where the answer sets up that full value was paid for the land and that defendant is financially responsible: *Horner v. Bell*, 105 Md. 113, 66 Atl. 39.

<sup>96</sup> *Smith v. Lusk*, 119 Ala. 394, 24 South. 256; *Nesbitt v. Turrentine*, 83 N. C. 535 (action by lessor against lessee); and see *Mayo v. McPhaul*, 71 Ga. 758; *Davis v. Taylor*, 86 Ga. 506, 12 S. E. 881 (right lost by laches); *Troughber v. Akin*, 109 Tenn. 451, 73 S. W. 118 (see this opinion for a careful review of the Tennessee cases on the question of appointment).

and both claim to be in possession, interfering with each other in harvesting the crops grown by each respectively and threatening each other with assaults and forcible resistance.<sup>97</sup>

The relief has sometimes been granted to the plaintiff after a judgment in his favor, pending a motion for a new trial, or the like, where it was necessary to protect the proceeds of the land from loss at the hands of an insolvent defendant.<sup>98</sup>

In North Carolina the relief is granted with some freedom, although the statute authorizing the relief seems to be merely declaratory of the general rule of equity;<sup>99</sup>

<sup>97</sup> *Hlawacek v. Bohman*, 51 Wis. 92, 8 N. W. 102.

<sup>98</sup> See *Whitney v. Buckman*, 26 Cal. 447; *Collier v. Sapp*, 49 Ga. 93; *Atlas Sav. etc. Ass'n v. Kirklin*, 110 Ga. 572, 35 S. E. 772 (one in whose favor it has been finally adjudged that, as against an insolvent person, the former has the title to, and the right to the possession of, given realty, but who is under an injunction, sued out at the instance of others, preventing him from taking possession, is entitled to have a receiver appointed to collect and hold rents which such insolvent is seeking by judicial process to collect from the tenants to whom he had undertaken to rent the premises); *Stephens v. Kaga*, 142 Ind. 523, 41 N. E. 930 (receiver to take charge of crops rendered unnecessary by a statutory bond, given by defendant on motion for a new trial, to pay all costs and damages which shall be recovered against him). Of course, a receiver will not be granted, pending appeal, in favor of a party against whom judgment in an ejectment suit has been rendered: *Corbin v. Thompson*, 141 Ind. 128, 40 N. E. 533 ("to have entertained the appellant's petition was to deny the force and effect of a judgment adverse to the very claim which his petition asserted").

<sup>99</sup> Code N. C., § 379: "A receiver may be appointed, before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property, or its rents and profits, are in danger of being lost, or materially injured or impaired." Under this statute, "where a party to an action asks, as affirmative relief, the possession of land, and alleges that his adversary, who wrongfully withholds it, is insolvent, and the latter directly admits or fails to deny the allegation, it only remains for the plain-

and it is held, in several instances, that a receiver may be awarded against an insolvent plaintiff in possession, in a proper case.<sup>100</sup>

A receiver of mining property, the title to which is in litigation, is rarely appointed, and still more rarely is such receiver directed to extract the ore, since that is of the very substance of the estate.<sup>101</sup> Exceptional cases

tiff, in order to establish his right to the appointment of a receiver to take charge of the rents and profits, to show that he has set up in an affidavit filed under the sanction of the court, or in a verified pleading in the cause, used as an affidavit, an apparently good title, either not controverted at all, or not unequivocally and sufficiently denied by the affidavits of the claimant in possession": *Lovett v. Slocumb*, 109 N. C. 110, 13 S. E. 893. And a statute requiring the defendant in ejectment to give a bond for costs and damages before putting in a defense to the action does not abridge the power of the court to appoint a receiver to secure the rents and profits: *Kron v. Dennis*, 90 N. C. 327. And where the plaintiff was charged with cutting and carrying away timber of peculiar value, he was compelled to give a bond to answer possible damages, and a receiver was appointed to take and state accounts of the timber so cut until the cause should be heard on its merits, although the plaintiff was solvent: *John L. Roper Lumber Co. v. Wallace*, 93 N. C. 23. See, further, *Stith v. Jones*, 101 N. C. 360, 8 S. E. 151 (receiver appointed on conflicting evidence).

<sup>100</sup> *Horton v. White*, 84 N. C. 297 (against plaintiff suing *in forma pauperis*); *McNair v. Pope*, 96 N. C. 502, 2 S. E. 54; *John L. Roper Lumber Co. v. Wallace*, 93 N. C. 23 (receiver, for a special purpose, against a solvent plaintiff).

<sup>101</sup> *Tornanses v. Melsing*, 106 Fed. 775, 784, 45 C. C. A. 615; approved in *Heinze v. Butte & Boston Consol. Min. Co.*, 61 C. C. A. 63, 126 Fed. 1, 11. See, also, *Thomas v. Nantahala Marble etc. Co.*, 58 Fed. 485, 7 C. C. A. 330 (injunction proper, but not receiver); *Bigbee v. Summerour*, 101 Ga. 201, 28 S. E. 642 (a most vigorous and convincing opinion); *Hickey v. Parrot Silver etc. Min. Co.*, 25 Mont. 164, 64 Pac. 330; *Stith v. Jones*, 101 N. C. 360, 8 S. E. 151 (receiver not to operate the mine, but to receive the proceeds); *Chicago & Allegheny Oil etc. Co. v. U. S. Petroleum Co.*, 57 Pa. St. 83. In *United States v. Dominion Oil Co.*, 241 Fed. 425, the court refused to appoint a receiver of oil land which the government was seeking to recover.

are those where there are timbers to be repaired, or water to be controlled; or, in the case of oil-wells, when it is necessary for the preservation of the claim that the work be continued to prevent the oil from being drawn off by the operation of wells on adjoining ground; or where a receiver is necessary in order that the annual work required by law may be performed for the benefit of the party who may ultimately be adjudged entitled to the ground.<sup>102</sup>

§ 1509. (§ 88.) **Class III: In General.**—"The third class embraces those cases in which the person holding title to the property is in a position of trust or of *quasi* trust, and is violating his fiduciary duties by misusing, misapplying, or wasting the property, and is thereby endangering the rights of other persons beneficially interested. In many, but not in all, the instances falling within this class, the plaintiff has, and is seeking to enforce, some equitable estate or interest; but whatever be the nature of his right, the ground of the remedy is always the misconduct of the party holding the title, and the consequent danger of loss."<sup>103</sup>

§ 1510. (§ 89.) **(1) Receivers in Suits Against Trustees, for Breach of Trust.**—Courts will not interfere with

<sup>102</sup> Tornanses v. Melsing, 106 Fed. 775, 784, 45 C. C. A. 615, by Ross, Cir. J.; Nevada Sierra v. Home Oil Co., 98 Fed. 673 (receiver denied). For other instances where receivers were appointed, under special circumstances, see, in addition to the partition cases mentioned in the last section, Ulman v. Clark, 75 Fed. 868 (coal mine; receiver's appointment did not disturb defendants' operations, but merely secured the rents and profits, which were in danger of being scattered among many persons, thus imposing on the plaintiff the necessity of bringing many suits); Stith v. Jones, 101 N. C. 360, 8 S. E. 151; West v. Hermann, 47 Tex. Civ. App. 131, 104 S. W. 428 (oil land). In United States v. McCutchen, 234 Fed. 702, where the government sought to quiet title to oil land, a receiver was appointed.

<sup>103</sup> 4 Pom. Eq. Jur., § 1334.



trustees' possession by a receiver unless there is real danger from their misconduct.<sup>104</sup> Instances of such misconduct, fraudulent or negligent, resulting in danger to the trust property and justifying the appointment of a receiver,<sup>105</sup> are as follows: Where there was an abuse of trust by an insolvent party in possession of real property, whereby the rents and profits were exposed to

<sup>104</sup> 4 Pom. Eq. Jur., § 1334, note; 72 **Am. St. Rep.** 95; *Barkley v. Reay*, 2 Hare, 306; *Browell v. Reed*, 1 Hare, 434; *Latham v. Chafee*, 7 Fed. 525; *Vose v. Reed*, 1 Woods, 647, 651, Fed. Cas. No. 17,011; *Orphan Asylum v. McCartee*, Hopk. Ch. (N. Y.) 429; *Poythress v. Poythress*, 16 Ga. 406. "The court would not, at the instance of one of several parties interested in an estate, displace a competent trustee, or take the possession from him, unless he willfully or ignorantly permitted the property to be placed in a state of insecurity, which due care or conduct would have prevented": *Barkley v. Reay*, *supra*. Where the defendant had been in possession of the property and administering the trust for a period of over seven years, the court would not, on a bill for his removal, appoint a receiver, before answer and a hearing on the merits, if there was not great danger that the complainant would suffer irreparable loss by any delay: *Latham v. Chafee*, *supra*. Even the mingling of the trust funds with his own, by one of the trustees, does not render a receiver necessary, when it is not alleged that the fund is in danger: *Orphan Asylum v. McCartee*, *supra*. The court is extremely reluctant to interfere where the trust is vested by the legislature in state officers: *Vose v. Reed*, *supra*.

The refusal of one of several trustees to act does not necessitate the appointment of a receiver: *Browell v. Reed*, 1 Hare, 434; compare *Tait v. Jenkins*, 1 Younge & C. Ch. 492; otherwise where some of the trustees refuse to act, and all the parties in interest are before the court and consent to the appointment: *Brodie v. Barry*, 3 Mer. 695. In general, see *Rousseau v. Call*, 169 N. C. 173, 85 S. E. 414 (citing the text). For an unusual instance of the appointment of a receiver in aid of a bill for discovery, see *Williams v. Phiel*, 66 Fla. 192, 63 South. 658.

<sup>105</sup> "It is the impending danger to the trust fund which induces the court to interpose with these extraordinary remedies in the case of an express trust, where a trustee has failed to take possession of the trust property, and has allowed it to remain in the hands of the debtor, who may dispose of it at any moment, or where he is about to part

imminent danger of loss;<sup>106</sup> where a trustee of lands is insolvent, has sold parts of the trust property and misapplied the proceeds, has never accounted to the plaintiff for the rents and profits, but has applied the same to his own use, and has proposed to sell other parts of the trust property within a short time before the plaintiff's application for an injunction and receiver;<sup>107</sup> where the trustee has conveyed lands in fraud of the equitable interest of the *cestui que trust*;<sup>108</sup> where the trustee, in violation of the condition of his trust, loaned trust funds to a firm of which he was a member, which afterwards became insolvent;<sup>109</sup> where trustees of leasehold property had failed to keep the premises in proper repair, so as to prevent a forfeiture of the leasehold;<sup>110</sup> where the rents of the property had not been collected, and encumbrancers were threatening to take possession of the estate.<sup>111</sup> A receiver has been appointed in an action to compel an accounting, where the trustee wrongfully withheld the fund because of an alleged claim for damages against the beneficiary arising from a breach of contract.<sup>112</sup> For further instances, see the next two sections.

with it in a fraudulent manner, so that it will be lost to the trust estate, or where the trustee is clearly proven to have been guilty of acts of fraud, so that the fund is not safe in his hands for any length of time": *Latham v. Chafee*, 7 Fed. 525.

106 *Chase's Case*, 1 Bland Ch. 206, 17 Am. Dec. 277.

107 *Albright v. Albright*, 91 N. C. 220.

108 *Gunn v. Blair*, 9 Wis. 352.

109 *North Carolina R. R. Co. v. Wilson*, 81 N. C. 223.

110 *In re Fowler*, 16 Ch. D. 723.

111 *Hart v. Tulk*, 6 Hare, 611; and where rents have fallen in arrears, owing to dissensions among the trustees: *Wilson v. Wilson*, 2 Kean, 249.

112 *Hagenback v. Hagenback etc. Co.*, 59 Fed. 14. In general, see *Lyles v. Williams*, 97 S. C. 373, 81 S. E. 659; *Bauer v. Haggerty*, 42 Wash. 313, 84 Pac. 871.

§ 1511. (§ 90.) **Same; Assignees for Benefit of Creditors.**—In the following cases the validity of the assignment was not attacked, but a receiver was sought on the ground of some incapacity or misconduct of the assignee, whereby the interests of the creditors were supposed to be imperiled.<sup>113</sup> Such receiver was not appointed, on the allegation of the insolvency of one of the sureties of the assignee, where there was no allegation of misfeasance or misappropriation of the latter's part, since the creditors had a perfect security in the statutory bond given by the assignee.<sup>114</sup> Upon general allegations of benefits to be derived from the appointment, the court has no authority to place an estate, assigned for the benefit of creditors, in the hands of a receiver to be sold, upon the application of a preferred creditor, though the assignor and assignee consent to the appointment.<sup>115</sup> Nor are the youth and inexperience of an assignee, and the fact that he is not required to give a bond, and that his property is inconsiderable when compared with the value of the property conveyed by the assignment, sufficient to justify his removal and the appointment of a receiver in his stead.<sup>116</sup> If a trustee with power to continue the assignor's business is unfaithful or incompetent, the remedy is to require that he furnish ample security for the protection of those interested, or that he be removed, and another who is suitable be substituted. It would be an extreme case, if such could exist, which would call for

In England, under the provisions of the Judicature Act, where the defaulting trustee is out of the jurisdiction, so that service of a writ of attachment could not be effected, a judgment against him for the payment of money into court may be enforced by the appointment of a receiver of his equitable interest in property: *In re Coney*, L. R. 29 Ch. D. 993.

<sup>113</sup> See 72 *Am. St. Rep.* 43-45, note.

<sup>114</sup> *Dozier v. Logan*, 101 Ga. 173, 28 S. E. 612.

<sup>115</sup> *Penzel Grocer Co. v. Williams*, 53 Ark. 81, 13 S. W. 736.

<sup>116</sup> *Jones v. McPhillips*, 77 Ala. 314.

the appointment of a receiver to execute an express trust continuous in its nature, and not merely to hold *pendente lite* for the removal of the trustee.<sup>117</sup>

The cases seem to indicate that receivers are commonly appointed with somewhat greater freedom than in other classes of trusts. Thus, insolvency of the assignee has been held to be a good cause for a receiver of his trust.<sup>118</sup> Refusal of the assignee to proceed with the execution of the trust,<sup>119</sup> or his resignation,<sup>120</sup> presents a proper ground for a receiver to protect the assets for the benefit of the creditors. The violation of his duty to keep the trust fund separate and distinct from his individual funds, and a separate bank account, to the injury, or great risk of injury, of those who may be ultimately entitled to the fund, requires the substitution of a receiver.<sup>121</sup> Gross mismanagement, with failure to comply with the terms of the assignment, resulting in danger of waste of the assets, clearly justifies the interposition of the court.<sup>122</sup>

117 *Etowah Min. Co. v. Wills Val. Min. etc. Co.*, 106 Ala. 492, 17 South. 522.

118 *Haggarty v. Pittman*, 1 Paige, 298, 19 Am. Dec. 434; *City Nat. Bank v. Bridges*, 114 N. C. 381, 19 S. E. 642 (insolvent trustee fails to give a bond when required by the court); *Connah v. Sedgwick*, 1 Barb. 210; *Reed v. Emery*, 8 Paige, 417, 35 Am. Dec. 720.

119 *Suydam v. Dequindre*, Harr. Ch. (Mich.) 347.

120 *McFerran v. Davis*, 70 Ga. 661; or upon any vacancy: *Andrews v. Wilson's Assignee*, 114 Ky. 671, 71 S. W. 890.

121 *Wagner v. Coen*, 41 W. Va. 351, 23 S. E. 735; or continuing to carry on the business of the assignor, and keeping no account of the sales of the assigned property: *Connah v. Sedgwick*, 1 Barb. 210; *Hart v. Crane*, 7 Paige, 37.

122 *Jones v. Dougherty*, 10 Ga. 273; *Cohen & Co. v. Morris & Co.*, 70 Ga. 313; *Goldsmith v. Fletcheimer*, 16 Ky. Law Rep. 433, 28 S. W. 211. See, also, *Robinson v. Worley*, 19 Ky. Law Rep. 791, 42 S. W. 95.



§ 1512. (§ 91.) (2) **In Suits Against Executors and Administrators.**—A strong case is required to induce the appointment of a receiver to take assets from the custody of an executor or administrator, displacing his authority. There must be actual misconduct or fraud, and immediate danger of loss, or the appointment of a receiver cannot be justified.<sup>123</sup> Such a case is not presented by charges stated on information and belief,<sup>124</sup> or

<sup>123</sup> *Randle v. Carter*, 62 Ala. 95, 102, where it is further said: "The executor is appointed by the testator, who has the right to declare in whom the management of his estate after his death shall be reposed. The administrator derives his authority from, and is, in a qualified sense, the officer of another court of exclusive jurisdiction, compelled to give and keep a bond, with sufficient sureties, for the prompt and faithful discharge of the trusts of the administration. The court is, therefore, reluctant to interfere with them by the appointment of a receiver. . . . A different rule obtains, and should obtain, than in the case of trustees. The court of probate has, by the constitution, a general jurisdiction over the grant of letters testamentary, and of administration, in which is involved the power of revocation. The grant may be revoked whenever gross misconduct is shown, or, whenever a necessity exists, additional security may be required. Protection against loss to creditors, legatees, or next of kin, and security for a faithful administration, are within the power of the parties and the competency of that court. There can but seldom be a necessity for the exercise of any other preventive or protective remedy than such as that court can afford, and hence, though a court of equity has the jurisdiction to appoint a receiver of the assets, practically taking the administration into its hands, the jurisdiction is not exercised, unless there is manifest danger of loss which may be irreparable." See, also, substantially to the same effect, *Werborn v. Kahn*, 93 Ala. 201, 9 South. 729; *Haines v. Carpenter*, 1 Woods, 262, Fed. Cas. No. 5905, affirmed in 91 U. S. 254, 23 L. Ed. 345; *Dougherty v. McDougald*, 10 Ga. 121; *Harrup v. Winslet*, 37 Ga. 655; *Powell v. Quinn*, 49 Ga. 523; *West v. Mercer*, 130 Ga. 357, 60 S. E. 859; *Crawford v. Wilson*, 139 Ga. 654, 44 L. R. A. (N. S.) 773, 78 S. E. 30; Pom. Eq. Jur., § 1334, note; 72 Am. St. Rep. 63-66, note. In general, see *Smith v. Jennings*, 238 Fed. 48, 151 C. C. A. 124.

<sup>124</sup> *Haines v. Carpenter*, 1 Woods, 262, Fed. Cas. No. 5905.

otherwise lacking in certainty.<sup>125</sup> The mere poverty of the executor does not justify his removal, in the absence of proof of danger of loss to the estate.<sup>126</sup> Disagreement between executors as to the management of the estate does not warrant the interposition of the court by means of a receiver.<sup>127</sup> Where the application is based on the executor's incompetency and misconduct, his resignation and the appointment of an administrator *de bonis non* remove the ground for a receiver.<sup>128</sup> The relief is said to be designed to prevent future injury, and not to redress past grievances.<sup>129</sup>

Notwithstanding the emphatic expressions of reluctance to interfere noted above, it has been observed that the "strong" or "extraordinary" cases in which a receiver may be appointed seem to be quite common in chancery practice.<sup>130</sup> Any serious misconduct, gross mismanagement, misuse, or misappropriation of funds

<sup>125</sup> Powell v. Quinn, 49 Ga. 523.

<sup>126</sup> Knight v. Duplessis, 1 Ves. 324; Anonymous, 12 Ves. 4; Howard v. Papera, 1 Madd. (86) 141; Johns v. Johns, 23 Ga. 31; Fairbairn v. Fisher, 4 Jones Eq. 390.

<sup>127</sup> Wanneker v. Hitchcock, 38 Fed. 383; Fairbairn v. Fisher, 4 Jones Eq. 390.

<sup>128</sup> Lunsford v. Lunsford, 122 Ala. 242, 25 South. 171.

<sup>129</sup> Dougherty v. McDougald, 10 Ga. 121.

<sup>130</sup> See note, 72 Am. St. Rep. 651. In *Ex parte Walker*, 25 Ala. 81, it was said: "Nothing is more common in chancery practice than the appointment of receivers in suits against executors, when there is danger to the fund without such appointment; so, also, if he has wasted the effects, or in other respects has misconducted himself. Although mere poverty, of itself, may not furnish sufficient ground for the appointment of a receiver, as against an executor, yet where it is coupled with other facts or circumstances, showing that he has proceeded not in accordance with law (as where he has made private sales of the property of the estate, or is dealing with it on his private account), especially where it is doubtful whether he is, in fact, the legal representative, or is not shorn of his authority by removal, the court, in all such cases, should promptly secure the effects by placing them in the hands of a receiver."

by an irresponsible executor or administrator which imperils the estate justifies the appointment of a receiver.<sup>131</sup> While mere insolvency of the executor is not sufficient, an actual adjudication of bankruptcy, it has been held, presents a strong ground;<sup>132</sup> and his removal from the state, leaving both his *cestui que trust* and the trust estate within the state, amounts to an abandonment of his trust, and, it seems, renders it the duty of the court to appoint a receiver.<sup>133</sup>

§ 1513. (§ 92.) (3) **Receivers in Suits to Enforce Mortgages—English Rule.**—In England, by the rule that prevailed prior to the year 1860, an equitable mortgagee was, in general, alone entitled to a receiver, because a legal mortgagee could at any time gain possession after a default, and thus secure the rents and profits.<sup>134</sup> Yet

<sup>131</sup> *Middleton v. Dodswell*, 13 Ves. 266 (appointment may be made before answer); *Ex parte Walker*, 25 Ala. 81; *Calhoun v. King*, 5 Ala. 523; *Werborn v. Kahn*, 93 Ala. 201, 9 South. 729; *Chappell v. Akin*, 39 Ga. 177; *Ware v. Ware*, 42 Ga. 408; *Thompson v. Orser*, 105 Ga. 482, 30 S. E. 626; *Jenkins v. Jenkins*, 1 Paige, 243; *Stairley v. Rabe*, *McMull. Eq. (S. C.)* 22; *Price v. Price*, 23 N. J. Eq. 428.

<sup>132</sup> For the reason that there is no person to protect the assets: *Steele v. Cobham*, L. R. 1 Ch. App. 325; and see *Gladdon v. Stoneman*, 1 Madd. (86) 141, note.

<sup>133</sup> *Ex parte Galluchat*, 1 Hill Eq. (S. C.) 148; *Elting v. First Nat. Bk.*, 173 Ill. 368, 50 N. E. 1095. For further instances, see *Marvine v. Drexel*, 68 Pa. St. 362; *Du Val v. Marshall*, 30 Ark. 230.

<sup>134</sup> 4 Pom. Eq. Jur., § 1334, note 3; 27 *Am. St. Rep.* 794; *Berney v. Sewell*, 1 Jacob & W. 647, per Lord Eldon; *Sturch v. Young*, 5 Beav. 557; *Ackland v. Gravener*, 31 Beav. 482, per Romilly, M. R. By the statute 23 & 24 Vict., c. 145, §§ 11-32, it is provided that the mortgagee, in all cases where the payment of the principal is in arrear one year, or the interest six months, or after any omission to pay any insurance premium which, by the terms of the deed, ought to be paid, may obtain the appointment of a receiver of the rents and profits of the estate mortgaged. As to the effect of authority given to the mortgagee to appoint a receiver, previous to this statute, see *Jolly v. Arbuthnot*, 4 De Gex & J. 224; and as to the appointment of a re-

where, under peculiar circumstances, the legal mortgagee could not obtain possession, a receiver might be appointed;<sup>135</sup> and the jurisdiction was freely exercised in behalf of equitable, as distinguished from legal, mortgagees.<sup>136</sup>

§ 1514. (§ 93.) **General Rule in United States; Receiver Appointed When Security Inadequate and Mortgagor Insolvent.**—The rule is well settled in a strong majority of the states where the question has been passed upon, that a receiver of the rents and profits will generally be appointed, at the application of the mortgagee, upon the commencement of a suit to foreclose the mortgage, upon a sufficient showing of two things: First, that the property covered by the mortgage is an inadequate security for the payment of the debt, with the accrued interest and costs of suit; and second, that the mortgagor, or other person who is personally liable for the payment of the debt, is insolvent, or beyond the jurisdiction, or in such doubtful financial standing that an execution against him for any deficiency would be unavail-

ceiver and manager under the liberal provisions of the Judicature Act, see *Peek v. Trinsmaran Iron Co.*, L. R. 2 Ch. D. 115; *Makins v. Percy*, *Ibotson & Sons*, [1891] 1 Ch. 133; *Campbell v. Lloyd's etc. Bank*, 1 Ch. 136, note; *Edwards v. Standard etc. Stock Syndicate*, [1893] 1 Ch. 574; *County etc. Bank v. Colliery Co.*, [1895] 1 Ch. 629; *Whitley v. Challis*, [1892] 1 Ch. 64.

<sup>135</sup> *Ackland v. Gravener*, 31 Beav. 482; *Shakel v. Duke of Marlborough*, 4 Madd. 463; *Truman v. Redgrave*, L. R. 18 Ch. D. 547. See, also, *Warner v. Rising Fawn Iron Co.*, 3 Woods, 514, Fed. Cas. No. 17,188, where a receiver was granted to enforce the right to immediate possession of the mortgaged premises conferred on a trustee for bondholders by the deed of trust, which right the trustee refused to exercise at the request of the bondholders.

<sup>136</sup> *Pom. Eq. Jur.*, § 1334, note; *Meaden v. Sealey*, 6 Hare, 620; *Holmes v. Bell*, 2 Beav. 290 (equitable mortgage by deposit of title deeds).



ing.<sup>137</sup> This relief does not grow directly out of the relations of the parties or the stipulations contained in

<sup>137</sup> **United States.**—Kountze v. Omaha Hotel Co., 107 U. S. 378, 27 L. Ed. 609, 2 Sup. Ct. 911; Grant v. Phoenix Mut. L. Ins. Co., 121 U. S. 105, 30 L. Ed. 905, 7 Sup. Ct. 841; Shepherd v. Pepper, 133 U. S. 626, 33 L. Ed. 706, 10 Sup. Ct. 438; American Nat. Bank v. Northwestern Mut. L. Ins. Co., 89 Fed. 610, 32 C. C. A. 275; Boyce v. Continental Wire Co., 125 Fed. 741.

**Alabama.**—Hughes v. Hatchett, 55 Ala. 631; Lehman v. Tallassee Mfg. Co., 64 Ala. 567; Scott v. Ware, 65 Ala. 174; Lindsay v. American Mtg. Co., 97 Ala. 412, 11 South. 470; Jackson v. Hooper, 107 Ala. 634, 18 South. 254; Warren v. Pitts, 114 Ala. 65, 21 South. 494; Albritton v. Lott-Blackshear Commission Co., 167 Ala. 541, 52 South. 653; Skidmore v. Stewart (Ala.), 75 South. 1.

**Arkansas.**—Price v. Dowdy, 34 Ark. 285.

**California.**—La Societe Francaise v. Salheimer, 57 Cal. 623; Montgomery v. Merrill, 65 Cal. 432, 4 Pac. 414; Simpson v. Ferguson, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484.

**Florida.**—Pasco v. Gamble, 15 Fla. 562 (a valuable case).

**Georgia.**—The rule appears to be recognized in Hart v. Respeas, 89 Ga. 87, 14 S. E. 910. Compare Ray v. Carlisle, 125 Ga. 316, 54 S. E. 119; Planters' Oil Mill v. Carter, 140 Ga. 808, 79 S. E. 1120.

**Idaho.**—Commercial Trust Co. v. Idaho Brick Co., 25 Idaho, 755, 139 Pac. 1004.

**Illinois.**—Haas v. Chicago Bldg. Soc., 89 Ill. 498.

**Indiana.**—Main v. Ginthert, 92 Ind. 180; Storm v. Ermantrout, 89 Ind. 214. A broader rule is laid down in Leader Pub. Co. v. Grant Trust & Savings Co., 182 Ind. 651, 108 N. E. 121.

**Kansas.**—Havana State Bank v. Dikemar, 98 Kan. 222, 157 Pac. 1177 (by statute may be appointed if security is inadequate).

**Kentucky.**—Douglass v. Cline, 12 Bush, 608; Wooley v. Holt, 14 Bush, 788. After default in payment of several installments due under a mortgage payable in installments, the mortgagee, according to the code, is entitled to a receiver although the land is of sufficient value to satisfy the mortgage: Hardman v. Volk (Ky.), 99 S. W. 660.

**Mississippi.**—Hill v. Robertson, 24 Miss. 368; Whitehead v. Wooten, 43 Miss. 523; Myers v. Estell, 48 Miss. 372; Phillips v. Eiland, 52 Miss. 721.

**Nevada.**—Hyman v. Kelly, 1 Nev. 179.

the mortgage, but out of equitable considerations alone. It is not, therefore, a matter of strict right, but is

**New York.**—*Sea Insurance Co. v. Stebbins*, 8 Paige, 565; *Astor v. Turner*, 11 Paige, 436, 43 *Am. Dec.* 766; *Shotwell v. Smith*, 3 *Edw. Ch.* 588; *Post v. Dorr*, 4 *Edw. Ch.* 412; *Quincy v. Cheeseman*, 4 *Sand. Ch.* 405; *Hollenbeck v. Donnell*, 94 *N. Y.* 342, 29 *Hun*, 94; *Warner v. Gouverneur*, 1 *Barb.* 36; *Syracuse City Bank v. Tallman*, 31 *Barb.* 201; *Smith v. Tiffany*, 13 *Hun*, 671.

**North Carolina.**—*Kerchner v. Fairley*, 80 *N. C.* 24; *Oldham v. First Nat. Bank*, 84 *N. C.* 304; *Durant v. Crowell*, 97 *N. C.* 367, 2 *S. E.* 541 (alternative of a receiver or a bond to secure to plaintiff the rents, profits and damages to which he may be adjudged entitled).

**South Carolina.**—*Greenwood Loan & G. Co. v. Childs*, 67 *S. C.* 251, 45 *S. E.* 167.

**South Dakota.**—It is said to be enough to show that the conditions of the mortgage have not been performed and that the property is probably inadequate to discharge the mortgage debt: *Sherman v. Wichner*, 35 *S. D.* 436, 152 *N. W.* 700.

**Tennessee.**—*Henshaw v. Wells*, 9 *Humph.* 568.

**Texas.**—*Rogers v. Southern Pine Co.*, 21 *Tex. Civ. App.* 48, 51 *S. W.* 26; *De Berrera v. Frost* (*Tex. Civ. App.*), 77 *S. W.* 637; *Ferguson v. Dickinson* (*Tex. Civ. App.*), 138 *S. W.* 221.

**Virginia.**—*Bristow v. Home Bldg. Co.*, 91 *Va.* 18, 20 *S. E.* 946.

**Wisconsin.**—*Finch v. Houghton*, 19 *Wis.* 150; *Schreiber v. Carey*, 48 *Wis.* 208, 4 *N. W.* 124; *Morris v. Branchaud*, 52 *Wis.* 187, 8 *N. W.* 883; *Sales v. Lusk*, 60 *Wis.* 490, 19 *N. W.* 362; *Wisconsin Nat. Loan & Bldg. Ass'n v. Pride*, 136 *Wis.* 102, 116 *N. W.* 637.

In **Indiana**, **Nebraska** and **South Dakota**, the statutes are interpreted as permitting the appointment of a receiver on the ground of insufficiency of the mortgaged property to discharge the mortgage debt, without averment or proof of the mortgagor's insolvency: *Ponder v. Tate*, 96 *Ind.* 330; *Hursh v. Hursh*, 99 *Ind.* 500; *Sellers v. Stoffel*, 139 *Ind.* 468, 39 *N. E.* 52; *Jacobs v. Gibson*, 9 *Neb.* 380, 2 *N. W.* 893; *Philadelphia Mtg. etc. Co. v. Goos*, 47 *Neb.* 804, 66 *N. W.* 843; *Waldron v. First Nat. Bank*, 60 *Neb.* 245, 82 *N. W.* 856; *Philadelphia Mortgage & T. Co. v. Oyler*, 61 *Neb.* 702, 85 *N. W.* 899; *Roberts v. Parker*, 14 *S. D.* 323, 85 *N. W.* 591. The statutes of several states contain a provision that a receiver may be appointed "in an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged

addressed to the sound discretion of the court.<sup>138</sup> The relief, not being a matter of strict legal right, is held, in many of the states which have adopted the "lien theory" of mortgages,<sup>139</sup> not to be affected by statutes entitling the mortgagor to possession upon default and until sale under the decree of foreclosure.<sup>140</sup>

Both of the conditions mentioned must co-exist,<sup>141</sup> and be alleged and satisfactorily proved; if either the inadequacy of the security<sup>142</sup> or the financial irresponsibility<sup>143</sup> of the person liable for the debt is not shown, the

property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt." These states are Arkansas; California, Code Civ. Proc., § 564; Idaho; Kentucky; Montana; Nebraska, Civ. Code, § 266; New York; North Dakota; Ohio; South Dakota, Comp. Laws, § 5015; Washington; Wyoming.

<sup>138</sup> *Syracuse City Bank v. Tallman*, 31 Barb. 201; *Hollenbeck v. Donnell*, 94 N. Y. 342, 346. "The mortgagor holds the estate in some respects as a trustee for the benefit of the mortgagee": *Schreiber v. Carey*, 48 Wis. 208, 4 N. W. 124.

<sup>139</sup> See Pom. Eq. Jur., § 1188.

<sup>140</sup> See the cases above from Florida, Indiana, Nebraska, Nevada, New York, Texas and Wisconsin; especially *Schreiber v. Carey*, 48 Wis. 208, 4 N. W. 124.

<sup>141</sup> Except in Indiana, Nebraska and South Dakota; see note 137, *supra*.

<sup>142</sup> *Shotwell v. Smith*, 3 Edw. Ch. (N. Y.) 621; *Whitehead v. Wooten*, 43 Miss. 523; *Rogers v. Southern Pine Co.*, 21 Tex. Civ. App. 48, 51 S. W. 26; *Lindsay v. American Mortgage Co.*, 97 Ala. 412, 11 South. 770. In the last case it was said: "It is clear that when lands are the subject of a mortgage security the mortgagee is not entitled to a receiver unless it is made to appear that the preservation of the rents and profits is necessary to the mortgagee's security. If the lands are of sufficient value to secure the debt, the possession of the mortgagee should not be disturbed by the appointment of a receiver. It is incumbent on the mortgagee to show that such necessity exists." But that the appellate court is reluctant to disturb a finding as to the inadequacy of the security, see *Ponder v. Tate*, 96 Ind. 330.

<sup>143</sup> *Myers v. Estell*, 48 Miss. 372; *Warren v. Pitts*, 114 Ala. 65,

application for a receiver of rents and profits must be denied.

§ 1515. (§ 94.) **Same; Rule not Followed in Certain States.**—On the other hand, the courts of a number of states hold that they are prohibited by their statutes, which entitle the mortgagor to the possession of the mortgaged property until sale under the foreclosure decree, from assisting the mortgagee to obtain indirectly, through the agency of a receiver, the benefit of the rents and profits incidental to ownership and possession.<sup>144</sup>

21 South. 494. In the latter case the property had been sold under a judgment against the mortgagor, and the purchaser was in possession and solvent.

<sup>144</sup> **California.**—*Guy v. Ide*, 6 Cal. 99, 65 Am. Dec. 490; but the rule is now changed; see note to last section.

**Iowa.**—*White v. Griggs*, 54 Iowa, 650, 7 N. W. 125; *American Invest. Co. v. Farrar*, 87 Iowa, 437, 54 N. W. 361. See, also, *Callanan v. Shaw*, 19 Iowa, 183.

**Michigan.**—*Wagar v. Stone*, 36 Mich. 364; *Beecher v. Marquette etc. Co.*, 40 Mich. 307; *Hazeltine v. Granger*, 44 Mich. 503, 7 N. W. 74; *Fifth Nat. Bank v. Pierce*, 117 Mich. 376, 75 N. W. 1058; *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. 286, 3 L. R. A. 90 (Michigan decisions held binding on the federal courts sitting in Michigan, since the right of the mortgagor to the rents and profits is a substantial right, and the appointment of a receiver is not a mere question of practice). Where there is an entire failure to show extravagant or inefficient management, or a disposition to let plant depreciate in value, receiver should not be appointed in suit to foreclose mortgage: *Union Trust Co. v. Charlotte General Electric Co.*, 152 Mich. 568, 116 N. W. 379.

**Minnesota.**—*Marshall etc. Bank v. Cady*, 76 Minn. 112, 78 N. W. 978; *National Fire Ins. Co. v. Broadbent*, 77 Minn. 175, 79 N. W. 676.

**South Carolina.**—*Hardin v. Hardin*, 34 S. C. 77, 27 Am. St. Rep. 786, 12 S. E. 936.

**Washington.**—*Norfor v. Busby*, 19 Wash. 450, 53 Pac. 715. Compare *Collins v. Gross*, 51 Wash. 516, 99 Pac. 573.

In *Wagar v. Stone*, 36 Mich. 367, *Marston, J.*, said: "Since the passage of this act, which prevents the mortgagee from obtaining



It is said, however, that the fact that the premises are inadequate security, or that the mortgagor is insolvent, or both combined, might be a very material consideration in passing upon the propriety or necessity of appointing a receiver in order to prevent waste, or for the purpose of preserving the premises.<sup>145</sup>

In New Jersey, a similar result is reached by adherence to the former English doctrine, that the legal mortgagee must appropriate the property to the payment of his debt by means of his legal remedy of ejectment. Inadequacy of the security and insolvency of the mortgagor are not in themselves regarded as sufficient

possession until he has acquired an absolute title to the mortgaged premises, the mortgage binds only the lands. The rents and profits of the land do not enter into or form any part of the security. At the time of giving the security both parties understand that the mortgagor will, and that the mortgagee will not, be entitled to the rents, issues or profits of the mortgaged premises, until the title shall have become absolute upon a foreclosure of the mortgage. Until the happening of this event, the mortgagor has a clear right to the possession and to the income which he may derive therefrom, and the legislature, by the passage of this statute, contemplated that he should have such possession and income to aid him in paying the debt. It would be a novel doctrine to hold that the mortgagee had a right to the profits incident to ownership, and yet that he had neither a legal title or right to possession. The legislature, in depriving him of the means of enforcing possession, intended thereby also to cut off and deprive him of all rights which he could have acquired in case he obtained possession before acquiring an absolute title. To deprive him of this particular remedy, and yet allow him in some other proceeding to, in effect, arrive at the same result, would be but a meaningless proceeding, and would not be securing to the mortgagor those substantial rights which it was the evident intent he should have. We do not overlook the fact that a contrary doctrine has been held elsewhere under a similar statute. We cannot avoid thinking, however, that for us to so hold would be a mere evasion of our statute."

<sup>145</sup> Marshall etc. Bank v. Cady, 76 Minn. 112, 78 N. W. 978; National Fire Ins. Co. v. Broadbent, 77 Minn. 175, 79 N. W. 676.

grounds to warrant the appointment of a receiver in that state.<sup>146</sup>

§ 1516. (§ 95.) **Other Grounds.**—The mortgagee's case may be strengthened by other circumstances in addition to the essential conditions for relief above mentioned. Such circumstances are, the mortgagor's neglect to pay taxes, or to comply with his agreement to keep the premises insured;<sup>147</sup> and where such neglect is shown, the court will not closely scrutinize conflicting evidence as to the value of the mortgaged property, but will be satisfied with less convincing proof than usual of the inadequacy of the security.<sup>148</sup>

<sup>146</sup> *Cortleyeu v. Hatheway*, 11 N. J. Eq. 39, 64 Am. Dec. 478; *Best v. Schermier*, 6 N. J. Eq. 154; *Frisbie v. Bateman*, 24 N. J. Eq. 28; *Horner v. Dey*, 61 N. J. Eq. 554, 49 Atl. 154; *Spear v. Locust Wood Cemetery Co.*, 72 N. J. Eq. 821, 66 Atl. 1068. But see *Land Title & Trust Co. v. Kellogg*, 73 N. J. Eq. 524, 68 Atl. 80, adopting the general rule.

<sup>147</sup> *Shepherd v. Pepper*, 133 U. S. 626, 33 L. Ed. 706, 10 Sup. Ct. 438; *American Nat. Bank v. Northwestern Mut. L. Ins. Co.*, 89 Fed. 610, 32 C. C. A. 275; *Eslava v. Crampton*, 61 Ala. 507; *Jackson v. Hooper*, 107 Ala. 634, 18 South. 254; *Harris v. United States etc. Inv. Co.*, 146 Ind. 265, 45 N. E. 328; *Philadelphia Mortgage & T. Co. v. Oyler*, 61 Neb. 702, 85 N. W. 899; *Finch v. Houghton*, 19 Wis. 150; *Schreiber v. Carey*, 48 Wis. 208, 4 N. W. 124; *Winkler v. Magdeburg*, 100 Wis. 421, 76 N. W. 332. See, also, *Donnelly v. Butts*, 137 Minn. 1, 162 N. W. 674. In Georgia, the mere facts that the property is uninsured and, in the event of fire, that the land would not sell for enough to pay the claim, are not grounds for the appointment of a receiver. It does not constitute "manifest danger of loss or destruction": *Ray v. Carlisle*, 125 Ga. 316, 54 S. E. 119. Nor does the mere failure to pay taxes or insurance furnish any ground for such relief: *Planters' Oil Mill v. Carter*, 140 Ga. 808, 79 S. E. 1120. To the same effect, see *Ferguson v. Dickinson* (Tex. Civ. App.), 138 S. W. 221 (mortgagee may pay and add to his debt); *Eureka Mining, Smelting & Power Co. v. Lewiston Navigation Co.*, 12 Idaho, 472, 86 Pac. 49.

<sup>148</sup> *Eslava v. Crampton*, 61 Ala. 507; *Jackson v. Hooper*, 107 Ala. 634, 18 South. 254; *Winkler v. Magdeburg*, 100 Wis. 421, 76 N. W. 332.

In the group of states mentioned in the last section it is held that the statutes abrogating the common-law theory of the mortgage have not abrogated the power to afford such remedies for the protection of the mortgagee's equitable rights as do not rest upon the doctrine of the legal title or right of possession being in the mortgagee.<sup>149</sup>

§ 1517. (§ 96.) **General Considerations Governing the Appointment.**—A court should not appoint a receiver in a foreclosure action unless the facts establish a case which clearly invokes the exercise of the equitable power of the court to grant that relief; for the right to the rents and profits—in those states at least which have discarded the common-law theory of the mortgage—does not grow directly out of the relation of the parties as a matter of strict right, but is founded upon equitable considerations which address themselves to the sound discretion of the court.<sup>150</sup>

<sup>149</sup> *Lowell v. Doe*, 44 Minn. 144, 46 N. W. 297; *Union Mut. Life Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. 286, 3 L. R. A. 90. In the former case the grounds for the appointment were, in addition to the inadequacy of the security and the insolvency of the mortgagor, non-payment of taxes, probable cancellation of the insurance, and permanent impairment of the value of the property by the cessation of its use for hotel purposes. In the latter case it was held that the mere disuse of a manufacturing plant was not such serious waste as to justify the appointment of a receiver. In South Carolina, the mere non-payment of taxes is not a sufficient ground, where it is not alleged that the security is inadequate, and where the statute provides that the mortgagee may pay the taxes and include the amount in the mortgage debt: *Nathans v. Steinmeyer*, 57 S. C. 386, 35 S. E. 733.

As to the grounds of appointment in New Jersey, see *Cortleyou v. Hatheway*, 11 N. J. Eq. 39, 64 Am. Dec. 478; *Mahon v. Crothers*, 28 N. J. Eq. 567; *Stockman v. Wallis*, 30 N. J. Eq. 449; *Chetwood v. Coffin*, 30 N. J. Eq. 450; *Brasted v. Sutton*, 30 N. J. Eq. 462.

<sup>150</sup> *Sales v. Lusk*, 60 Wis. 490, 19 N. W. 362, citing *Syracuse City Bank v. Tallman*, 31 Barb. 201, 208; *Rider v. Bagley*, 84 N. Y. 461; *Schreiber v. Carey*, 48 Wis. 208, 4 N. W. 124.

In an often cited case the rule is laid down in a negative form, that "a receiver in mortgage cases will never be appointed unless it is clearly shown that the security is inadequate, or that the rents and profits have been expressly pledged for the debt, or that there is imminent danger of waste, removal, or destruction of the property. There must be some strong special reason for it."<sup>151</sup> The substance of this rule has been embodied in the statutes of many of the states in a positive form.<sup>152</sup>

Receivers should not be appointed simply because an occasion for their appointment is anticipated or may in the future arise. The occasion must exist when the appointment is made.<sup>153</sup> The insufficiency of the security on which the appointment is grounded must be an insufficiency existing at the time when the application is made or acted on, not merely one that may arise at some future date.<sup>154</sup>

§ 1518. (§ 97.) **Effect of Stipulations in the Mortgage.**—That a mortgage contains a clause mortgaging the rents and profits as an additional security for the debt does not require the court to appoint a receiver in an action to foreclose the mortgage. Unless the land is inadequate security the appointment of a receiver is an unnecessary annoyance and hardship.<sup>155</sup> It seems, however, that such a clause may cause the court to dispense

<sup>151</sup> *Morrison v. Buckner*, Hempst. 442, Fed. Cas. No. 9844. It must appear that the property is not worth the debt, and that there is real danger of material injury. It is not enough to allege that the property is "probably insufficient": *Title Ins. & Trust Co. v. California Development Co.*, 164 Cal. 58, 127 Pac. 502.

<sup>152</sup> See *ante*, § 93, note 137.

<sup>153</sup> *Chaldron Banking Co. v. Mahoney*, 43 Neb. 214, 61 N. W. 594.

<sup>154</sup> *Laune v. Hauser*, 58 Neb. 663, 79 N. W. 555.

<sup>155</sup> *Brick v. Hornbeck*, 19 Misc. Rep. (N. Y.) 218, 43 N. Y. Supp. 301; *Aetna Life Ins. Co. v. Broecker*, 166 Ind. 576, 77 N. E. 1092.



with proof of the mortgagor's insolvency.<sup>156</sup> In Iowa a difference between the right to the appointment of a receiver under a mortgage which pledges rents and profits, and under one that does not, is recognized, and the appointment of a receiver in the former case, on proof of the mortgagor's insolvency and the inadequacy of the security, is said to be a matter of course;<sup>157</sup> but in a later case, where the mortgage gave the mortgagee the right of possession in case of default on the part of the mortgagor, and pledged the rents and profits, such pledge was construed to take effect only in case possession should be taken by the mortgagee, and the appointment of a receiver was held to be unauthorized.<sup>158</sup>

Stipulations in the mortgage providing that the mortgagee may have a receiver of rents and profits on default by the mortgagor have been frequently considered by the inferior courts of New York. It is there held that such a stipulation gives the mortgagee no absolute right to the appointment of a receiver, and will not be enforced when, under all the circumstances, it is inequitable to take the property out of the owner's hands pending the action of foreclosure; but, at the same time, such a clause is entitled to weight, and is to be considered, among other features of the case, in determining the propriety of making such appointment.<sup>159</sup> It will not be enforced when the security is ample.<sup>160</sup> In Iowa,

<sup>156</sup> *Butler v. Frazer* (Sup. Ct.), 57 N. Y. Supp. 900.

<sup>157</sup> *Des Moines Gas Co. v. West*, 44 Iowa, 25.

<sup>158</sup> *Swan v. Mitchell*, 82 Iowa, 307, 47 N. W. 1042, explained in *American Investment Co. v. Farrar*, 87 Iowa, 437, 54 N. W. 361.

<sup>159</sup> *C. B. Keogh Mfg. Co. v. Whiston*, 14 N. Y. Supp. 344 (approved in *Bagley v. Illinois Trust & Sav. Bank*, 199 Ill. 76, 64 N. E. 1085); *Eidlitz v. Lancaster*, 40 App. Div. 446, 59 N. Y. Supp. 54; *Fletcher v. Krupp*, 35 App. Div. 586, 55 N. Y. Supp. 146. Apparently the same rule applies in Indiana: *Aetna Life Ins. Co. v. Broeker*, 166 Ind. 576, 77 N. E. 1092.

<sup>160</sup> *Degener v. Stiles*, 53 Hun, 637, 6 N. Y. Supp. 474; and see *Jarvis v. McQuaide*, 24 Misc. Rep. 17, 53 N. Y. Supp. 97; *United*

it is held that the stipulation is a controlling fact in the case, and will be enforced as the parties intended, even when there is no showing of the insolvency of the party personally liable for the mortgage debt, and the inadequacy of the security is in dispute;<sup>161</sup> but the mortgagee is not entitled to a receiver on an application made at the time of taking judgment, if the agreement therefor contemplated such appointment at the commencement of the action.<sup>162</sup> In Illinois, too, a pledge of the rents and profits, and a stipulation for a receiver to collect and apply them to the payment of the debt and costs, authorizes the appointment of a receiver, without regard to the solvency of the mortgagor; the authority arises from the contract, the express words giving a lien on the rents and profits.<sup>163</sup>

*States Life Ins. Co. v. Ettinger*, 32 Misc. Rep. 378, 66 N. Y. Supp. 1. Where the plaintiff's affidavit showed that default had been made in the payment of insurance, taxes, and interest, and stated that he did not believe that the premises afforded adequate security, the stipulation for the appointment of a receiver was properly enforced: *Fletcher v. Krupp*, 35 App. Div. 586, 55 N. Y. Supp. 146.

<sup>161</sup> "We think it is not to be seriously questioned that the court could, by a stipulation of the parties, place the property in the hands of a receiver, to be held under its direction. And it seems to us equally clear that the parties could, by contract, when the property was pledged on security, settle the conditions on which it should be preserved and applied. The parties, in making the contract, seem to have been in such doubt, as to the sufficiency of the property as security, as to provide that if proceedings to foreclose should be commenced, a receiver should take the rents and profits, and apply them, and otherwise preserve the property, under the direction of the court. We see nothing in such a contract that is unconscionable or against public policy; nor do we see why it should not be enforced as the parties intended": *Hubbell v. Avenue Investment Co.*, 97 Iowa, 135, 66 N. W. 85. As to the rule in Pennsylvania, see *Galey v. Guffey*, 248 Pa. St. 523, 94 Atl. 238.

<sup>162</sup> *Paine v. McElroy*, 73 Iowa, 81, 34 N. W. 615.

<sup>163</sup> *First Nat. Bank v. Illinois Steel Co.*, 174 Ill. 140, 51 N. E. 200; *Bagley v. Illinois Trust & Sav. Bank*, 199 Ill. 76, 64 N. E. 1085.

In California, on the other hand, it is held that where a court has no authority under the law to appoint a receiver, such authority cannot be conferred by consent or stipulation of the parties; in such case consent of parties cannot confer jurisdiction upon a court, or impose upon it the duty of taking care of and disposing of the property.<sup>164</sup> In Michigan, also, and in Oregon, such stipulations are held to be contrary to the public policy of those states as expressed in the statutes which secure a mortgagor in his possession until a foreclosure has become absolute.<sup>165</sup>

§ 1519. (§ 98.) **Time of the Appointment.**—A receiver will not generally be appointed when the mortgage debt is not yet due.<sup>166</sup> When the mortgage debt is only partly due, and the usual grounds for the appointment

<sup>164</sup> "It might as well be said that in a suit upon a promissory note, or upon any simple contract for the payment of money, a stipulation in the instrument by which the debt was evidenced that the court might appoint a receiver upon suit brought would give jurisdiction to the court to appoint such receiver; or that there could be a specific performance of a contract in any kind of a case because the parties had stipulated for a decree of specific performance": *Baker v. Varney*, 129 Cal. 564, 79 **Am. St. Rep.** 140, 62 Pac. 100. The order appointing the receiver in this case, based solely upon the stipulation of the parties in the mortgage, was held to be void and subject to collateral attack. See, also, *Scott v. Hotchkiss*, 115 Cal. 94, 47 Pac. 45.

<sup>165</sup> *Hazeltine v. Granger*, 44 Mich. 503, 7 N. W. 74; *Couper v. Shirley*, 75 Fed. 168, 21 C. C. A. 288, affirming s. c., *sub nom.* *Thompson v. Shirley*, 69 Fed. 484.

<sup>166</sup> *Bank of Ogdensburg v. Arnold*, 5 Paige, 38; *Mayfield v. Wright* (Ky.), 54 S. W. 864. In the case of *In re London Pressed Hinge Co., Ltd.*, [1905] 1 Ch. 576, it was held that debenture holders who have a floating security upon the undertaking and all property, present and future, may have a receiver appointed if the security is in jeopardy, although there has been no default. In this case the property was in jeopardy because of the issuance of an execution upon a judgment.

of a receiver on foreclosure proceedings exist, a receiver of the whole premises may be appointed, provided that the premises are indivisible, or so circumstanced that they must inevitably be sold in one parcel;<sup>167</sup> but where the mortgaged premises are divided into two parcels nearly equal, which can be sold separately without injury to the parties interested, and there is no pledge or specific lien by which the accruing rents of that portion of the premises not yet liable to be sold are constituted a security to the mortgagee for that portion of the mortgage not due, the latter is not entitled to a receivership for the protection of the unmatured portion of the debt, or of that portion of the premises as to which his right to sell has not yet accrued, but only as to one of the parcels.<sup>168</sup>

The question of the appointment of a receiver after the decree of foreclosure, or after the sale under the decree and during the statutory period of redemption, has arisen in a number of the states, and has received very diverse answers. It may be stated as a general rule, that a receiver may be appointed, after judgment and before sale, especially when the sale is delayed for some considerable length of time thereafter;<sup>169</sup> and the denial

<sup>167</sup> Quincy v. Cheeseman, 4 Sand. Ch. (N. Y.) 405; Hollenbeck v. Donnell, 94 N. Y. 342; Buchanan v. Berkshire etc. Ins. Co., 96 Ind. 510, 527 *et seq.* See, also, Handman v. Volk, 30 Ky. Law Rep: 818, 99 S. W. 660.

<sup>168</sup> Hollenbeck v. Donnell, 94 N. Y. 342.

<sup>169</sup> Schreiber v. Carey, 48 Wis. 208, 219, 4 N. W. 124, citing Bank v. Tallman, 31 Barb. 201; Smith v. Tiffany, 13 Hun, 671; Astor v. Turner, 11 Paige, 436, 43 Am. Dec. 766; Hackett v. Snow, 10 Irish Eq. 220; Cooke v. Gwyn, 3 Atk. 690; Thomas v. Davies, 11 Beav. 29. See, also, Brinkman v. Ritzinger, 82 Ind. 358. In the first case the court say: "We think there would be great propriety in many cases in delaying the appointment until after the rights of the parties are fixed by the judgment, and especially so where there is a dispute as to the amount actually due upon the mortgage, or where there is a question as to what real estate the mortgage covers. In



of a receiver in foreclosure before judgment is not a bar to an application for a receiver after judgment.<sup>170</sup> In Nebraska, however, it is held that a receiver is unnecessary, unless an appeal is taken, as the mortgagee may proceed to sell the property in twenty days after the final decree in foreclosure.<sup>171</sup>

In several states the owner of the equity of redemption has a right to the possession of the premises until the expiration of a specified time—usually a year—from the date of the foreclosure sale. It is held in Iowa and in California that this right to the possession forbids the appointment of a receiver on the application of the mortgagee who has purchased the premises at the foreclosure sale.<sup>172</sup> In Illinois and Indiana, on the other

cases of this kind great injustice might be done by the appointment of a receiver before judgment, whereas after judgment, when the amount of the mortgage claim is fixed, and the property subjected to the payment of the same ascertained, the court is in a much more advantageous position for determining whether equity requires the appointment of a receiver or not." The plaintiff's laches may influence the court to deny his application: *Cone v. Combs*, 18 Fed. 576, 5 McCrary, 651. When the right to a receiver depended on a stipulation for appointment on commencement of foreclosure, the mortgagee is not entitled to a receiver at the time of taking judgment: *Paine v. McElroy*, 73 Iowa, 81, 34 N. W. 615. In England, the mortgagee cannot have a receiver after a judgment for foreclosure absolute, the action being at an end; "the plaintiff is, in fact, asking for a receiver order against himself, in respect of the interest which is all vested in him": *Wills v. Luff*, L. R. 38 Ch. D. 197.

<sup>170</sup> *Nash v. Meggett*, 89 Wis. 486, 61 N. W. 283.

<sup>171</sup> *Chadron Banking Co. v. Mahoney*, 43 Neb. 214, 61 N. W. 594. That a receiver is proper after the taking of an appeal, see *Eastman v. Cain*, 45 Neb. 48, 63 N. W. 127; *Philadelphia Mortgage etc. Co. v. Goos*, 47 Neb. 804, 66 N. W. 843.

<sup>172</sup> *White v. Griggs*, 54 Iowa, 650, 7 N. W. 125; *West v. Conant*, 100 Cal. 231, 34 Pac. 705. In the latter case it is held that a statute which entitles the purchaser to receive from the tenant in possession the rents of the property sold on execution, or the value of the use and occupation, during the period for redemption, does not

hand, the question of appointment after sale appears to be governed by much the same considerations as if the application were made at the commencement of the suit. If the property is bid in at the sale for the full amount of the debt, interest and costs, there is no occasion for the appointment or continuance of a receiver.<sup>173</sup> In Illinois, where there is a deficiency decree, the appointment is made on the same grounds as before the decree—viz., the insufficiency of the security and the insolvency of the mortgagor,<sup>174</sup> or a stipulation in the mortgage for

warrant the appointment of a receiver to oust the judgment debtor. Compare the case of *Hill v. Taylor*, 22 Cal. 191, where a receiver was appointed on behalf of the purchaser on foreclosure of the mortgagor's part interest in a gold mine, the mortgagor being insolvent, working the mine and refusing to pay the purchaser his share of the dividends, with a likelihood that the mine would be exhausted before the expiration of the redemption period. In Iowa, a stipulation in the mortgage for the appointment of a receiver during the period for redemption is controlling upon the court: *Hubbell v. Avenue Inv. Co.*, 97 Iowa, 135, 66 N. W. 85.

<sup>173</sup> *Bogardus v. Moses*, 181 Ill. 554, 54 N. E. 984; *Davis v. Dale*, 150 Ill. 239, 37 N. E. 215; *World Bldg. etc. Co. v. Marlin*, 151 Ind. 630, 52 N. E. 198; except where he is appointed or continued for the benefit of a second mortgagee, who is a party to the suit, the amount of the bid being insufficient to satisfy both mortgages: *Roach v. Glos*, 181 Ill. 440, 54 N. E. 1022.

<sup>174</sup> *First Nat. Bank v. Illinois Steel Co.*, 174 Ill. 140, 51 N. E. 200; *Roach v. Glos*, 181 Ill. 440, 54 N. E. 1022; *Christie v. Burns*, 83 Ill. App. 514; *Prussing v. Lancaster*, 234 Ill. 462, 84 N. E. 1062; *Haas v. Chicago Building Society*, 89 Ill. 498, 506. In the last case it was said: "The necessity for the appropriation of the rents to the payment of the mortgage debt may frequently not appear until after both decree and sale. The amount due is often matter of dispute, and can only be determined by the decree, and what the property will sell for can only be ascertained with certainty from the result of the judicial sale. If an appropriation of the rents on the indebtedness is justified by the surrounding facts before sale, we see no good reason why the same and more weighty facts existing after sale may not warrant a similar procedure. The security, plainly, is not exhausted by the sale, for there is a fund included in it which is

such appointment during the period of redemption.<sup>175</sup> In Indiana, similarly, it is held that the redemption statute postpones the time for the ending of the equity of redemption, and gives a year's additional existence to the mortgage lien; and, notwithstanding that the redemption statute is silent as to the judgment debtor's liability for the rents and profits during the year of his occupancy, the mortgage creditor, who has purchased at the foreclosure sale, may, in case of the inadequacy of the security and the insolvency of the debtor, have a receiver to collect and hold the rents and profits, during the year allowed for redemption, of such parts of the land as are in the possession of the mortgagor's tenants.<sup>176</sup>

§ 1520. (§ 99.) **Effect of Assignment of the Mortgaged Premises; of Administration Thereof; and of Homestead Right Therein.**—It has been held that if the mortgagee is entitled to a receiver, his right thereto is not affected by the fact that the mortgagor has made an assignment of the property for the benefit of creditors.<sup>177</sup>

secondarily liable. It is true, the mortgagee has elected to foreclose and sell; but then he has pursued that remedy to the end, and without getting satisfaction of his debt, and he may avail himself of any just and equitable means of collecting the residue."

<sup>175</sup> First Nat. Bank v. Illinois Steel Co., 174 Ill. 140, 51 N. E. 200; Oakford v. Robinson, 48 Ill. App. 270.

<sup>176</sup> Merritt v. Gibson, 129 Ind. 155, 15 L. R. A. 277, 27 N. E. 136, examining Connelly v. Dickson, 76 Ind. 444; Travelers' Ins. Co. v. Brouse, 83 Ind. 62; Sheeks v. Klotz, 84 Ind. 471, and other Indiana cases decided under previous statutes. The principal case contains an interesting and very able discussion of the distinction between an execution sale, and a sale based on a decree foreclosing a mortgage, of the purpose of the redemption statutes, and of their effect upon the right to a receiver.

<sup>177</sup> Sweet & Clark Co. v. Union Nat. Bank, 149 Ind. 305, 49 N. E. 159; Bristow v. Home Bldg. Co., 91 Va. 18, 20 S. E. 947; and see

It has been held that the administrator of a deceased mortgagor is entitled to no exception in his favor;<sup>178</sup> but in Missouri, where an administrator has taken possession of the intestate's land under an order of the probate court, and his bond secures the faithful application of the rents, the necessity for the appointment of a receiver does not exist, since the property is already *in custodia legis*.<sup>179</sup>

Whether a homestead may ever be placed in the possession of a receiver at the commencement of a suit to foreclose a mortgage thereon is also a question on which the courts are at variance. The question has received a negative answer in Nebraska;<sup>180</sup> while in Minnesota, although in such a case the court should ordinarily require a somewhat stronger showing, yet, when the debtor mortgages his homestead it is held that he subjects the property to all the legal and equitable rights of a mortgagee, among which is the right to have a receiver

Post *v. Dorr*, 4 Edw. Ch. 412. *Contra*, *Seignious v. Pate*, 32 S. C. 134, 17 Am. St. Rep. 846, 10 S. E. 880; but the grounds alleged for the appointment in the last case were soon after declared by the same court to be insufficient: *Hardin v. Hardin*, 34 S. C. 77, 27 Am. St. Rep. 794, 12 S. E. 936.

<sup>178</sup> *Jacobs v. Gibson*, 9 Neb. 380, 2 N. W. 893.

<sup>179</sup> *St. Louis Nat. Bank v. Field*, 156 Mo. 306, 56 S. W. 1095.

<sup>180</sup> "We cannot read into the law the incidental remedies which accompany mortgage liens ordinarily or in general. Any invasion of the homestead right will not be extended beyond the fair, direct import of the enactment by which it may be sought to make it less absolute": *Chadron L. & B. Ass'n v. Smith*, 58 Neb. 469, 78 N. W. 938; *Laune v. Hauser*, 58 Neb. 663, 79 N. W. 555. See, also, *Hoge v. Hollister*, 8 Baxt. (Tenn.) 533; *Nash v. Meggett*, 89 Wis. 486, 61 N. W. 283 (an order excepting the homestead is proper). It has been held in Nebraska, however, that where the homestead right does not extend to the whole property, and there is no difficulty in separating it, a receiver may be appointed to take charge of the excess: *Sanford v. Anderson*, 69 Neb. 249, 95 N. W. 632.



appointed when necessary to prevent waste or preserve the property.<sup>181</sup>

§ 1521. (§ 100.) **To What the Receiver's Title Extends.**—The receiver's title to the rents extends to those, and those only, which accrue after his appointment, or such as have theretofore accrued but have not yet come to the hands of the owner of the equity of redemption or his assignee.<sup>182</sup> He has no title to crops sold on execution against the mortgagor before his appointment.<sup>183</sup> In California it is held that he cannot be directed before the decree of foreclosure to take possession of the crops of the mortgagor upon which the mortgagee has no lien previous to the appointment.<sup>184</sup>

In an action to foreclose a mortgage which covers only the interests of a lessee, it is not competent for the court

<sup>181</sup> *Marshall etc. Bank v. Cady*, 75 Minn. 241, 77 N. W. 831; *Lowell v. Doe*, 44 Minn. 144, 46 N. W. 297.

<sup>182</sup> *Lofsky v. Manjer*, 3 Sand. Ch. (N. Y.) 69; *Rider v. Bagley*, 84 N. Y. 461; *Wyckoff v. Scofield*, 98 N. Y. 475; *Lawrence v. Conlon*, 26 Misc. Rep. 44, 56 N. Y. Supp. 345; *Alabama Nat. Bank v. Mary Lee Coal etc. Co.*, 108 Ala. 288, 19 South. 404; but see *Bank of Woodland v. Heron*, 120 Cal. 614, 54 Pac. 1006. The mortgagor cannot evade the rule by leasing the premises *pendente lite* for one or more years, and taking payment of the rent in advance; the lessee, in such case, must either surrender or attorn to the receiver, or pay him a reasonable rent for the use of the premises from the date of the appointment: *Gaynor v. Blewett*, 82 Wis. 313, 33 Am. St. Rep. 47, 52 N. W. 313. His lien on the rents is superior to the rights of the mortgagor's assignee in bankruptcy: *Post v. Dorr*, 4 Edw. Ch. (N. Y.) 412. The propriety of the appointment of the receiver cannot be questioned, in an action by him to recover rents, by one who was a party to the suit in which the receiver was appointed: *Goodhue v. Daniels*, 54 Iowa, 19, 6 N. W. 129.

<sup>183</sup> *Favorite v. Deardoff*, 84 Ind. 555.

<sup>184</sup> *Locke v. Klunker*, 123 Cal. 231, 55 Pac. 993; *Bank of Woodland v. Heron*, 120 Cal. 614, 52 Pac. 1006; *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484.

to appoint a receiver who should represent not only that interest, but also that of the lessor.<sup>185</sup>

§ 1522. (§ 101.) **Receiver on Application of Junior Mortgagee.**—Where a prior mortgagee is in possession of the mortgaged premises, the court will not, upon the application of a subsequent mortgagee, appoint a receiver, to the prejudice of such prior mortgagee, while anything remains due on his mortgage;<sup>186</sup> but to justify the court's refusal on the ground of the prior mortgagee's possession it must clearly appear that his mortgage has not been fully paid.<sup>187</sup> In case the prior mortgagee has not taken possession, it is well settled that, on a proper showing, the court may appoint a receiver on behalf of a junior mortgagee, without the consent of the prior encumbrancer.<sup>188</sup>

The usual grounds for the appointment are, the insolvency of the person liable for the debt, and the insufficiency of the property to secure the plaintiff's mortgage and those prior to it;<sup>189</sup> or in jurisdictions where these

185 *Woodward v. Winehill*, 14 Wash. 394, 44 Pac. 860.

186 See 27 *Am. St. Rep.* 798; *Berney v. Sewell*, 1 Jacob & W. 647, per Lord Eldon; *Rowe v. Wood*, 2 Jacob & W. 553; *Codrington v. Parker*, 16 Ves. 469; *Hiles v. Moore*, 15 Beav. 175; *Trenton Banking Co. v. Woodruff*, 3 N. J. Eq. 210.

187 *Codrington v. Parker*, 16 Ves. 469; *Hiles v. Moore*, 15 Beav. 175.

188 *Bryan v. Cormick*, 1 Cox, 422; *Dalmer v. Dashwood*, 2 Cox, 378; and cases in the following notes.

189 *Roach v. Glos*, 181 Ill. 440, 54 N. E. 1022; *Buchanan v. Berkshire etc. Ins. Co.*, 96 Ind. 510; *Pearson v. Kendrick*, 74 Miss. 235, 21 South. 37 (the application of a junior encumbrancer said to stand upon much more favorable grounds than that of first mortgagee); *Ecklund v. Willis*, 42 Neb. 737, 60 N. W. 1026; *Browning v. Stacey*, 52 App. Div. 626, 65 N. Y. Supp. 203; *Fletcher v. Krupp*, 35 App. Div. 586, 55 N. Y. Supp. 146. In the first case cited, a receiver appointed at the instance of a first mortgagee, after a sale which realized only enough to satisfy the first mortgage, was continued for

are not recognized as sufficient grounds, the additional fact that the owner, who is in possession, refuses to keep down the interest on the first mortgage;<sup>190</sup> or, in New Jersey, the facts that the buildings upon the mortgaged premises have been burned down, and the property generally has been permitted to go to waste, through the fault of the person in possession, or that fraud or bad faith is shown by the misappropriation of the rents and profits.<sup>191</sup>

§ 1523. (§ 102.) **Same; Right to Rents as Between Prior and Junior Mortgagees.**—It is an established rule that a junior mortgagee, who succeeds in getting a receiver appointed, becomes thereby entitled, as against a prior mortgagee, to the rents collected during the appointment, until such prior mortgagee obtains the appointment of a receiver, or the extension of the existing receivership, for his own benefit. This is on the principle that a mortgagee acquires a specific lien upon the rents by obtaining the appointment of a receiver of them, and if he be a second or third encumbrancer, the court will give him the benefit of his superior diligence over his senior in respect to the rents which accrued during the time that the elder mortgagee took no measures

the collection of rents and profits during the year of redemption, for the benefit of the second mortgagee, and against a purchaser of the equity of redemption.

<sup>190</sup> *Haugan v. Netland*, 51 Minn. 552, 53 N. W. 873; cf. *Myton v. Davenport*, 51 Iowa, 583, 2 N. W. 462. In Wisconsin, it was held, in *Sales v. Lusk*, 60 Wis. 490, 19 N. W. 362, where the security had not decreased since the mortgage was given, and there was no evidence that the property was being mismanaged by the mortgagor's assignees in possession, that although the mortgagors were non-resident and insolvent, a receiver should not have been appointed upon the application of a plaintiff who sought thereby to intercept the rents and profits and divert them to his own use to the prejudice of the prior mortgagees.

<sup>191</sup> *Cortleyeu v. Hatheway*, 11 N. J. Eq. 39, 64 Am. Dec. 478.

to have the receivership extended to his suit and for his benefit.<sup>192</sup> But this exclusive right of a junior mortgagee to the income of a receivership created upon his application is limited to the cases in which either (1) the senior mortgagee was not a party to the action, or, (2) the senior mortgagee being a party, the receiver was appointed for the benefit of the junior mortgagee and the receivership was not extended to the other liens. If (3) the senior mortgagee was a party to the action, and the appointment was general in its nature, the respective rights to the rents are controlled by the priority of the liens.<sup>193</sup>

<sup>192</sup> *Howell v. Ripley*, 10 Paige, 43; *Post v. Dorr*, 4 Edw. Ch. 412; *Ranney v. Peyser*, 83 N. Y. 1; *Washington Life Ins. Co. v. Fleischauer*, 10 Hun, 117; *Sanders v. Lord Lisle*, 4 Irish Eq. 43; *Bank v. Barry*, 3 Irish Eq. 443; *Lanauze v. Railway Co.*, 3 Irish Eq. 454; *Nesbit v. Wood*, 22 Ky. Law Rep. 127, 56 S. W. 714; *Goddard v. Clarke*, 81 Neb. 373, 116 N. W. 41. See, also, *Ruprecht v. Muhlke*, 225 Ill. 188, 80 N. E. 106; *Longdock Mills & Elevator v. Alpen*, 82 N. J. Eq. 190, 88 Atl. 623. The prior mortgagee may either have an additional receiver appointed for his own benefit, thus displacing the rights of the receiver previously appointed to the further receipt of rents: *Holland Trust Co. v. Con. Gas etc. Co.*, 85 Hun, 455, 32 N. Y. Supp. 830; *Hennessy v. Sweeney*, 57 N. Y. Supp. 901; *Goddard v. Clarke*, 81 Neb. 373, 116 N. W. 41; or the existing receivership may be extended, on the application of the prior mortgagee: *Putnam v. McAllister* (Sup. Ct.), 57 N. Y. Supp. 404; *Anderson v. Matthews*, 8 Wyo. 513, 58 Pac. 898.

In Virginia, the general rule is not followed, but the receiver is regarded as appointed in behalf of all the parties, and must account according to the priorities of the different encumbrances: *Beverley v. Brooke*, 4 Gratt. 187.

<sup>193</sup> *Miltengerger v. Railroad Co.*, 106 U. S. 286, 307, 27 L. Ed. 117, 1 Sup. Ct. 140, 158; *Williamson v. Gerlach*, 41 Ohio St. 692; *Bank v. Tilden*, 66 Hun, 635, 22 N. Y. Supp. 11; *Cross v. Will Co. Nat. Bank*, 177 Ill. 33, 52 N. E. 322. See, also, *New Jersey Title G. & T. Co. v. Cone*, 64 N. J. Eq. 45, 53 Atl. 97. *Contra*, that it is immaterial whether the appointment was general: *Nesbit v. Wood*, 22 Ky. Law Rep. 127, 56 S. W. 714.



§ 1524. (§ 103.) **Receivers in Behalf of Others Than Mortgagees.**—A receiver will not be appointed, on the application of a mortgagor, against a mortgagee who is in possession by virtue of an agreement with a mortgagor, where the mortgagee practiced no fraud in obtaining possession, and it is undisputed that the mortgagor is indebted to the mortgagee. Waste, alone, by the mortgagee in possession is not a sufficient ground for a receiver in such a case.<sup>194</sup>

The right to have a receiver appointed, in aid of proceedings to foreclose a mortgage, does not rest exclusively with the mortgagee, or his assignee, but may be exercised by any other party to the proceeding, when necessary to protect his interest in the subject-matter of the litigation.<sup>195</sup>

§ 1525. (§ 104.) **Chattel Mortgages.**—A receiver cannot be appointed in behalf of a chattel mortgagee except

<sup>194</sup> *Brundage v. Home etc. Loan Ass'n*, 11 Wash. 277, 39 Pac. 666. But in Oklahoma, if it appears that the mortgagee is irresponsible, or that rents and profits will be lost or will be in danger of loss, or that the mortgagee is committing waste upon or materially injuring the premises, a receiver may be appointed: *Harding v. Garber*, 20 Okl. 11, 93 Pac. 539. For receivers in behalf of judgment creditors of the mortgagor, see *post*, § 107.

<sup>195</sup> *Main v. Ginthert*, 92 Ind. 180. In this case a wife joined her husband in the execution of a mortgage of his lands to secure his debt; and her inchoate interest afterward becoming absolute by reason of a sheriff's sale, according to a statute of the state, it was her right, upon foreclosure of the mortgage, to have the other two-thirds of the land exhausted before resort should be had to her interest. Held, if the two-thirds were insufficient in value to satisfy the mortgage, and her husband was insolvent, she was entitled, pending the suit, to have a receiver appointed of the rents and profits of the two-thirds, so that, if necessary, they might be applied upon the debt. In *Philadelphia Mortgage & T. Co. v. Oyler*, 61 Neb. 702, 85 N. W. 899, it was held that a receiver might be appointed on the application of a defendant who was liable for a deficiency judgment, on proper grounds being shown.

in a suit to foreclose the mortgage.<sup>196</sup> A receiver was refused on foreclosure of a chattel mortgage where it appeared *prima facie* that the mortgagor was solvent;<sup>197</sup> and where it appeared that, although the mortgagor was insolvent, the security was not being impaired, whether any amount was due was controverted, and the appointment of a receiver would absolutely destroy the value of the property as a newspaper.<sup>198</sup> Danger of the loss or impairment of the mortgaged property is a common ground for a receiver.<sup>199</sup> Attachment and sale thereunder by the unsecured creditors of the mortgaged per-

<sup>196</sup> *State v. Union Nat. Bank*, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585. A receiver should not be appointed to take the property out of the hands of a chattel mortgagee, to whom it had been delivered for foreclosure, unless insolvency, bad faith, or mismanagement on his part, or some other recognized ground for equitable interference, is shown: *Stone Co. v. McLamb & Co.*, 153 N. C. 378, 69 S. E. 281.

<sup>197</sup> *Stillwell-Bierce etc. Co. v. Williamston etc. Co.*, 80 Fed. 68. In *Mannos v. Bishop-Babcock-Becker Co.*, 181 Ind. 343, 104 N. E. 579, it was held that mere allegations that the property is worth much less than the amount of the mortgage, and that its value will be somewhat impaired by use pending suit will not warrant the appointment of a receiver where there is no showing that defendant is insolvent or that the property is about to be removed from the jurisdiction.

<sup>198</sup> *Whitehead v. Hale*, 118 N. C. 601, 24 S. E. 360. In *Brown v. Erb-Harper-Rigney Co.*, 48 Mont. 17, 133 Pac. 691, it appeared that economy in administration would be effected by leaving the property with the mortgagor, and a receiver was not appointed.

<sup>199</sup> *Valley Nat. Bank v. H. B. Claffin Co.*, 108 Iowa, 504, 79 N. W. 279 (under the Iowa statute concerning receivers); *Maish v. Bird*, 59 Iowa, 307, 13 N. W. 298 (same); *Logan v. Slade*, 28 Fla. 699, 10 South. 25. A receiver is properly appointed when it is shown that the security is inadequate, the mortgagor is insolvent, the security has become impaired, and there is no defense to the action: *Euphrat v. Morrison*, 39 Wash. 311, 81 Pac. 695. But the mere fact that the mortgaged property is a steamboat plying between states is no ground for a receivership: *Eureka Mining, Smelting & Power Co. v. Lewiston Navigation Co.*, 12 Idaho, 472, 86 Pac. 49.

sonalty does not defeat the right of the mortgagee to a receiver of the property;<sup>200</sup> and where a chattel mortgagee filed his bill to foreclose, and an attaching creditor of a person not the mortgagor seized upon the same chattels, and by an auditor offered them for sale, the court not only restrained the attaching creditor from selling, but also appointed a receiver with authority to make a sale, in order to avoid a multiplicity of suits and to preserve the value of the property until the rights of the parties could be determined.<sup>201</sup>

§ 1526. (§ 105.) (4) **Suits to Enforce Equitable Liens; Statutory Liens.**—Receivers may be appointed in suits to enforce equitable liens under circumstances similar to those in which they may be appointed in foreclosing mortgages.<sup>202</sup> It has been held, however, that the plaintiff in an action to foreclose a mechanic's lien has no interest in the property, like that of a mortgagee, which entitles him to a receiver of the rents and profits *pendente lite*, in the absence of statutory authority for the appointment.<sup>203</sup> On the other hand, it has been de-

<sup>200</sup> *Cooper v. Berney Nat. Bank*, 99 Ala. 119, 11 South. 760.

<sup>201</sup> *Wiedemann v. Sann* (N. J. Eq.), 31 Atl. 211. See, also, *Crow v. Red River County Bank*, 52 Tex. 362.

<sup>202</sup> Pom. Eq. Jur., § 1334; *Price v. Dowdy*, 34 Ark. 285 (inadequacy of the security and insolvency of the mortgagor). The text is quoted and applied in *Meridian Oil Co. v. Randolph*, 26 Okl. 634, 110 Pac. 722. Receiver to protect rent charge: *Pritchard v. Fleetwood*, 1 Mer. 54. Pending a suit to subject a debtor's real estate to the payment of liens upon it, the court may sequester the rents and profits of such real estate, and appoint a receiver for that purpose, whenever it appears that the debtor is insolvent: *Ogden v. Chalfant*, 32 W. Va. 559, 9 S. E. 879; and see *Dunlap v. Hedges*, 35 W. Va. 287, 13 S. E. 656.

<sup>203</sup> *Meyer v. Seebald*, 11 Abb. Pr., N. S., 326, note; *Stone v. Tyler*, 173 Ill. 147, 50 N. E. 688; *contra*, *Webb v. Van Zandt*, 16 Abb. Pr. 314. By the amendments of 1895 to the mechanic's lien law of Illinois, § 12 (Laws 1895, p. 231), a receiver is allowed in such cases,

cided that in an action to enforce a statutory lien for machinery furnished to a steamboat, in the absence of special provisions regulating the proceedings, the full equity powers of the court may be invoked, and a receiver appointed to take charge of the property pending the proceedings;<sup>204</sup> and the same is true of an action to enforce a statutory lien of a laborer on an oil-well.<sup>205</sup>

§ 1527. (§ 106.) **Judgment Creditors' Suits: In General.**—It has been held, in many cases, that in a judgment creditor's suit, on the return of the execution unsatisfied, it is almost a matter of course to appoint a receiver to collect and preserve the judgment debtor's property pending the litigation.<sup>206</sup> If the debtor has

"for the same causes, and for the same purposes, as in cases of foreclosure of mortgages." In *Northland Pine Co. v. Melin Bros.*, 136 Minn. 236, 161 N. W. 407, it is said that a receiver may be appointed in an action to enforce a mechanic's lien when necessary for the preservation of the property. A sufficient showing was not made to authorize the appointment. See, also, *Pacific Coast Pipe Co. v. Conrad City Water Co.*, 245 Fed. 846, 158 C. C. A. 186.

<sup>204</sup> *Washington Iron Works Co. v. Jensen*, 3 Wash. 584, 28 Pac. 1019; *Summers Fiber Co. v. Walker*, 33 Ky. Law Rep. 153, 109 S. W. 883.

<sup>205</sup> *Gallagher v. Kearns*, 27 Hun, 375.

<sup>206</sup> *Bloodgood v. Clark*, 4 Paige (N. Y.), 574; *Osborn v. Heyer*, 2 Paige, 343; *Fitzburgh v. Everingham*, 6 Paige, 29; *Bank of Monroe v. Schermerhorn*, Clarke Ch. (N. Y.) 214; *Lent v. McQueen*, 15 How. Pr. 313; *Gage v. Smith*, 79 Ill. 219; *Lutt v. Grimont*, 17 Ill. App. 308; *Hirsch v. Israel*, 106 Iowa, 498, 76 N. W. 811; *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 587, 21 N. W. 345; *Campau v. Detroit Driving Club*, 144 Mich. 80, 107 N. W. 1063; *Johnson v. Tucker*, 2 Tenn. Ch. 398. As to appointment under the judicature acts, see *Edwards & Co. v. Picard*, [1909] 2 K. B. 903. The court has a broad discretion in the appointment of a receiver in a creditor's suit where an execution has been returned unsatisfied: *Bagley & Co. v. Scudden*, 66 Mich. 97, 33 N. W. 47; *Dutton v. Thomas*, 97 Mich. 93, 56 N. W. 229. That the court has authority to appoint a receiver in all cases where it entertains jurisdiction of a creditor's bill, see *Livingston v. Swafford Bros. etc. Co.*, 12 Colo. App. 331, 56 Pac. 351. That on application for a receiver it cannot go behind the judgment and



property, the return of the execution unsatisfied yields the inference that the property will be misapplied; while if there is nothing for the receiver to take, the defendant cannot be injured by the appointment, and the complainant proceeds at the peril of costs.<sup>207</sup> Indeed, it is declared to be the duty of a complainant who has obtained an injunction upon such a bill, restraining the defendant from collecting his debts or disposing of property which might be liable to waste or deterioration, to apply to the court and have a receiver appointed without any unreasonable delay.<sup>208</sup>

It is usually a prerequisite to the filing of a creditor's bill that execution must have been returned unsatisfied upon the plaintiff's judgment; unless the purpose of the suit is merely to set aside a fraudulent conveyance or transfer and thus remove an obstacle which may render the execution inefficient. In the latter case it is usually held sufficient if the plaintiff has proceeded so far in pursuit of his legal remedies as to obtain a lien upon the property.<sup>209</sup> The assertion frequently made, that the creditor must have exhausted his legal remedy before applying for a receiver, must, therefore, be considered in the light of this distinction, and with reference to the facts of the particular case.<sup>210</sup>

execution, see *Lent v. McQueen*, 15 How. Pr. (N. Y.) 313. Where the defendant had delayed execution sale for seven years through meritless claims, and the property has depreciated in value, and he made another claim, it was held proper to appoint a receiver: *Smith v. Zachry*, 128 Ga. 290, 57 S. E. 513. The receiver must conduct affairs for the benefit of all creditors, not merely the plaintiff: *Campau v. Detroit Driving Club*, 144 Mich. 80, 107 N. W. 1063.

<sup>207</sup> *Bloodgood v. Clark*, 4 Paige, 474; *Fitzburgh v. Everingham*, 6 Paige, 29; *Fuller v. Taylor*, 6 N. J. Eq. (2 Halst. Ch.) 301.

<sup>208</sup> *Osborn v. Heyer*, 2 Paige, 342; *Bloodgood v. Clark*, 4 Paige, 474; *Bank of Monroe v. Schermerhorn*, Clarke Ch. 214.

<sup>209</sup> See *post*, vol. II, chapter on "Creditors' Bills."

<sup>210</sup> That a receiver should not be appointed when the plaintiff and the sheriff know of the existence of property subject to execution,

Fraudulent assignments by a judgment debtor often afford a ground for the appointment of a receiver in favor of judgment creditors.<sup>211</sup>

The question whether a creditor's suit may be maintained and a receiver appointed against the estate of a decedent in the process of administration is one that has received different answers, varying with the view held in regard to the jurisdiction of equity in matters of administration.<sup>212</sup>

and that there was no impediment to the sale, see *Congdon v. Lee*, 3 Edw. Ch. 304; or when no necessity existed, and no copy of the bill was served upon the defendant: *Hart v. Sims*, 3 Edw. Ch. 266; or when execution was not issued to the county of the defendant's residence: *Minkler v. United States Sheep Co.*, 4 N. D. 507, 33 L. R. A. 546, 62 N. W. 594; *Williams v. Hogeboom*, 8 Paige, 469. As to receiver of joint property of two defendants on a judgment rendered against one, see *Austin v. Figueira*, 4 Paige, 56. As to the appointment on return of the execution unsatisfied made before the proper return day, see *Williams v. Hubbard*, Walk. Ch. (Mich.) 28.

That a return of the execution unsatisfied is not necessary where the purpose of the suit is to set aside a fraudulent conveyance, see *Chautauqua County Bank v. White*, 6 N. Y. 236, 57 Am. Dec. 442. For an interpretation, in such cases, of the Iowa statute requiring the applicant to show that "he has a probable right to or interest in the property which is in controversy," see *Clark v. Raymond*, 86 Iowa, 661, 53 N. W. 354; *Hirsch v. Israel*, 106 Iowa, 498, 76 N. W. 811.

<sup>211</sup> *Connah v. Sedgwick*, 1 Barb. 210 (insolvency of the assignee a good cause for the appointment of a receiver); *Shainwald v. Lewis*, 7 Saw. 148, 6 Fed. 766 (an instructive case); *Strong v. Goldman*, 8 Biss. 552, Fed. Cas. No. 13,542; *Nat. Bank of the Republic v. Hobbs*, 118 Fed. 627. That a state of facts which would warrant a receiver in aid of a judgment creditor whose debtor has made a fraudulent conveyance, authorizes the appointment in behalf of a purchaser at sheriff's sale under the judgment, see *Mays v. Rose*, Freem. Ch. (Miss.) 718. But see, to the effect that a receiver should not be appointed when the only relief asked is the setting aside of a fraudulent conveyance, *James H. Rice Co. v. McJohn*, 244 Ill. 264, 91 N. E. 448.

<sup>212</sup> See *Pom. Eq. Jur.*, § 1154; *Sylvester v. Reed*, 3 Edw. Ch. (N. Y.) 296; *McKaig v. James*, 66 Md. 583, 8 Atl. 663; *Davis v. Chap-*

§ 1528. (§ 107.) **Same; Receiver of Debtor's Property Subject to Prior Mortgage.**—With respect to a receiver of the rents and profits of mortgaged premises belonging to the judgment debtor, the plaintiff in a creditor's suit stands in much the same position as a junior mortgagee. Thus, such a receiver will not be appointed as against a mortgagee in possession, if anything remains due upon his mortgage.<sup>213</sup> But a receiver of the rents and profits of an equity of redemption fraudulently conveyed is proper, where the debtor and his grantee are insolvent;<sup>214</sup> and such a receiver may be appointed where the debtor's property is encumbered by numerous mortgages and judgments whose priorities are to be ascertained, and the real estate is insufficient to pay the indebtedness.<sup>215</sup>

A receiver may be appointed and an injunction granted, in a proper case, to restrain the judgment debtor from selling his goods, notwithstanding a mortgage thereon, not yet due, to another person. Such a bill is sufficient if it alleges that executions upon valid judgments have been levied upon goods in a store; that a sale thereof to satisfy the judgments is sought to be prevented by the holder of a prior mortgage thereon; that the property is more than sufficient to satisfy the mortgage, and the debtor has no other property; that since the execution of the mortgage, the goods remaining in the possession of the mortgagor, some of them had been sold and other goods substituted in their place, and

man, 83 Va. 67, 5 **Am. St. Rep.** 251, 1 S. E. 472; *Warfield v. Owens*, 4 Gill (Md.), 364.

<sup>213</sup> *Quinn v. Brittain*, 3 Edw. Ch. (N. Y.) 314; *United States v. Masich*, 44 Fed. 10 (the court may issue an injunction in such a case to protect the property and to apply the rents and profits to the satisfaction of the mortgage); *Furlong v. Edwards*, 3 Md. 79.

<sup>214</sup> *Freeman v. Stewart*, 119 Ala. 158, 24 South. 31.

<sup>215</sup> *Smith v. Butcher*, 28 Gratt. 144; *Grantham v. Lucas*, 15 W. Va. 425.

that if the debtor is allowed to retain the possession of the goods he would so dispose of them that the complainant's claims would be wholly lost.<sup>216</sup>

§ 1529. (§ 108.) **Same; Nature of the Property as Affecting Appointment—Receiver of Rents.**—The defendant's denial that there is any property to protect is no reason for refusing to appoint a receiver; indeed, the discovery of assets is an important part of the receiver's function.<sup>217</sup>

Where a contest as to the title to real estate is involved in the suit, and a receiver is sought of the rents and profits pending the litigation, the principle which has been mentioned in a previous section comes into play, and the possession of the adverse holder will rarely be disturbed.<sup>218</sup> Thus, where the purpose of the judgment creditor's action is to remove an alleged fraudulent conveyance of real estate, he is not entitled, as against the person claiming the property under the conveyance, to a receiver of the rents and profits *pendente lite*, unless upon a strong case of danger to the property and inability to respond to a decree because of insolvency.<sup>219</sup>

Under peculiar circumstances a receiver of rents may be the most effectual means of carrying into effect the decree; as, where a building was erected by the judgment debtor from his individual funds on land occupied by him as a *cestui que trust*, a receiver was appointed to

<sup>216</sup> *Rose v. Bevan*, 10 Md. 466, 69 Am. Dec. 170.

<sup>217</sup> *Bloodgood v. Clark*, 4 Paige Ch. 574; *Fuller v. Taylor*, 6 N. J. Eq. 301.

<sup>218</sup> See *ante*, § 87.

<sup>219</sup> *Vause v. Woods*, 46 Miss. 120; *National Union Bank v. Riger*, 38 App. Div. 123, 56 N. Y. Supp. 545; *Ohlhauser v. Doud*, 74 Wis. 400, 43 N. W. 169. In the last case, however, it was held that a receiver was properly appointed for the purpose of taking charge of money substituted for a part of the land by virtue of condemnation proceedings, although the money had been paid to a clerk of court.



apply the rents on the judgment, and the trustees were enjoined from collecting them.<sup>220</sup>

By the English practice, a receiver of rents of a debtor's real estate might be allowed in the first instance, if the bill claimed satisfaction out of both the personal and real estate of the debtor, and it appeared probable from the defendant's answer that there was no personal estate.<sup>221</sup>

§ 1530. (§ 109.) **Same; Miscellaneous Cases.**—A receiver has been appointed of a husband's interest in a mercantile business, which he carried on ostensibly as agent for his wife, in order to restrain the disposition of the property, and to subject the property to the payment of a judgment recovered against the husband.<sup>222</sup>

A receiver has been appointed for the purpose of recovering rings and jewelry belonging to the judgment debtor, since these are articles generally worn on the person, and it might be out of the power of the sheriff to levy on, or take possession of them.<sup>223</sup>

It is said that a receiver will not be appointed to take possession of property which, though belonging to the defendant, cannot for any reason be subjected to the complainant's judgment; or for property which, though nominally belonging to defendant, is beneficially owned by third persons, or is encumbered beyond its value. In such a case it can in no sense be said that such property, or any interest of the defendant therein, is subject to the payment of his debts, or can be reached and applied thereto.<sup>224</sup>

A judgment creditor's bill to reach property or interests unknown to the complainant and perhaps concealed

<sup>220</sup> Johnson v. Woodruff, 8 N. J. Eq. 120.

<sup>221</sup> Jones v. Pugh, 8 Ves. 71.

<sup>222</sup> Penn v. Whiteheads, 12 Gratt. 74.

<sup>223</sup> Frazier v. Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666.

<sup>224</sup> McCullough v. Jones, 91 Ala. 186, 8 South. 696.

need not point out the specific property sought to be reached.<sup>225</sup>

§ 1531. (§ 110.) **Receivers in Proceedings Supplementary to Execution.**—Proceedings supplementary to execution being designed to be a substitute for the equity procedure by creditors' bill, receivers are appointed in such proceedings very much as a matter of course, where it appears that the judgment creditor has, or probably has, property that ought to be subjected to the satisfaction of the judgment, after the return of the execution unsatisfied.<sup>226</sup> Probability that the judgment debtor

<sup>225</sup> *Dutton v. Thomas*, 97 Mich. 93, 56 N. W. 228.

<sup>226</sup> See *Hervy v. Gibson*, 10 Bosw. (N. Y.) 591; *People v. Mead*, 29 How. Pr. (N. Y.) 360; *Coates v. Wilkes*, 92 N. C. 376. The last case contains such an excellent statement of the general purpose and character of these proceedings, and of the receivership therein, that I quote at some length: *Coates v. Wilkes*, 92 N. C. 376, 379-384, per Merrimon, J.: "The proceedings supplementary to the execution in an action, as allowed and provided for by the code, §§ 488-500, are mainly, if not altogether, equitable in their nature. While, perhaps, they go beyond in some respects, they are in large part a substitute for, and take the place of the methods of granting relief in equity in favor of a judgment creditor as against his judgment debtor, after he had exhausted his remedy at law by the ordinary process of execution, as these prevailed before the present code system of procedure was adopted: *Hasty v. Simpson*, 77 N. C. 69; *Rand v. Rand*, 78 N. C. 12; *Hinsdale v. Sinclair*, 83 N. C. 338; *High on Rec.*, § 401.

"In the order of procedure, such supplementary proceedings are incident to the action; they extend and enlarge its scope for the purpose of reaching the judgment debtor's property of every kind subject to the payment of his debts, that cannot, for any cause, be successfully reached by the ordinary process of execution, and subjecting the same, or so much thereof as may be necessary, to the payment of the judgment.

"In effectuating this purpose, it very frequently becomes necessary to grant relief by injunction and the appointment of a receiver, as in other cases. Indeed, a receiver is appointed almost as of course, where it appears that the judgment debtor has, or probably

has, or has fraudulently conveyed, such property, is the criterion; certainty or conclusiveness of proof is not re-

has, property that ought to be so subjected to the satisfaction of the judgment, after the return of the execution unsatisfied. The receivership operates and reaches out in every direction as an equitable execution, and it is the business of the receiver, under the superintendence of the court, to make it effectual by all proper means.

“If it appear that the debtor has funds or property in his own hands, the court may, by proper order, apply the same to the judgment; but if the title to the property alleged or claimed to be that of the debtor, be in dispute, or it be disposed of by the debtor, in fraud of creditors, in such way as that it cannot be promptly reached by execution or the order of the court, then a receiver may be appointed at once. And it is not essential to such appointment that it shall actually appear that the debtor has property; if it appear with reasonable certainty, or that it is probable that he has property that ought to be subjected to the payment of the judgment, a receiver may be appointed: *Bloodgood v. Clark*, 4 Paige, 574; *Osborne v. Hyer*, 2 Paige, 342. . . .

“The judgment debtor cannot complain at the appointment of a receiver. If he has property subject to the payment of his debt, it ought to be applied to it; if he has not such property, this fact ought to appear, with reasonable certainty, to the satisfaction of the creditor. The receiver proceeds to do this, not at the peril of the debtor, but at his own peril, as to costs, if he fails in his action. The purpose of the law, in such proceedings, is to afford the largest and most thorough means of scrutiny, legal and equitable, in their character, in reaching such property as the debtor has, that ought justly to go to the discharge of the debt his creditor has against him. . . .

“It was not necessary, indeed, not proper, under the circumstances of this case, for the court to find *conclusively*, whether or not the defendant had certainly made a disposition of his property, fraudulent as to his creditors. If there was evidence tending strongly to show such a disposition of it, or that he was refusing, covertly or otherwise, to apply his property to the judgment, this was sufficient to warrant the appointment of a receiver, to the end that he might take such steps, and, if need be, bring such actions as would enable him to secure and recover any property of the defendant so conveyed or withheld by him, to be applied to the judgment of the plaintiff. To warrant the appointment of a receiver, it need not appear, certainly or conclusively, that the defendant has property that he ought

quired in order to justify the appointment.<sup>227</sup> The defendant's denial of the ownership of property, or his debtor's denial of the existence of an alleged claim, is not conclusive in this matter, but the contrary may be made to appear by other witnesses, and a receiver may be appointed on their testimony.<sup>228</sup> Further, if it appear that the judgment debtor has real estate that is subject to sale under execution, and that there are no obstacles to hinder such sale, a receiver will be refused, in many states, in order that his statutory right of redemption may not be imperiled.<sup>229</sup> Subject to these re-

to apply to the judgment—if there is evidence tending in a reasonable degree to show that he probably has such property, this is sufficient, or if it appears probable that he has made a fraudulent conveyance of his property as to his creditors, this is sufficient." In *O'Neill v. Kilduff*, 81 Conn. 116, 70 Atl. 640, after a trustee in bankruptcy had obtained judgment setting aside a fraudulent conveyance, a receiver was appointed to take charge of the property.

<sup>227</sup> *Coate v. Wilkes*, 92 N. C. 376, 384. "The discretion to appoint a receiver is legal, not arbitrary. The judge cannot lawfully refuse to appoint a receiver if there be presented to him competent evidence of assets": *Wilkinson v. Market*, 65 N. J. L. 518, 47 Atl. 488. On the other hand, when it does not appear probable that the judgment debtor has any property, rights or credits as to which a receiver is required, the appointment will be refused: *Rodman v. Harvey*, 102 N. C. 1, 8 S. E. 888; *Adler v. Turnbull*, 57 N. J. L. 62, 30 Atl. 319; *Colton v. Bigelow*, 41 N. J. L. 266. "Mere suspicion or surmise falls far short of what is required to justify the exercise of a power which should be sparingly used": *Flint v. Zimmerman*, 70 Minn. 346, 73 N. W. 175.

<sup>228</sup> *Seyfert v. Edison*, 47 N. J. L. 428, 1 Atl. 502; *Colton v. Bigelow*, 47 N. J. L. 428, 1 Atl. 502; *Knight v. Nash*, 22 Minn. 452.

<sup>229</sup> *Bunn v. Daly*, 24 Hun, 526; *Second Ward Bank v. Upmann*, 12 Wis. 499; but see *Bailey v. Lane*, 15 Abb. Pr. 373, note; and *Dilling v. Foster*, 21 S. C. 334. In the last case it was held that although the examination disclosed property subject to execution in the debtor's hands, sufficient to satisfy the judgment, a receiver might nevertheless be appointed; that the rule prohibiting the appointment in such cases, in creditor's bills, dependent on the fact that equity and law were administered by different tribunals; and as the powers of



strictions the appointment is usually spoken of as a matter of sound legal discretion,<sup>230</sup> a power to be exercised only with caution and in the absence of other adequate remedies available to the creditor.<sup>231</sup>

**§ 1532. (§ 111.) (5) In Suits for Specific Performance; or to Enforce Vendor's Lien.**—A receiver may be

the court of equity were only invoked in aid of the law court, such powers were not exercised where such aid was not necessary.

<sup>230</sup> See *Wilkinson v. Markert*, 65 N. J. L. 518, 47 Atl. 488; *Flint v. Webb*, 25 Minn. 263; *Bean v. Heron*, 65 Minn. 64, 67 N. W. 805; *Flint v. Zimmerman*, 70 Minn. 346, 73 N. W. 175; *Poppitz v. Rognes*, 76 Minn. 109, 78 N. W. 964. "That a receiver may, in the discretion of the court, be appointed immediately upon granting the order for the examination, there can be no doubt; and such, it seems, is the safer and better practice, inasmuch as it effectually secures to the prosecuting creditor that priority upon his debtor's property which his vigilance justly entitles him to"; citing *Hervy v. Gibson*, 10 Bosw. (N. Y.) 591, and *People v. Mead*, 29 How. Pr. (N. Y.) 360.

<sup>231</sup> The mere fact that upon a debtor's examination property is disclosed which may be subjected to the satisfaction of the creditor's judgment does not necessarily entitle the latter, as a matter of right, to have a receiver appointed. . . . It is against the general policy of the law to permit a creditor to resort to it [receivership] where he has other adequate remedy": *Poppitz v. Rognes*, 76 Minn. 109, 78 N. W. 964. "Equitable principles, which are always very flexible, should be taken into account in determining whether a receiver should be appointed. A receivership, the costs of which have to be paid, if any property is reached, out of the debtor's estate, is a very drastic remedy, and is subject to great abuses. At the present day it unfortunately is often more beneficial to the receiver and his attorneys than to the creditor. It should, therefore, be resorted to with great caution, and sparingly. When it clearly appears that a creditor holds mortgage security ample to satisfy his whole debt, his application for a receiver of his debtor's property ought, ordinarily, to be denied. In such a case it would be an abuse of judicial discretion to appoint one, unless, possibly, there were some exceptional circumstances." Such circumstances were held to be present, and the appointment was held not to be an abuse of discretion, although the judgment creditor had not exhausted his mortgage security: *Bean v. Heron*, 65 Minn. 64, 67 N. W. 805.

appointed in a suit by a vendor to enforce the specific performance of a contract for the sale of land against a vendee who is in possession, under the same circumstances as in a suit by a mortgagee for foreclosure of his mortgage; viz., when the land is a doubtful or inadequate security, and the vendee is insolvent, or committing waste;<sup>232</sup> and the same rule generally holds true in suits by a vendor who has retained the legal title to foreclose his (so-called) "vendor's lien" by a sale of the property for the unpaid purchase money.<sup>233</sup> In some states, however, a stronger showing is required, and waste, threatened or committed by the vendee, or bad husbandry, impairing the value of the vendor's security, is essential

<sup>232</sup> Pom. Eq. Jur., § 1334; *Phillips v. Eiland*, 52 Miss. 721; and see *Tufts v. Little*, 56 Ga. 139; *Gunley v. Thompson*, 56 Ga. 316; *Chappell v. Boyd*, 56 Ga. 578; *Leonard v. King*, 63 Tex. Civ. App. 224, 135 S. W. 742; *Hall v. Jenkinson*, 2 Ves. & B. 125 (vendee insolvent and attempting to convey his estate for the benefit of creditors); *Boehm v. Wood*, 2 Jacob & W. 236 (receiver pending a reference as to the validity of the plaintiff's title).

<sup>233</sup> See *Smith v. Kelley*, 31 Hun, 387; *Belding v. Meloche*, 113 Mich. 223, 71 N. W. 592 (relief awarded to a vendor under circumstances where it would be refused to a mortgagee); *McCaslin v. State*, 44 Ind. 151, 174 (insolvency of vendee, and waste by cutting valuable timber); *Cotulla v. American Freehold L. M. Co.* (Tex. Civ. App.), 86 S. W. 339 (by statute); *Hughes v. Hatchett*, 55 Ala. 631 (relief refused, where insolvency of vendee not shown, and amount of indebtedness disputed). See, also, *Murray v. Murray*, 124 Ky. 426, 99 S. W. 301. In *Belding v. Meloche*, *supra*, it was held that the decision in *Wagar v. Stone*, 36 Mich. 364, in which a receiver was refused in a suit by a mortgagee, on account of the statute whereby the mortgagor is entitled to possession until after foreclosure, did not apply to the case of foreclosure of a land contract, wherein it was agreed that in case of default the vendor should be entitled to possession. A vendor of land who has no lien on crops is not entitled to a receiver to take possession of them: *Golden Valley Land & Cattle Co. v. Johnstone*, 21 N. D. 101, *Ann. Cas.* 1913B, 631, 128 N. W. 691.

as a foundation for the relief.<sup>234</sup> In England, a receiver may be allowed in a suit to enforce a vendor's lien for land sold to an insolvent railway company, after, but not before, a final decree.<sup>235</sup> A receiver to secure the property has occasionally been appointed in a suit for specific performance instituted by the vendee.<sup>236</sup>

§ 1533. (§ 112.) (6) **In Behalf of Unsecured Creditors Before Judgment.**—It is the almost universal rule that a creditor's bill, whether to set aside a fraudulent transfer or to reach equitable assets, will not lie in behalf of mere general creditors who have not prosecuted their claims to judgment, nor in any other manner acquired a lien upon the debtor's property. The slowness and in-

<sup>234</sup> See *Columbia Finance etc. Co. v. Morgan*, 19 Ky. Law Rep. 1761, 44 S. W. 389, 45 S. W. 65; *Collins v. Richart*, 14 Bush (Ky.), 621. In Georgia, a bill alleging the insolvency of the vendee, and the deterioration in value of the land, but not showing that the vendee is less able to pay when the debt matured than when it was incurred, or that the deterioration is due to the vendee's waste or mismanagement, makes no case for a receiver of the rents and profits of the premises: *Turnlin v. Vanhorn*, 77 Ga. 315, 3 S. E. 264. As to receiver in foreclosure of the vendor's lien in Tennessee, see *Morford v. Hamner*, 3 Baxt. 391; *Darusmont v. Patton*, 4 Lea, 597.

<sup>235</sup> *Munns v. Isle of Wight R. Co.*, L. R. 5 Ch. 414; *Latimer v. Aylesbury & B. R'y Co.*, L. R. 9 Ch. D. 385.

<sup>236</sup> Where the vendor has fraudulently repossessed himself of the property: *Dawson v. Yates*, 1 Beav. 301; in an action for the specific performance of a contract to assign a lease giving the right to sink or bore for oil, receiver to operate oil-wells, pending the action, is authorized, where the defendant, a non-resident without property in the state, except the machinery on the land, is operating the wells and selling the product: *Galloway v. Campbell*, 142 Ind. 324, 41 N. E. 597. See, also, *Mead v. Burk*, 156 Ind. 577, 60 N. E. 338. But in a suit to enforce an oral contract between father and son, whereby the son was to have the father's land on the death of the latter, in consideration of his agreement to support the father, it was improper to appoint a receiver of the land on the death of the son before full performance on his part: *Walters v. Walters*, 132 Ill. 467, 23 N. E. 1120.

adequacy of the legal remedies open to such creditors are not considerations that can move a court of equity, in the absence of statutory authority, to intervene in their behalf with the instrumentality of a receiver, to preserve the debtor's property.<sup>237</sup> An apparent exception to the rule has been established by a series of cases in

<sup>237</sup> *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Uhl v. Dillon*, 10 Md. 500, 69 *Am. Dec.* 172; *Oberholser v. Greenfield*, 47 Ga. 530; *Kehler v. G. W. Jack Mfg. Co.*, 55 Ga. 639; *Johnson v. Farnum*, 56 Ga. 144; *Mayer v. Wood*, 56 Ga. 427, 429; *Stillwell v. Savannah Grocery Co.*, 88 Ga. 100, 13 S. E. 963; *Turnipseed v. Kentucky Wagon Co.*, 97 Ga. 258, 23 S. E. 84; *Blondheim v. Moore*, 11 Md. 365; *Hubbard v. Hubbard*, 14 Md. 356; *Blum v. Rowe*, 98 Wash. 683, 168 Pac. 781; *Thompson v. Adams*, 60 W. Va. 463, 55 S. E. 668; *Maxwell v. McDaniels*, 184 Fed. 311, 106 C. C. A. 453; *Carter v. Hightower*, 79 Tex. 135, 15 S. W. 223; *Cahn v. Johnson*, 12 Tex. Civ. App. 304, 33 S. W. 1000; *Waples-Platter Co. v. Mitchell*, 12 Tex. Civ. App. 90, 35 S. W. 200. This section is cited generally in *Galvin v. McConnell*, 53 Tex. Civ. App. 486, 117 S. W. 211. *Uhl v. Dillon*, *supra*, was a bill by general creditors for injunction and receiver, alleging that the defendant was indebted to the complainants, that he was disposing of his property, collecting money due him, and secreting his money and property, with the intent, as complainants were informed and believed, to abscond and defraud them. The court says, in part, by Bartol, J.: "Whatever may be the supposed defects of the existing laws of the state, in leaving to the debtor the absolute power of disposing of his property, and leaving the creditor to the slow and very inadequate legal remedies now provided, it is solely in the power of the legislature to correct them. It is not within the province of the chancery courts to stretch their power beyond the limits of the authorities of the law, for the purpose of remedying such defects. Such a course would be productive of great mischief, and make the rights of the citizen depend upon the vague and uncertain discretion of the judges, instead of the safe and well-defined rules of law." In *Hogsett v. Thompson*, 258 Pa. St. 85, 101 Atl. 941, it is said that a receiver will not be appointed for the property of a person *sui juris* in aid of an ordinary creditor's bill. Possible exceptions to the rule may be found in *Haggarty v. Pittman*, 1 Paige, 298, 19 *Am. Dec.* 434 (fraudulent assignment to an insolvent assignee); *Rosenberg v. Moore*, 11 Md. 376 (objection that plaintiff had no judgment not urged).



Georgia, where an insolvent debtor, with fraudulent intent, has bought goods on credit from the plaintiff, and afterwards has made a fraudulent transfer of his goods to a third person, who is himself insolvent; but the defrauded creditor's right to the equitable relief of a receiver is strictly limited to these circumstances, and is based on the ground that the plaintiff, having a right to rescind the fraudulent sale, had never, in equity, parted with the title to the goods.<sup>238</sup> The right of a creditor

**In Aid of Attachment.**—A receiver is not warranted in an action on a simple money demand, in which action property has been attached. The fact that a writ of attachment was issued does not change the nature of the action to one for the relief of "subjecting a fund to the plaintiff's claim," within the meaning of the statute authorizing a receiver in an action "by a creditor to subject any property or fund to his claim"; nor do writs of attachment issued by two creditors on simple money demands convert the action into one "between partners or others jointly owning or interested in any property or fund," under another clause of the same statute: *State v. Eighth Judicial Dist. Ct.*, 14 Mont. 577, 37 Pac. 969. But it has been held that the court possesses the power, independently of statute, to appoint a receiver to take charge of property abandoned by a garnishee: *Northfield Knife Co. v. Shapleigh*, 24 Neb. 635, 8 Am. St. Rep. 224, 39 S. W. 788.

<sup>238</sup> *Cohen v. Meyers*, 42 Ga. 46; *Johnson v. Farnum*, 56 Ga. 144 (relief denied when plaintiff does not claim title to the goods, or right to rescind the sale); *Mayer v. Wood*, 56 Ga. 427, 429 (same); *Wachtel v. Wilde*, 58 Ga. 50; *Cohen & Co. v. Morris & Co.*, 70 Ga. 313; *Albany etc. Steel Co. v. Southern etc. Works*, 76 Ga. 135, 2 Am. St. Rep. 26; *Wolfe v. Claffin*, 81 Ga. 64, 6 S. E. 599; *Martin v. Burgyn*, 88 Ga. 78, 13 S. E. 958. But the appointment of a receiver is erroneous where it appears that the person to whom the alleged fraudulent transfer was made is solvent and able to respond to a judgment in favor of the plaintiff: *Turnipseed v. Kentucky Wagon Co.*, 97 Ga. 258, 23 S. E. 84; *Stillwell v. Savannah Grocery Co.*, 88 Ga. 100, 13 S. E. 963; and where, under the order of the judge, the plaintiffs had pointed out and separated the goods in question, there should be no receiver appointed except for the purpose of taking charge of the goods so identified: *Atlantie Brew. etc. Co. v. Bluthenthal*, 101 Ga. 541, 28 S. E. 1003.

without judgment, depending on the general jurisdiction of equity in the administration of the estates of decedents, to come into equity to subject to his demand property fraudulently conveyed by the debtor while in life, there being a deficiency of legal assets, is recognized in some states;<sup>239</sup> and a receiver may be necessary, in such a suit.<sup>240</sup> A further exception has been made in New York, in the case of the creditor, without judgment, of a partnership, suing on behalf of himself and for the benefit of other creditors, where the indebtedness is not disputed, and the firm and its members are insolvent, and have attempted to make a fraudulent assignment of their property.<sup>241</sup> Statutes in several of the states now provide for creditor's bills by general, unsecured creditors in certain exigencies, and the right to receivers in such suits has received much consideration in at least two of these states.<sup>242</sup>

<sup>239</sup> See Pom. Eq. Jur., § 1154, and note.

<sup>240</sup> See *Werborn's Adm'r v. Kahn*, 93 Ala. 201, 9 South. 729.

<sup>241</sup> *Mott v. Dunn*, 10 How. Pr. 225; *La Claire v. Lord*, 10 How. Pr. 461; *Levy v. Ely*, 15 How. Pr. 395; *Jackson v. Sheldon*, 9 Abb. Pr. 127; and see *Cohen & Co. v. Morris & Co.*, 70 Ga. 313. *Jackson v. Sheldon* was a case of limited partnership, and relief was based upon the neglect of the partners to assign to a trustee for the benefit of all the partnership creditors.

<sup>242</sup> **Alabama.**—Complainants, on filing their bill and service of process, acquire an inchoate lien on the property fraudulently conveyed, and are entitled to a receiver upon showing three things; namely, a reasonable probability of success upon their part in finally subjecting the property to the satisfaction of their lien; a necessity of resorting to the property to make their debts; and a danger that the property will be wasted, disposed of, or gotten out of the reach of the court so that the lien cannot be effectuated: *Heard v. Murray*, 93 Ala. 127, 9 South. 514; *Weis v. Goetter*, 72 Ala. 259. A pending suit by creditors for the benefit of all who may join is no bar to a subsequent suit by a simple contract creditor averring the collusive action of parties to the former suit and asking the removal of a receiver appointed thereunder, and that the custody already assumed by the court may be extended to his own case: *Alabama etc. Steel*

*Co. v. McKeever*, 112 Ala. 134, 20 South. 84. The creditor's remedy by attachment is usually adequate; "it affords as ample redress and protection, in ordinary cases, as a receivership, fully securing the forthcoming of the property to answer any judgment obtained in the attachment suit, if found liable to the attachment": *Pearce v. Jennings*, 94 Ala. 524, 10 South. 511; hence, when an attachment has been levied on personalty, a receiver will not be appointed in aid of the suit, unless special circumstances are shown rendering the attachment inadequate and inefficacious: *Id.*; and a debtor's threatened removal of his property from the state, while authorizing an attachment by the creditor, does not entitle the latter to the aid of a court of equity, or the appointment of a receiver: *Smith-Dimmick Lumber Co. v. Teague*, 119 Ala. 385, 24 South. 4. When property of the debtor has been attached, and the statutory claim interposed, it is in the custody of the law, and should not be taken away from such custody and placed in the hands of a receiver, at the suit of another creditor: *Dollins v. Lindsay*, 89 Ala. 217, 7 South. 234; *Williams v. Dismukes*, 106 Ala. 402, 17 South. 620; but a receiver may be had of the surplus of the goods over the amount of the prior equitable attachment creditor's claim: *Sackhoff v. Vandegrift*, 98 Ala. 192, 13 South. 495.

**Georgia.**—"Insolvent Trader's Law," Stats. 1881, p. 124; Code § 3297; § 3149, etc. To warrant a receiver at the suit of a general creditor, it must appear that the debtor is insolvent: *Collins v. Myers*, 68 Ga. 530; and that his effects will not be exhausted by other creditors having liens, before the simple contract creditors will be reached in the order of distribution: *Id.*; *Barnwell v. Wofford*, 67 Ga. 50. See, further, as to the right to a receiver under these statutes, *Fechheimer v. Baum*, 37 Fed. 167, 2 L. R. A. 153; *Nussbaum v. Price*, 80 Ga. 205, 5 S. E. 291; *Pendleton v. Johnson*, 85 Ga. 840, 11 S. E. 144; *Sullivan v. McDonald*, 86 Ga. 78, 12 S. E. 215; *Stillwell v. Savannah Grocery Co.*, 88 Ga. 100, 13 S. E. 963; *Atlanta Brewing Co. v. Bluthenthal*, 101 Ga. 541, 28 S. E. 1003. Receiver in aid of creditors having laborers' liens, before judgment, where the plaintiffs are numerous, the defendants insolvent, and there is "manifest danger of loss" (Code, § 3149) by removal of the property from the state: *Orton v. Madden*, 75 Ga. 83.

**Michigan.**—3 How. Ann. Stats., § 8749 (o), providing that a person having a preferred labor claim against an insolvent person or corporation may proceed in chancery for appointment of a receiver, if an assignment for the benefit of creditors has been made. A chattel mortgage is not such an assignment, within the meaning of the stat-

§ 1534. (§ 113.) (7) **Receiver in Suits for Rescission of Contracts for Sale of Land.**—A receiver may be appointed, under special circumstances, in a suit by a vendee of land for rescission of the contract of purchase.<sup>243</sup> It has been held improper to appoint a re-

ute: *Wineman v. Fisher Electrical Works*, 118 Mich. 636, 77 N. W. 245. An order appointing a receiver of assets of an insolvent debtor, upon a bill by holders of preferred claims, and requiring an attachment creditor to surrender to him property held by virtue of his writ, is improvidently made: *Lawton v. Richardson*, 115 Mich. 12, 72 N. W. 988. See, also, *Hall v. Donovan*, 111 Mich. 395, 69 N. W. 643.

**Minnesota.**—Laws 1881, chapter 148, Amend. chap. 30, Laws 1889. As to receivers under the insolvency act of this state, see *Hyde v. Weitzner*, 45 Minn. 35, 47 N. W. 311 (assignee for benefit of creditors treated as an officer of the court, and receiver refused); *Citizens' Nat. Bank v. Minge*, 49 Minn. 454, 52 N. W. 44 (creditor's claim need not be due, to qualify him to institute proceedings for a receiver); *Rollins v. Rice*, 60 Minn. 358, 62 N. W. 325.

**Rhode Island.**—Pub. Laws, c. 723, § 2. Receiver on petition of creditors of insolvent who has made an assignment giving illegal preferences: See *Bank of America, Petitioner*, 13 R. I. 176.

**South Carolina.**—Statute authorizing creditors without judgment to attack a voluntary assignment giving preference to creditors. It is error to appoint a receiver when it is not alleged that there was any danger of loss or injury to the property during litigation: *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781.

**Washington.**—Code, § 302, allows a receiver at any time for attached property "according to the nature of the property and the exigencies of the case." A receiver is proper when the property "was of such a character that its value would be diminished by mere lapse of time, and that an early sale thereof was desirable": *State v. Superior Court of Whatcom County*, 14 Wash. 324, 44 Pac. 542.

<sup>243</sup> *Pom. Eq. Jur.*, § 1334. The court, in such a suit, has power to appoint a receiver to preserve and retain the purchase money until the rights of the parties are adjudicated: *Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, 24 Pac. 707. A receiver was appointed in an action by the purchasers of a colliery to set aside the sale for fraudulent representations, the ownership



ceiver pending an action to rescind the contract of sale at the instance of the vendor, on the mere ground of the insolvency of the vendee in possession.<sup>244</sup>

§ 1535. (§ 114.) (8) **Receivers in Suits to Enforce Payment of Annuities.**—Receivers have sometimes been appointed in suits to enforce payment of the arrears of annuities charged upon land;<sup>245</sup> but in England this relief is given only when the payment cannot be enforced by distress.<sup>246</sup>

§ 1536. (§ 115.) (9) **Receivers in Suits for the Protection of Remainder-men.**—If a life tenant neglects or refuses to keep down the taxes or to make such repairs as he is legally bound to make, a receiver may be appointed, at the instance of the remainder-man, to collect rents sufficient to discharge these liabilities of the life tenant's estate.<sup>247</sup> So, when a life tenant of lease-

being involved in great uncertainty, and it being of great importance that the colliery should be worked, and so worked as to leave as little doubt as possible whether it was properly or improperly worked: *Gibbs v. David*, L. R. 20 Eq. 373.

<sup>244</sup> *Jordan v. Beal*, 51 Ga. 602. But in England, a receiver has been appointed on the application of the vendor of a leasehold, to preserve the lease from forfeiture for non-payment of rent by the vendee: *Cook v. Andrews*, [1897] 1 Ch. 266.

<sup>245</sup> *Sollory v. Leaver*, L. R. 9 Eq. 22; *Probasco v. Probasco*, 30 N. J. Eq. 108; *Abernathy v. Orton*, 42 Or. 437, 95 Am. St. Rep. 774, 71 Pac. 327; *Pom. Eq. Jur.*, § 1334. Receiver to enforce agreement to support grantor from the proceeds of property conveyed: See, *ante*, § 74, note 40; *Keister v. Cubine*, 101 Va. 768, 45 S. E. 285.

<sup>246</sup> *Sollory v. Leaver*, *supra*; *Buxton v. Monkhouse*, Coop. 41.

<sup>247</sup> *Cairns v. Chabert*, 3 Edw. Ch. 312; *Sage v. Gloversville*, 43 App. Div. 245, 60 N. Y. Supp. 791; *Goodman v. Malcom*, 5 Kan. App. 285, 48 Pac. 439; *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124, 60 Am. St. Rep. 444, 32 L. R. A. 756, 67 N. W. 657 (appointed at the instance of executor authorized by the express terms of the will to collect rents and pay taxes); *Murch v. Smith Mfg. Co.*, 47 N. J. Eq. 193, 20 Atl. 213. But in Michigan such appointment is held to be

hold premises is allowed by the trustees of the premises to receive the rents, and the houses are not kept in a proper state of repair to prevent a forfeiture according to the covenants of the lease, a receiver may be appointed of the rents, for the purpose of applying them to the proper repair of the houses.<sup>248</sup>

§ 1537. (§ 116.) (10) **Appointment of Receivers of Corporations—The Inherent Jurisdiction of Equity—In General.**—The inherent jurisdiction of a court of equity to appoint receivers of corporations, in proper cases, independently of statutory authorization, has been frequently recognized.<sup>249</sup> The cases in which the power is most frequently invoked are as follows:<sup>250</sup> 1. In suits

improper under the method of enforcing the payment of unpaid taxes upon real estate and foreclosing liens in that state: *Jenks v. Horton*, 96 Mich. 13, 55 N. W. 372.

<sup>248</sup> *In re Fowler*, L. R. 16 Ch. D. 723.

**Disputes Between Landlord and Tenant.**—In *Gray v. Council of Town of Newark*, 9 Del. Ch. 171, 79 Atl. 735, 739, the court refused to appoint a receiver for the lessee of waterworks at the suit of the lessor where it was not shown that possession was obtained by fraud, or that there was imminent danger of loss from the neglect, waste, misconduct or insolvency of the defendant. In *Conover v. Tansey*, 73 N. J. Eq. 562, 67 Atl. 1013, the court refused to appoint a receiver to carry out a farming contract.

<sup>249</sup> See *Thompson v. Greeley*, 107 Mo. 577, criticising the statements on this subject of certain text-books on receivers; *Ford v. Kansas City etc. R'y Co.*, 52 Mo. App. 439; *Matter of Louisiana Savings Bank*, 35 La. Ann. 196, criticising *Baker v. Louisiana etc. R. R. Co.*, 34 La. Ann. 754, where a sweeping denial of the existence of the jurisdiction, except in cases of extreme necessity, was made.

**Effect of Bankruptcy Act.**—The National Bankruptcy Act does not take away the jurisdiction of state courts to take charge of the assets of an insolvent corporation: *Murphy v. Penniman*, 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282.

<sup>250</sup> The supreme court of Louisiana says of the practice in that state that it "had not proceeded further, and should not, without legislative enactment, proceed further, than in making such appoint-

by stockholders seeking a remedy for breaches of their fiduciary duty by the directors or officers of the corporation; 2. After dissolution, where no means are provided by statute or otherwise for winding up the affairs of the corporation; 3. When the corporation has no properly constituted governing body, or there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage; 4. In suits by judgment creditors of the corporation; 5. In suits for the foreclosure of mortgages or other liens upon the corporate property.<sup>251</sup>

Insolvency of the corporation, alone, does not warrant the appointment of a receiver,<sup>252</sup> unless this has been made a ground by statute.

ment in cases where the parties litigant agree that it be done, or when it is necessary to the execution of a judgment of the court, or in a case where, the property in controversy being under seizure by a writ of the court and in custody, it is necessary as a conservatory process to care for or administer the same, or where the property of a corporation is abandoned, or there are no persons authorized to take charge of and conduct its affairs, or where it is done in aid of proceedings pending before the court for the liquidation of the affairs of a corporation, and rendered necessary for the preservation of the interests of all concerned": *In re Moss Cigar Co.*, 50 La. Ann. 789, 23 South. 544.

<sup>251</sup> That it is improper to appoint a receiver merely for the purpose of representing the corporation in litigation, see *Hutchinson v. American Palace-Car Co.*, 104 Fed. 182. The text is quoted in *Exchange Bank v. Bailey*, 29 Okl. 246, 39 L. R. A. (N. S.) 1032, 116 Pac. 812.

<sup>252</sup> *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. 262; *Lawrence Iron Works Co. v. Rockbridge Co.*, 47 Fed. 755; *Murray v. Superior Court*, 129 Cal. 628, 62 Pac. 191. See, also, *Falmouth Bank v. Cape Cod Ship Canal Co.*, 166 Mass. 550, 44 N. E. 617; *Pond v. Framingham & Lowell R. Co.*, 130 Mass. 194; *Baltimore Skate Mfg. Co. v. Randall*, 112 Md. 411, 76 Atl. 491; *Forsell v. Pittsburg & Montana Copper Co.*, 42 Mont. 412, 113 Pac. 479; *Berryman v. Billings Mut. Heating Co.*, 44 Mont. 517, 121 Pac. 280; *Prudential Securities Co. v. Three Forks, H. & M. V. R. Co.*, 49 Mont. 567, 144 Pac. 158; *De-*

The object of the appointment of a receiver of a corporation is the preservation of its property for the benefit of persons interested, and not the confiscation of the property.<sup>253</sup>

§ 1538. (§ 117.) **Receivers of Corporations Cautiously Appointed.**—The reasons for the oft-asserted reluctance of the court to assume the responsibilities involved in the appointment of receivers of corporations are well stated in the following extracts: “As a rule of equity practice, the courts are very reluctant to appoint receivers [of the property of corporations], upon the idea that it is a practical displacement of the board of directors. It is an assumption of the function of the directors. It displaces the board of managers placed there by the stockholders, who sustain the relation of

partment Store Co. v. Ganss-Langenberg Hat Co., 17 N. M. 112, 125 Pac. 614; Virginia-Carolina Chemical Co. v. Hunter, 84 S. C. 214, 66 S. E. 177; Waggy v. Jane Lew Lumber Co., 69 W. Va. 666, 72 S. E. 778. The text is cited to this effect in Galvin v. McConnell, 53 Tex. Civ. App. 486, 117 S. W. 211; and in Houston & B. V. Ry. Co. v. Hughes (Tex. Civ.), 182 S. W. 23, 25.

<sup>253</sup> See *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121. This principle seems clearly to have been disregarded in an Indiana case (*Columbia Athletic Club v. State*, 143 Ind. 98, 52 Am. St. Rep. 407, 28 L. R. A. 727, 40 N. E. 914), where a receiver was appointed to render more effectual an injunction restraining the continuance of a nuisance—viz., giving exhibitions of prize-fighting—by a corporation. The dissenting opinion of Hackney, J., points out that while the injunction was properly issued, the appointment of a receiver for the purpose merely of staying the commission of crime is entirely without precedent; and that the object sought might have been reached by enlarging the scope of the injunction. However, the fact that the relief was based, in part, on the broad terms of the Indiana statute (Rev. Stats. 1894, § 1236; Rev. Stats. 1881, § 1222) authorizing a receivership when “in the discretion of the court, it may be necessary to secure ample justice to the parties,” probably destroys whatever general value as a precedent this case might possess.



trustees for the stockholders, trustees for the corporation, and trustees for its creditors; and before the court will take charge of the corporation and thus displace its chosen directors and managers, it ought to have the clearest evidence of the absolute necessity for such extraordinary action for the protection of the creditors, stockholders, and all parties concerned.”<sup>254</sup> “It is no slight matter for a court of chancery to lay its hand upon large business enterprises, take them out of the control of capacity and experience, and charge them with expenses and commissions. It should only be done when the court can point to the specific allegation or allegations, sustained by credible evidence, that will justify such action.”<sup>255</sup>

<sup>254</sup> Consolidated Tank Line Co. v. Consolidated Varnish Co., 43 Fed. 204. See, also, *Blades v. Billings Mercantile Co.*, 154 Mo. App. 350, 134 S. W. 579; *Inscho v. Mid-Continental Development Co.*, 94 Kan. 370, *Ann. Cas.* 1917B, 546, 146 Pac. 1014. The text is cited in *Galvin v. McConnell*, 53 Tex. Civ. App. 486, 117 S. W. 211.

<sup>255</sup> *Young v. Rutan*, 69 Ill. App. 513. “Courts proceed with extreme caution in the appointment of receivers to take the property of a corporation out of the control of its officers, and are much more readily moved to, by proper orders, restrain the doing of improper acts, and compel the recognition of undoubted rights”: *Original Vienna Bakery etc. Co. v. Heissler*, 50 Ill. App. 406. Before a court “will take the property and business of a liquidating bank from the control of its directors into its own hands, on the application of a stockholder, it must appear that the danger of loss or injury to the rights of the plaintiff is clearly proved, and the necessity and right of appointment of a receiver free from reasonable doubt”: *Watkins v. National Bank*, 51 Kan. 254, 32 Pac. 914. “The power is a discretionary one, to be exercised with great circumspection, and only in cases where there is fraud or spoliation, or imminent danger of the loss of the property, if the immediate possession should not be taken by the court; and these facts must be clearly proved. But, where these conditions have been fully met, courts do not hesitate to appoint receivers over the property of corporations, for the benefit of all concerned during the controversy”: *Davis v. United States Electric etc. Co.*, 77 Md. 35, 25 Atl. 982; *Steinberger v. Independent*

The relief cannot be granted on the strength of mere general averments of fraud, when that is the ground on which the relief is asked. The conduct and facts from which the conclusion is deduced must be averred, so that issue can be formed on the averments.<sup>256</sup>

§ 1539. (§ 118.) **A Receiver is an Ancillary Remedy; not Appointed on the Petition of the Corporation.**—Unless authorized by statute, there is no such thing as an action brought distinctively for the mere appointment of a receiver; to justify the appointment it is essential that some proper final relief in equity be asked for in the bill which will justify the court in proceeding with the case.<sup>257</sup> It follows that it is error for the court to

*Sav. Ass'n*, 84 Md. 625, 36 Atl. 439. See, also, *Thompson v. Greeley*, 107 Mo. 577, 17 S. W. 962; *People's Investment Co. v. Crawford* (Tex. Civ. App.), 45 S. W. 738. "Cessation of business, alone, does not make a fit case for the appointment of a receiver of the remaining assets of the company; it must be shown, in addition, that the officers have been guilty of mismanagement of its affairs, or that there exists some need to preserve the property, through a receivership, for the benefit of the creditors and stockholders": *Clark v. National Linseed Oil Co.*, 105 Fed. 787, 792, 45 C. C. A. 53. "Undoubtedly, there are cases in which a court of equity may, through its receiver, take possession and control of the business of corporations and individuals. But it is a jurisdiction to be sparingly exercised. None of the prerogatives of a court of equity have been pushed to such extreme limits as this, and there is none so likely to lead to abuses. It is not the province of a court of equity to take possession of the property, and conduct the business of corporations or individuals, except where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor, which would otherwise be lost or greatly endangered, and which cannot be saved or protected by any other action or mode of proceeding": *Overton v. Memphis etc. R. R. Co.*, 10 Fed. 866, 3 McCrary, 436.

<sup>256</sup> *Fort Payne Furnace Co. v. Fort Payne Coal etc. Co.*, 96 Ala. 472, 38 Am. St. Rep. 109, 11 South. 439.

<sup>257</sup> *Hutchinson v. American Palace Car Co.*, 104 Fed. 182; *Murray v. Superior Court*, 129 Cal. 628, 62 Pac. 191; *In re Atlas Iron*

appoint a receiver of a corporation on its own petition, alleging its insolvency;<sup>258</sup> and it has been held that such a proceeding is void for want of jurisdiction.<sup>259</sup>

Construction Co., 2 N. Y. Ann. Cas. 124, 38 N. Y. Supp. 172; Mann v. German-American Inv. Co. (Neb.), 97 N. W. 600; Toomey v. First Mortgage Trust Co. (Tex. Civ. App.), 177 S. W. 539; Hartnett v. St. Louis Min. & Mill. Co., 51 Mont. 395, 153 Pac. 437. See, also, Price v. Bankers' Trust Co. (Mo.), 178 S. W. 745.

<sup>258</sup> State v. Ross, 122 Mo. 435, 23 L. R. A. 534, 25 S. W. 947; Kimball v. Goodburn, 32 Mich. 11; Hugh v. McRae, Chase Dec. 466; Jones v. Bank of Leadville, 10 Colo. 464, 17 Pac. 272; McIlhenny v. Binz, 80 Tex. 1, 26 Am. St. Rep. 705, 13 S. W. 655; In re Moss Cigar Co., 50 La. Ann. 789, 23 South. 544; Jones v. Schaff Bros. Co., 187 Mo. App. 597, 174 S. W. 177. This portion of the text is quoted in Galvin v. McConnell, 53 Tex. Civ. App. 486, 117 S. W. 211. The notorious "Wabash" case (Wabash etc. R. Co. v. Central Trust Co., 22 Fed. 272), *contra*, appears to have been thoroughly discredited, and does not appear to have been followed, unless Petition of Kittinging Ins. Co., 146 Pa. St. 102, 23 Atl. 336, the report of which is scarcely intelligible, is to be taken as announcing the same doctrine. See the caustic criticism of the Wabash case in State v. Ross, *supra*, and in an article by Gov. D. H. Chamberlain, entitled "New Fashioned Receiverships," in Harvard Law Review. The attempt (in Central Trust Co. v. Wabash, St. L. & P. R'y Co., 29 Fed. 618), to find support for its doctrine in subsequent *dicta* of the supreme court of the United States, and in the previous case of Brassey v. Railroad Co., 19 Fed. 663 (a suit by a bondholder), is thoroughly exposed in the opinion of Brace, J., in State v. Ross, *supra*. A receiver will not be appointed in a friendly suit inspired by the corporation to hinder and delay creditors: Cronan v. District Court of Kootenai County, 15 Idaho, 184, 96 Pac. 768. But the fact that the plaintiff is attorney for the corporation only goes to the question of good faith and not to the jurisdiction: Thornley v. J. C. Walsh Co., 200 Mass. 179, 86 N. E. 355. Compare Burton v. R. G. Peters Salt & Lumber Co., 190 Fed. 262. In Camden v. Virginia Safe Deposit & Trust Corp., 115 Va. 20, 78 S. E. 596, a receiver was appointed in a suit commenced by the directors of the corporation. In New Jersey, in the absence of statute, a corporation cannot voluntarily dissolve by its own action: Sumner Lodge No. 180, I. O. O. F. v. Odd Fellows' Home, 77 N. J. Eq. 386, 77 Atl. 36.

<sup>259</sup> State v. Ross, *supra*; *contra*, that the appointment, although erroneous, does not render the proceedings of the court consequent

§ 1540. (§ 119.) **Suit for Dissolution and Receiver; No Inherent Jurisdiction.**—It is well settled, with scarcely a dissenting voice, that in the absence of express statutory authority, a court of equity has no power to dissolve a corporation, or to wind up its affairs and sequester its property.<sup>260</sup> A few exceptions have,

thereupon void, so as to be assailable in a collateral proceeding, see *Mellhenny v. Binz*, 80 Tex. 1, 26 **Am. St. Rep.** 705, 13 S. W. 655.

<sup>260</sup> *Republican Mountain Silver Mines v. Brown*, 58 Fed. 644, 648, 24 **L. R. A.** 776, 7 C. C. A. 412; *Conklin v. United States Ship Building Co.*, 140 Fed. 219; *Pearce v. Sutherland*, 164 Fed. 609, 90 C. C. A. 519; *In re Electric Supply Co.*, 175 Fed. 612; *Murray v. Superior Court*, 129 Cal. 628, 62 Pac. 191; *La Societe Francaise v. District Court* ("French Bank Case"), 53 Cal. 495; *People v. District Court of City and County of Denver* (Colo.), 80 Pac. 909; *Daniel v. Jones*, 146 Ga. 583, 91 S. E. 665; *People v. Weigley*, 155 Ill. 491, 40 N. E. 300; *Wheeler v. Pullman Iron etc. Co.*, 143 Ill. 197, 17 **L. R. A.** 818, 32 N. E. 420; *Baker v. Backus's Adm'r*, 32 Ill. 79; *Feess v. Mechanics' State Bank*, 84 Kan. 828, **L. R. A.** 1915A, 606, 115 Pac. 563; *Craughwell v. Mousam River Trust Co.*, 113 Me. 531, 95 Atl. 221; *Pride v. Pride Lumber Co.*, 109 Me. 452, 84 Atl. 989; *Toron v. Duplex-Power Car Co.*, 172 Mich. 519, 138 N. W. 338; *Jackson Loan & Trust Co. v. States*, 101 Miss. 440, 56 South. 293; *State v. Foster*, 225 Mo. 171, 125 S. W. 184; *Ashton v. Penfield*, 233 Mo. 391, 135 S. W. 938; *State v. People's United States Bank*, 197 Mo. 574, 94 S. W. 953; *Morse v. Metropolitan S. S. Co.*, 87 N. J. Eq. 217, 100 Atl. 219; *Rider v. John G. Delker & Sons Co.*, 145 Ky. 634, 39 **L. R. A.** (N. S.) 1007, 140 S. W. 1011; *Belmont v. Erie R'y Co.*, 52 Barb. (N. Y.) 637; *Howe v. Duel*, 43 Barb. 505; *Bangs v. McIntosh*, 23 Barb. 600; *In re The Mart*, 22 Abb. N. C. 227, 5 N. Y. Supp. 82; *Davis v. Flagstaff etc. Min. Co.*, 2 Utah, 74, 94; *Mason v. Equitable Lodge Supreme Court*, 77 Md. 483, 39 **Am. St. Rep.** 433, 27 Atl. 171; *Vila v. Grand Island Electric L. I. & C. S. Co.* (Neb.), 94 N. W. 136; *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa, 313, 322, 63 **Am. St. Rep.** 389, 38 **L. R. A.** 122, 70 N. W. 216; *French v. Gifford*, 30 Iowa, 153; *People's Inv. Co. v. Crawford* (Tex. Civ. App.), 45 S. W. 738. This portion of the text is quoted in *Lyon v. McKeefrey*, 171 Fed. 384, 96 C. C. A. 340. Such authority is not to be found in a general statute, not relating to any specific class of cases, such as Code of Iowa, § 2903, declaring that a receiver may be appointed *pendente lite* "on the petition of either party to a civil action or proceeding, wherein he shows that



however, been admitted to this rule; as, where the corporation had utterly failed of its purpose because of fraudulent mismanagement and misappropriation of its funds by the president and manager, who owned a majority of its stock, a receiver was appointed to wind up its affairs at the suit of a minority stockholder;<sup>261</sup> and it

he has a probable right to, or interest in, any property which is the subject of the controversy, and that such property or its rents or profits are in danger of being lost or materially injured or impaired," if the court is "satisfied that the interests of one or both parties will be thereby promoted, and the substantial rights of neither unduly infringed": *Wallace v. Pierce-Wallace Pub. Co.*, and *French v. Gifford*, *supra*. This section does not warrant the placing of the property of the corporation in the hands of a receiver, when that practically accomplishes the same purpose as a dissolution: *Id.* That the president of a corporation has no power, without the authority of the directors or stockholders, to consent to the appointment of a receiver to wind up the affairs of a corporation, see *Walters v. Anglo-American Mort. & T. Co.*, 50 Fed. 316. In Nebraska, where an action to dissolve a corporation is authorized, a receiver may be appointed although the statute is silent on the subject: *State v. Farmers & Merchants' Ins. Co.*, 90 Neb. 664, *Ann. Cas.* 1913B, 643, 134 N. W. 284.

<sup>261</sup> In the well-considered case of *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 53 N. W. 218, the general rule is recognized, but it is pointed out that a strict adherence to the rule, or the attempt to apply any other remedy than a winding up of the business of the corporation through the agency of a receiver would amount to a denial of justice, and violate the fundamental principle of equity that "it is the duty of the court to adapt its practice and course of proceeding to the existing state of society." It appeared that for a number of years the defendant Lorman had controlled the corporation for his own interest and profit, and had appropriated all the profits of the business. The court says, after a discussion of the authorities: "The present case furnishes an instance of gross abuse of trust. Must the *cestui que trust* be committed to the domination of a trustee who for seven years continued to violate the trust? . . . The trustee has so far absorbed all returns. What is the outlook for the future? This court, in view of the past, can give no assurances. It can make no order that can prevent some other mode of bleeding this corporation, if it is allowed to continue. If Lorman be removed, who shall take

has been held, even in New York, that a court of equity has inherent power to appoint a receiver on the application of a stockholder for the purpose of the equitable distribution of the assets of an insolvent corporation, without regard to the statutory provisions for the dissolution of corporations, where the directors refuse to institute statutory proceedings for a voluntary dissolution, and there is danger of the assets being absorbed by judgments that will be recovered, so as to render an application to the attorney-general useless.<sup>262</sup> In a recent case in the United States circuit court for the eastern district of North Carolina the court even went to the

his place? He has the absolute power to determine. Once deposed he may elect a dummy to fill his place. . . . This corporation has utterly failed of its purpose, not because of matters beyond its control, but because of fraudulent mismanagement and misappropriation of its funds. Complainant has a right to insist that it shall not continue as a cloak for a fraud upon him, and shall not longer retain his capital to be used for the sole advantage of the owner of a majority of the stock, and a court of equity will not so far tolerate such a manifest violation of the rules of natural justice as to deny him the relief to which his situation entitles him. I think a court of equity, under the circumstances of this case, in the exercise of its general equity jurisdiction, has the power to grant to this complainant ample relief, even to the dissolution of the trust relations. Complainant is therefore entitled to the relief prayed. A receiver will be appointed, and the affairs of this corporation wound up." The text is quoted in *Exchange Bank v. Bailey*, 29 Okl. 246, 39 L. R. A. (N. S.) 1032, 116 Pac. 812.

<sup>262</sup> *Porter v. Industrial Information Co.*, 25 N. Y. Supp. 328, 5 Misc. Rep. 263. The court says: "Whenever, in the course of events, it proves impossible to attain the real objects for which a corporation was formed, or when the failure of the company has become inevitable, it is the duty of the company's agents to put an end to its operations, and to wind up its affairs; and if the majority should attempt to continue its operations, in violation of its charter, or should refuse to make a distribution of the assets; any shareholder feeling aggrieved will be entitled to the assistance of the courts: *Mor. Corp.*, § 284; *Merchants' etc. Line v. Wagoner*, 71 Ala. 581; *Cramer v. Bird*, L. R. 6 Eq. 143."

length of appointing a receiver for the purpose of the dissolution of a solvent and prosperous corporation, and the sale of its property, for the sole reason, apparently, that this action was desired by a majority of the stockholders, and that a minority stockholder was threatening to procure the passage of a bill by the state legislature forfeiting the charter of the corporation.<sup>263</sup>

§ 1541. (§ 120.) **Stockholders' Suit for Breach of Fiduciary Duty by Directors.**—Cases are to be found which assert that courts of equity, by virtue of their general equitable jurisdiction, will not appoint a receiver of a corporation, and assume control and management of its affairs, at the suit of a stockholder alleging fraud, mismanagement, and collusion on the part of the corporate authorities, or *ultra vires* acts of the directors or of the corporation itself.<sup>264</sup> The denial of the power to

<sup>263</sup> *Arents v. Blackwell's Durham Tobacco Co.*, 101 Fed. 338 (Simonton, J.). This decision, surely one of the most arbitrary ever rendered by a federal court, even in that circuit, is not cited here, it is hardly necessary to say, for its value as a precedent. No warrant whatever was found, or sought, by the court, in any legislation of the state of North Carolina, and the court expressly recognized the general rule forbidding the interference of a court of equity in the internal management of the affairs of a corporation, and the absence of any jurisdiction in such a court to dissolve a corporation, to wind up its affairs and in that connection to appoint a receiver. The court excuses its action with the vague statement that "a recognized ground of relief in equity is, when the affairs of the corporation are not satisfactory, when it is in the midst of or threatened with disaster, when further prosecution of its business will lead to loss and insolvency." The authorities cited, of course, establish no such ground for the dissolution of corporations by courts of equity, but merely concern the right of the majority stockholders themselves to put an end to the business of the corporation under such circumstances.

<sup>264</sup> *People's Investment Co. v. Crawford* (Tex. Civ. App.), 45 S. W. 738; *Empire Hotel Co. v. Main*, 98 Ga. 176, 25 S. E. 413; *Fischer v. Superior Court*, 110 Cal. 129, 42 Pac. 561; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *Robison v. Cleveland City R. Co.*, 7

grant the relief in such cases is based on one or both of two grounds: First, that such relief, in effect, results in a dissolution of the corporation, and the court should refuse to accomplish indirectly that which it has no power to do directly;<sup>265</sup> second, that an injunction, addressed to the specific wrongs charged, affords a sufficient remedy.<sup>266</sup> But, notwithstanding many *dicta*, and the assertions of the older text-books, the current of recent authority appears to be strongly in favor of the inherent power of the court, in a proper case, to displace the management of guilty or negligent officials by the instrumentality of its receiver.<sup>267</sup> It has been frequently pointed

Ohio Dec. 312; *People v. Judge of St. Clair Circuit*, 31 Mich. 456; *Mason v. Supreme Court of Equitable League*, 77 Md. 483, 39 Am. St. Rep. 433, 27 Atl. 171; *Goodman v. Jedidjah Lodge*, 67 Md. 117, 9 Atl. 13, 13 Atl. 627; *Waterbury v. Merchants' Union Express Co.*, 50 Barb. 157. See, also, *High on Receivers*, § 288.

<sup>265</sup> *Fischer v. Superior Court*, 110 Cal. 129, 42 Pac. 61.

<sup>266</sup> *People's Inv. Co. v. Crawford* (Tex. Civ. App.), 45 S. W. 738; *Empire Hotel Co. v. Main*, 98 Ga. 176, 25 S. E. 413; *Waterbury v. Merchants' Union Express Co.*, 50 Barb. 157. And see *Laurel Springs Land Co. v. Fougeray*, 50 N. J. Eq. 756, 26 Atl. 886.

<sup>267</sup> See *Gluck & Becker on Rec. of Corp.*, § 9, and cases cited. The text is cited in *Falfurrias Immigration Co. v. Spielhagen*, 61 Tex. Civ. App. 111, 129 S. W. 164. See *Towle v. American Bldg. etc. Soc.*, 60 Fed. 131; *Aiken v. Colorado Riv. Imp. Co.*, 72 Fed. 591; *Culver Lumber & M. Co. v. Culver*, 81 Ark. 102, 118 Am. St. Rep. 17, 99 S. W. 391 (receiver appointed for foreign corporation); *Wayne Pike Co. v. Hammond*, 129 Ind. 368, 27 N. E. 487; *Supreme Sitting I. H. v. Baker*, 134 Ind. 293, 20 L. R. A. 210, 33 N. E. 1128; *In re Lewis*, 52 Kan. 660, 35 Pac. 287; *Metropolitan Fire Ins. Co. v. Middendorf*, 171 Ky. 771, 188 S. W. 790; *Davis v. United States Electrical etc. Co.*, 77 Md. 35, 25 Atl. 982; *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218; *Ashton v. Penfield*, 233 Mo. 391, 135 S. W. 938 (not necessary that corporation be insolvent); *State v. Shelton*, 238 Mo. 281, 142 S. W. 417; *Cantwell v. Columbia Lead Co.*, 199 Mo. 1, 97 S. W. 167; *State v. Second Judicial District Court*, 15 Mont. 324, 48 Am. St. Rep. 682, 27 L. R. A. 392, 39 Pac. 316; *Ponca Mill Co. v. Mikesell*, 55 Neb. 98, 75 N. W. 46; *Porter v. Industrial Information Co.*, 25 N. Y. Supp. 328, 5 Misc. Rep. 262;



out that the appointment of a receiver in cases of this character does not necessarily result in the dissolution or extinction of the corporation. "The property and assets of the corporation, which are being dissipated and fraudulently absorbed, will be preserved and rightfully applied under the supervision of the court, and may be restored to the officers of the corporation, when there has been a change of officers, or when it is deemed prudent and safe to restore the property and affairs of the corporation to its duly constituted officers."<sup>268</sup>

*Line v. Carlisle Mfg. Co.*, 5 Pa. Dist. R. 642; *Cameron v. Groveland Imp. Co.*, 20 Wash. 169, 72 *Am. St. Rep.* 26, 54 *Pac.* 1128; *Haywood v. Lincoln Lumber Co.*, 64 *Wis.* 639, 26 *N. W.* 184. In a few of these cases the jurisdiction was aided by the terms of some general statute; but in all of them the inherent power of courts of equity was recognized.

<sup>268</sup> In *re Lewis*, *supra*; *Supreme Sitting of the Order of Iron Hall v. Baker*, 134 *Ind.* 293, 20 *L. R. A.* 210, 33 *N. E.* 1128; *State v. Second Judicial District Court*, 15 *Mont.* 324, 48 *Am. St. Rep.* 682, 27 *L. R. A.* 392, 39 *Pac.* 316; *Gibbs v. Morgan*, 9 *Idaho*, 100, 72 *Pac.* 733, and cases cited. That the guilty officers are necessary parties to the suit, see *Edwards v. Bay State Gas Co.*, 91 *Fed.* 942. That the allegations of fraud must be specific, see *Wheeler v. Pullman Iron etc. Co.*, 43 *Ill. App.* 626; *Baker v. Backus's Adm'r*, 32 *Ill.* 79.

**In General.**—The appointment of a receiver for a corporation does not *ipso facto* dissolve the corporation: *Barker v. Southern Bldg. & Loan Ass'n*, 181 *Fed.* 636; *Railroad Commission of Alabama v. Alabama Great Southern R. Co.*, 185 *Ala.* 354, *L. R. A.* 1915D, 98, 64 *South.* 13; *Butler v. Beach*, 82 *Conn.* 417, 74 *Atl.* 748; *Hirschfield v. Reading Finance & Securities Co.*, 9 *Del. Ch.* 344, 82 *Atl.* 690; *Schloss v. Metropolitan Surety Co.*, 149 *Iowa*, 382, 128 *N. W.* 384; *Woodland v. Wise*, 112 *Md.* 35, 76 *Atl.* 502; *State v. District Court*, 50 *Mont.* 259, 146 *Pac.* 539; *Falfurrias Immigration Co. v. Spielhagen*, 61 *Tex. Civ. App.* 111, 129 *S. W.* 164. But after the appointment, its officers cannot make contracts which will bind the estate: *Barker v. Southern Bldg. & Loan Ass'n*, 181 *Fed.* 636. Nor exercise general corporate functions: *Roberts v. W. H. Hughes Co.*, 86 *Vt.* 76, 83 *Atl.* 807. They may, however, unless enjoined by the court, continue to exercise functions not inconsistent with the receiver's jurisdiction: *Rowe v. Stevens*, 25 *Idaho*, 237, 137 *Pac.* 159. Under certain

§ 1542. (§ 121.) **Same; Power, When not Exercised.** In a suit by a stockholder, a receiver will not be appointed to take the property out of the hands of the managers, except as a last resort, and when it is considered absolutely necessary for the preservation of the trust fund.<sup>269</sup> So, when it appears that the appointment of a receiver, with the expenses incident thereto, would probably render the corporation insolvent, the court will endeavor to give relief by enjoining the managers from the further execution of contracts resulting in the diversion of corporate funds, and from committing other acts of mismanagement.<sup>270</sup> Moreover, the principle must be borne in mind that a receivership is a preventive, not a punitive, measure. "Courts do not appoint receivers as a punishment for past dereliction, nor because of past dangers. Receivers are appointed because of present conditions, and well-founded apprehension as to the future."<sup>271</sup> The complaining stockholder must, of

conditions, a railroad may, while under receivership, apply to a state commission for leave to issue more stock and bonds: *United States & Mexican Trust Co. v. Delaware Western Con. Co.* (Tex. Civ. App.), 112 S. W. 447.

<sup>269</sup> *United Securities Co. v. Louisiana Electric L. Co.*, 68 Fed. 673. See, also, *Bartow Lumber Co. v. Enwright*, 131 Ga. 329, 62 S. E. 233; *Blades v. Billings Mercantile Co.*, 154 Mo. App. 350, 134 S. W. 579; *Bridgeport Development Co. v. Tritsch*, 110 Ala. 274, 20 South. 16; *Laurel Springs Land Co. v. Fougerey*, 50 N. J. Eq. 756, 26 Atl. 886; *Miller v. Kitchen*, 73 Neb. 711, 103 N. W. 297; *Williams v. Watt* (Tex. Civ. App.), 171 S. W. 266. Allegations that the corporation was losing money, or that the principal stockholder had raised his salary as an officer when business was bad, afforded no ground for receivership: *Curtiss v. Dean & Curtiss*, 85 Wash. 435, 148 Pac. 581.

<sup>270</sup> *United Securities Co. v. Louisiana Electric L. Co.*, 68 Fed. 673.

<sup>271</sup> *Original Vienna Bak. etc. Co. v. Heissler*, 50 Ill. App. 406. "Past conduct and past conditions may be taken into consideration in determining what the present situation is and the future will be, but a receiver will not be appointed because of things done or attempted at a past time, when the present situation and the prospects

course, show that his fears are well grounded.<sup>272</sup> He must himself be free from any participation in the breaches of trust on the part of the ministerial officers of the corporation.<sup>273</sup> His right to the relief must be based on something more than mere irregularities in levying of assessments,<sup>274</sup> or than a denial of the right

for the future are not such as to warrant taking the control of the property out of the hands of its owners": *Id.* See, also, *Marcuse v. Gullett Gin Mfg. Co.*, 52 La. Ann. 1383, 27 South. 846; *New Albany Waterworks v. Louisville Banking Co.*, 122 Fed. 776, 58 C. C. A. 576 (one unauthorized act not ground for appointment; "it cannot be presumed that they will mismanage or act otherwise than in conformity with the order" setting aside an unauthorized act).

<sup>272</sup> So, the fears of a complainant that a suit brought by the corporation against an officer will not be diligently prosecuted, owing to the relation of the parties, will not warrant the appointment of a receiver to take charge of the suit, no laches on the part of the corporation being shown: *Griffing v. Griffing Iron Co.*, 96 Fed. 577. That the president of a corporation is in a position where he may betray its interests will not justify a receivership, when there is no evidence to justify the probability that he will betray them: *Young v. Rutan*, 69 Ill. App. 513. The appointment of a receiver for a corporation will not be made, the bill containing no allegations of mismanagement, improper application of funds, or other acts of corporate maladministration, merely on the general allegation of the shareholders seeking the appointment that they apprehend exposure in the future, if the corporation is not wound up, to liabilities not contemplated when they became shareholders: *Mulqueoney v. Shaw*, 50 La. Ann. 1060, 23 South. 915.

<sup>273</sup> *Hyde Park Gas Co. v. Kerber*, 5 Ill. App. 132. A stockholder who buys his stock with knowledge of the alleged illegal acts, and with the purpose of bringing the suit, is estopped from maintaining it: *Gordon v. Business Men's Racing Ass'n*, 141 La. 819, L. R. A. 1917F, 700, 75 South. 735.

<sup>274</sup> *Hardee v. Sunset Oil Co.*, 56 Fed. 51. In this case the directors of a corporation levied an assessment on its stock, and, on failure to pay the same, advertised for sale only the stock of one who held nearly one-third of the entire stock, although other stockholders were also delinquent; it appearing, however, that the other stockholders had promised to pay. At a meeting of the directors at which only the president, secretary and treasurer were present, they

of the stockholders to inspect the corporate books, as such right may, if necessary, be enforced by other and appropriate orders;<sup>275</sup> or than a refusal by the directors, not shown to be made with corrupt motive, to permit a pledgee of stock to vote it.<sup>276</sup> The appointment of a receiver of a solvent corporation on the application of a minority stockholder is a very drastic remedy, which can be justified only in a very strong case.<sup>277</sup>

voted themselves salaries, which, however, they never collected. It was shown that no actual fraud was intended. *Held*, that the irregularities are not sufficient to justify appointing a receiver for the corporation.

<sup>275</sup> *Original Vienna Bak. etc. Co. v. Heissler*, 50 Ill. App. 406; *Alabama Coal & Coke Co. v. Shackelford*, 137 Ala. 224, 97 Am. St. Rep. 23, 34 South. 833.

<sup>276</sup> *Thalmann v. Hoffman House*, 27 Misc. Rep. 140, 58 N. Y. Supp. 227.

<sup>277</sup> *Rothwell v. Robinson*, 44 Minn. 538, 47 N. W. 255; *Continental Nat. B. & L. Ass'n v. Miller*, 44 Fla. 757, 33 South. 404; *Stokes v. Knickerbocker Inv. Co.*, 70 N. J. Eq. 518, 61 Atl. 736 (should not be appointed merely because minority stockholders claim that proxies were obtained by fraud, when fraud is denied). In *Rumney v. Detroit & M. Cattle Co.*, 116 Mich. 640, 74 N. W. 1043, a receiver was refused on a bill by the owner of one-eighth of the stock of a corporation, alleging that defendant controlled a majority of the stock, loaned the profits in his own name, and refused to declare dividends until threatened with suit, and then withheld dividends coming to complainant; that no meetings of the directors had been held, nor reports of the condition of the company filed, as required by law, and that such condition had not been made known to the stockholders; and that no books of the company were kept, except a private memorandum of the defendant, which was inaccessible to stockholders. It was not shown that other stockholders were dissatisfied with the management, and there was no allegation of insolvency, or that defendant was irresponsible, and it appeared that complainant was in control of most of the property of the corporation, and that a dispute over unsettled claims was the mainspring of the litigation. In *Ranger v. Champion Cotton Press Co.*, 52 Fed. 609, the bill and affidavits charged that the president of the company refused to account for a large sum of money intrusted to him by the company to be used in the promotion of its interests, that he



§ 1543. (§ 122.) **Same; Power, When Exercised.**—The following cases may serve to illustrate the circumstances under which receivers have been appointed at the suit of stockholders: Where the officers of a building and loan association have so mismanaged its affairs that its assets amount to less than two-thirds of the capital paid in;<sup>278</sup> where the directors of a turnpike company

had applied this money to his own use, and obstinately refused to give the complainant an inspection of the books of the company, or any information whatever of its affairs; that he was insolvent, and since the inauguration of the suit had mortgaged all his real estate, with manifest intent to defeat the claim of the company. The bill contained no allegation of fraudulent collusion on the part of the other stockholders, but intimated that the president was sustained by them. The solvency of the company was unquestionable. It was held that the allegations were insufficient to warrant the court to appoint a receiver before answer, without the consent of the majority of the stockholders. See, also, *Laurel Springs Land Co. v. Fougerey*, 50 N. J. Eq. 756, 26 Atl. 886; *Baker v. Backus's Adm'r*, 32 Ill. 79; *Alabama Coal & Coke Co. v. Shackelford*, 137 Ala. 224, 97 Am. St. Rep. 23, 34 South. 833 (not because directors hold over in default of election, and refuse to show books, and to disclose facts connected with business). It has been said that a receiver should not be appointed unless the stockholder has made application to the directors to remedy the wrong: *Blades v. Billings Mercantile Co.*, 154 Mo. App. 350, 134 S. W. 579; *Ward v. Hotel Randolph Co.*, 65 W. Va. 721, 63 S. E. 613; *Smiley v. New River Co.*, 72 W. Va. 221, 77 S. E. 976. And that the directors must be made parties to the suit: *Golden v. Fifth Judicial Dist. Court (Averill)*, 31 Nev. 250, 101 Pac. 1021.

<sup>278</sup> *Towle v. American Building, Loan & Investment Society*, 60 Fed. 131. The text is cited in *Falfurrias Immigration Co. v. Spielhagen*, 61 Tex. Civ. App. 111, 129 S. W. 164. See, also, *Continental Nat. B. & L. Ass'n v. Miller*, 44 Fla. 757, 33 South. 404. In general, see *Thayer v. Kinder*, 45 Ind. App. 111, 89 N. E. 408, 90 N. E. 323; *Feess v. Mechanics' State Bank*, 84 Kan. 828, L. R. A. 1915A, 606, 115 Pac. 563; *Pride v. Pride Lumber Co.*, 109 Me. 452, 84 Atl. 989; *State v. Foster*, 225 Mo. 171, 125 S. W. 184; *Chisolm v. Carolina Agency Co.*, 88 S. C. 438, 70 S. E. 1035; *Ritchie v. People's Telephone Co.*, 22 S. D. 598, 119 N. W. 990; *Glover v. Manila Gold Min. & Mill. Co.*, 19 S. D. 559, 104 N. W. 261; *Falfurrias Immigration Co. v.*

have refused to keep the corporate property in repair, thus rendering it unproductive;<sup>279</sup> where the business and affairs of the corporation have been so mismanaged that it has become insolvent, and it is made to appear that all the officers and directors have conspired together to divert its business to another company, dissipate its funds, and fraudulently absorb and apply its assets to the individual benefit of such officers;<sup>280</sup> where four stockholders get control of the majority of the stock of the corporation, elect their officers, pocket the dividends, keep false books to deceive other stockholders, and buy a worthless franchise for which they mortgage the corporate property for the purpose of having the mortgage foreclosed, and the property of the corporation wiped out, a receiver may be appointed pending an action by minority stockholders to have the mortgage canceled;<sup>281</sup> in a suit to compel an accounting, on allegation that the officers have converted and are continuing to convert the money and property of the corporation to their own use, as pretended salaries and expenses, without any authority therefor, and fraudulently;<sup>282</sup> where the president

Spielhagen, 61 Tex. Civ. App. 111, 129 S. W. 164; *Hampton v. Buchanan*, 51 Wash. 155, 98 Pac. 374.

<sup>279</sup> *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487. The court relied, in part, on the broad terms of the statute (Ind. Rev. Stats. 1881, § 1222, cl. 7), providing that receivers may be appointed in cases "where, in the discretion of the court, it may be necessary to secure ample justice to the parties."

<sup>280</sup> *In re Lewis*, 52 Kan. 660, 35 Pac. 287. The court remarks that "in most cases of this character, no other adequate remedy exists."

<sup>281</sup> *State v. Second Judicial Dist. Court*, 15 Mont. 324, 48 Am. St. Rep. 682, 27 L. R. A. 392, 39 Pac. 316, a vigorous and instructive opinion. See, also, *Morse v. Metropolitan S. S. Co.*, 87 N. J. Eq. 217, 100 Atl. 219 (majority stockholders were planning to secure control, divert funds, and wreck the corporation).

<sup>282</sup> *Cameron v. Groveland Improvement Co.*, 20 Wash. 169, 72 Am. St. Rep. 26, 54 Pac. 1128.

and secretary of a corporation mortgaged its property, when it was nearly or quite insolvent, to secure their antecedent claims against the corporation in fraud of creditors, and threatened to sell out in gross all the property of the corporation without notice, and in this way to close up the business of the company.<sup>283</sup> "In all such cases the courts should proceed with caution, and carefully avoid having their process made use of for the purpose merely of directing corporate action adversely to the policy of the majority stockholders and that of the regular chosen officers; that is to say, that stockholders must not be permitted to invoke the power of the court, through the appointment of a receiver, simply to enforce their own ideas of the conduct of affairs, against the majority of the duly constituted officers. Matters of corporate policy must be determined by the corporation itself. On the other hand, when it clearly appears that the dispute is not of that character, but arises out of an attempt of the officers or the majority stockholders to abuse their power by misappropriating the corporate property, by using the corporate means for their individual profit, or by so acting as to willfully and wrongfully jeopardize the corporate business, then the courts should not hesitate to afford relief. No one is more help-

<sup>283</sup> *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, 26 N. W. 184. For further illustrations, see *Elwood v. Bank*, 41 Kan. 475, 21 Pac. 673; *Du Puy v. Transportation etc. Co.*, 82 Md. 408, 33 Atl. 889, 34 Atl. 910. In *California Fruit Growers' Ass'n v. Superior Court*, 8 Cal. App. 711, 97 Pac. 769, the directors of the corporation had been convicted of fraud and had abandoned their trust. The court, pending proceedings for their removal, took possession of the property through a receiver. In *Brent v. B. E. Brister Sawmill Co.*, 103 Miss. 876, Ann. Cas. 1915B, 576, 43 L. R. A. (N. S.) 720, 60 South. 1018, the court appointed a receiver for a solvent corporation on charge of waste, maladministration, etc., by officers and directors, and acts for the benefit of other concerns in which the officers were interested, at the expense of the corporation.

less, unless aided by the arm of the law, than the holder of a small portion of the stock of a corporation, when the large stockholders combine to advance their private interest at the expense of the corporation.”<sup>284</sup>

§ 1544. (§ 123.) **Receiver After Dissolution.**—“Since it has come to be recognized everywhere that, upon the dissolution of a trading corporation, its property neither reverts to its grantors nor escheats to the state, but belongs, after payment of its debts, to those who were stockholders at the date of dissolution, . . . some means must be provided for winding up the corporation and distributing its assets according to the equitable rights of those interested. In the absence of any statute regulating the matter, a court of equity would have the undoubted right, in a proper proceeding instituted by a creditor or a stockholder, to appoint a receiver to administer the property.”<sup>285</sup> Such statutes exist in a major-

<sup>284</sup> Ponca Mill Co. v. Mikesell, 55 Neb. 98, 75 N. W. 46.

<sup>285</sup> Havemeyer v. Superior Court, 84 Cal. 327, 362, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121. See, also, Harned v. Beacon Hill Real Estate Co., 9 Del. Ch. 411, 84 Atl. 229; Rowe v. Stevens, 25 Idaho, 237, 137 Pac. 159 (where, after forfeiture of charter, directors fail to defend foreclosure suit, receiver may be appointed for that purpose); Waters-Pierce Oil Co. v. State, 47 Tex. Civ. App. 162, 103 S. W. 836; Stark v. Burke, 5 La. Ann. 740; United States v. Church of Jesus Christ of L. D. S., 5 Utah, 361, 15 Pac. 473; Olmstead v. Distilling etc. Co., 73 Fed. 44. The last case states the effect of an Illinois statute (Ill. Rev. Stats., c. 32, §§ 10-12), whereby the corporate capacity of corporations whose powers may have expired by limitation or otherwise is continued during the term of two years for the purpose only of collecting the debts due said corporation and selling and conveying the property and effects thereof. It was held that upon a judgment of ouster in *quo warranto* proceedings the corporation itself (not its directors) becomes a trustee for its creditors and, subject to their rights, for its stockholders; and a bill by a stockholder, in behalf of himself and other stockholders who may join with him, showing that the corporation itself, acting through its directors, was unable to execute and carry out the trust, because



ity of the states, providing, in substance, that upon the dissolution of any corporation, the directors or managers of the affairs of such corporation at the time of its dissolution shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the corporation, collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain, after the payment of debts and necessary expenses.<sup>286</sup>

the affairs of the corporation were involved and its property in danger of being dissipated through executions and attachments, presented a good case for a receiver to administer its assets. The court refused to appoint a receiver in *Sullivan Timber Co. v. Black*, 159 Ala. 570, 48 South. 870.

286 See 2 Stimson Am. St. Law, § 8356, enumerating:

**Alabama.**—Code, 1886, §§ 1691, 1693.

**California.**—Civ. Code, § 400.

**Colorado.**—Gen. Stats. 1883, § 341.

**Delaware.**—Biennial Laws, vol. 17, c. 147, § 32.

**Florida.**—Digest, 1881, c. 34, § 21 (in cases of voluntary dissolution only).

**Idaho.**—Rev. Stats. 1887, § 2648.

**Kansas.**—Kelly's Gen. Stats. 1891, c. 23, § 42.

**Maryland.**—Public Gen. Laws 1888, c. 23, § 272.

**Missouri.**—Rev. Stats. 1889, § 2513.

**Montana.**—Gen. Laws, § 489.

**Nebraska.**—Comp. Stats. 1885, c. 16, § 62.

**Nevada.**—Gen. Stats. 1885, § 822.

**New Jersey.**—Corp. 57.

**New Mexico.**—Comp. Laws 1884, § 210.

**New York.**—Laws of 1890, c. 563, § 19.

**North Dakota.**—Civ. Code, § 420.

**Ohio.**—Revision of 1890, § 5675. See, also, §§ 5687, 5688.

**Oklahoma.**—Stats. 1890, § 995.

**South Dakota.**—Civ. Code, § 420.

**Tennessee.**—Milliken & Vertrees' Code 1884, §§ 1721, 1723.

A receiver cannot be appointed to carry on the business of a dissolved corporation, whose assets are in the hands of the statutory trustees, when the corporation is made the sole party defendant to the bill.<sup>287</sup>

In the settlement of the affairs of a dissolved corporation it is not a right of a minority of the stockholders to have a decree for receivers and a sale of assets, especially where they are in the hands of a trustee who admits the existence of the trust and shows his readiness and ability to perform it more effectively and more economically than could be done by receivers.<sup>288</sup> And where the charter of a corporation has expired, and its property and assets are in the custody, and its affairs under the management, of the persons designated by statute, the mere fact of dissolution, without more, furnishes no ground for the appointment of a receiver;<sup>289</sup> similarly,

**Texas.**—Rev. Stats. 1879, §§ 606, 607.

**Washington.**—Code 1881, § 2441.

**Wisconsin.**—Sanb. & Berr. Stats. 1889, § 1764.

**Wyoming.**—Rev. Stats. 1887, § 647.

<sup>287</sup> *Weatherby v. Capital City Water Co.*, 115 Ala. 156, 22 South. 140.

<sup>288</sup> *Baltimore & O. R. Co. v. Cannon*, 72 Md. 493, 20 Atl. 123.

<sup>289</sup> *Anderson v. Buckley*, 126 Ala. 623, 28 South. 729; for facts authorizing appointment, see *S. C.*, on second appeal, *Buckley v. Anderson*, 137 Ala. 325, 34 South. 238. In support of the text, see, also, *Ferrell v. Evans*, 25 Mont. 444, 65 Pac. 714; *Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 119 Md. 21, 85 Atl. 949; *Hege-man v. Atlantic Rubber Shoe Co.*, 73 N. J. Eq. 295, 75 Atl. 819 (receiver not appointed when solvent corporation is being dissolved by stockholders); *Brookshire v. Farmers' Alliance Exchange*, 73 S. C. 131, 52 S. E. 867 (not appointed where directors have been instructed to dissolve corporation and no fraud, mismanagement, nor neglect shown). But where a *prima facie* case of wrongdoing is made out against officers who, pending suit, appoint three trustees to liquidate the business, the court may remove the trustees and appoint a receiver: *Fitzgerald v. State Mut. Bldg. & Loan Ass'n*, 74 N. J. Eq. 440, 69 Atl. 564.

when the articles of association provide the manner of winding up the business, and no reason is shown why the mode provided cannot be executed, a receiver cannot be appointed for the corporation on the demand of one of the members who is dissatisfied with the action of the majority.<sup>290</sup>

§ 1545. (§ 124.) **Dissensions in the Governing Body of the Corporation, and Among the Stockholders.**—"The power of a court of equity to appoint a receiver of a corporation either because it has no properly constituted governing body, or because there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage to its stockholders, appears to be settled; but it is equally well settled that this power is subject to certain limitations, namely, it must always be exercised with great caution, and only for such time and to such an extent as may be necessary to preserve the property of the corporation, and protect the rights and interests of its stockholders. As soon as a lawfully constituted and competent governing body comes into existence, whether it is brought into existence by an adjustment of the dissensions or by the election of a new body, and such body is ready to take possession of the property of the corporation, and proceed in the proper discharge of its duties, the court must lift its hand and retire."<sup>291</sup> But mere dis-

<sup>290</sup> *Pringle v. Eltringham Const. Co.*, 49 La. Ann. 301, 21 South. 515; and see *Follett v. Field*, 30 La. Ann. 162.

<sup>291</sup> *Edison v. Edison United Phonograph Co.*, 52 N. J. Eq. 620, 29 Atl. 195, citing *Featherstone v. Cooke*, L. R. 16 Eq. 298; *Trade Auxiliary Co. v. Vickers*, L. R. 16 Eq. 303; *Incho v. Mid-Continent Development Co.*, 94 Kan. 370, Ann. Cas. 1917B, 546, 146 Pac. 1014; *Einstein v. Rosenfeld*, 38 N. J. Eq. 309; *Archer v. Waterworks Co.*, 50 N. J. Eq. 33, 24 Atl. 508. Also, see *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa, 313, 329, 63 Am. St. Rep. 389, 70 N. W. 216. In the first case it was further said: "Neither of the grounds which

satisfaction by a minority of the stockholders of a cor-

this doctrine recognizes as sufficient to warrant the appointment of a receiver exists in this case. The defendant corporation has a lawfully constituted governing body, which is in peaceable possession of all its property, controlling and directing its business, regularly and peacefully, in conformity to the judgment of seven of its nine directors. Two of the nine differ in judgment from the other seven. The two believe that the adoption of a different course of business from that which is now pursued would result in larger gains. Both methods are clearly within the purposes and powers of the corporation. Which method shall be pursued, or whether one or both, is a question which the law commits absolutely and unconditionally to the judgment of a majority of the directors. Though somewhat disguised, the real purpose of the bill in this case appears, when critically examined, to be to induce judicial action which shall substitute the judgment of a minority of the directors of this corporation for that of the majority. That cannot be done. It is beyond judicial power. No rule of law is better settled than that which declares that so long as the directors of a corporation keep within the scope of their powers, and act in good faith and with honest motives, their acts are not subject to judicial control or revision." In *Wallace v. Pierce-Wallace Pub. Co.*, *supra*, a somewhat stronger case, it was held that a receiver will not be appointed on the ground that the corporation has but two stockholders owning an equal number of shares of stock, and owns stock in another corporation, respecting the management of which there is such disagreement between the stockholders in the first-named corporation that they cannot agree in any measures for the voting of such stock, or for the management of the second corporation, nor will a receiver be appointed of such stock alone. Emphasis was laid on the temporary and limited nature of the relief that is permissible in such cases. "Now, a court of equity has no power to make them [the stockholders] agree; and, if their differences are such that it is impossible for them to carry on their business, it is not likely that the appointment of a receiver will bring about a reconciliation. . . . What, then, must result? Either that a court must carry on this business for the interest of the stockholders until the corporation is dissolved by lapse of time, or that one of the parties should sell his stock, or such portion thereof, as will give a majority to one or the other of these litigants." See, to the same effect, *Little Warrior Coal Co. v. Hooper*, 105 Ala. 665, 17 South. 118. In this case one of the grounds of complaint was, that the stock was equally divided between the complainant and the two



poration with its management by the majority, in the

defendants; that the latter acted and voted in confederation; that the three could not agree as directors in the management of the business, and could not elect directors; and that for this reason a receiver should be appointed to take charge of and operate the business. The bill did not show whether the plaintiff or the defendants were to blame, and charged no fraud. The court says: "The bill shows a mere disagreement among themselves as to how the business should be operated and managed, and who should control it. No case has been cited, and we have found none, nor any principle of law, which would authorize the appointment of a receiver upon such averments."

From the brief statement of facts in the last case, it is difficult to distinguish it from *Sternberg v. Wolff*, 56 N. J. Eq. 389, 67 Am. St. Rep. 494, 39 L. R. A. 762, 39 Atl. 397, reversing the decision of Vice-Chancellor Pitney in 56 N. J. Eq. 555, 42 Atl. 1078. The importance of this decision justifies a somewhat lengthy quotation from the opinion of Depue, J. "The two parties to the controversy—Sternberg and his wife, on the one side, and Wolff and his wife, on the other side—are the owners each of one-half of the capital stock. These four individuals are directors of the company, and by the by-laws the whole number is necessary to make a quorum for the transaction of business. The dissensions between these two parties—Sternberg and his wife, on one side, and Wolff and his wife, on the other side—have brought the affairs of this company to a deadlock, so far as any corporate action by the board of directors is concerned. It may be assumed that the court of chancery has no jurisdiction to dissolve a solvent corporation, and distribute its assets, on the ground that the business of the corporation is improperly conducted by its board of directors, even though such mismanagement be with the concurrence of a majority of the stockholders; but the jurisdiction of the court of chancery to control the business of a company, especially a trading company, pending a litigation over the management and conduct of its business, must necessarily exist; and we think, pending a litigation such as that which is inaugurated by the proceedings in this case, a receiver may be appointed. . . . No reason appears why in the matter of the control and conduct of its business the corporation and its officers should not be within the control of the court of chancery to an extent corresponding with the control of that court over the business of a mere partnership. The cases seem to establish the power of the court in virtue of its general jurisdiction to preserve the subject of

absence of fraud or insolvency, is not sufficient to au-

litigation *pendente lite*, though it may relate to the affairs of a trading company in form organized as a corporation. The two cases cited by the vice-chancellor in his second opinion are to that effect. *Featherstone v. Cooke*, L. R. 16 Eq. 298; *Trade Auxiliary Co. v. Vickers*, L. R. 16 Eq. 303. In the first case the complications in the affairs of the company arose out of a division in the board of directors, which made it absolutely impossible that the affairs of the company could be conducted with advantage. Vice-Chancellor Malins, in that case, says: 'With regard to private partnerships, nothing is of more frequent occurrence than the quarrels of partners. If partners quarrel, oust each other from the management, or so conduct themselves that the partnership cannot go on with advantage, it is every day's practice for the court to interfere by injunction, and appoint a receiver if necessary. With regard to public companies, I apprehend the same principle is applicable. If a state of things exists in which the governing body are so divided that they cannot act together, and there is the same kind of feeling between the members as there is frequently in the case of private partnerships, it is clearly within the rule of this court to interfere, and it will do so.' The court in that case intervened by injunction and receiver simply to protect the property of the company, to continue, however, no longer than until a governing body was duly appointed. In the latter case the dissension was also in the board of directors, one set of which closed the office doors of the company's building, and the other set, with the aid of some laborers, broke open the doors with crowbars, and forced the office open. The prayer of the bill was for the appointment of a receiver until the proper board of directors was constituted. The vice-chancellor placed the affairs of the company in the hands of a receiver *pendente lite* until a new governing body was appointed." Mr. Justice Depue also finds warrant for the appointment in certain *dicta* in *Einstein v. Rosenfeld*, 38 N. J. Eq. 309; in *Edison v. Phonograph Co.*, *supra*; in *Fougeray v. Cord*, 50 N. J. Eq. 185, 756, 24 Atl. 499, 26 Atl. 866; and in the opinion of Chancellor McGill in *Archer v. Waterworks*, 50 N. J. Eq. 33, 34 Atl. 508. In the last case, a suit by a stockholder, the complainant seemed to have the equitable ownership of certain stock, but the parties in control of the corporation fraudulently refused to make the transfer of such stock on the corporation's books. This, of course, prevented the complainant from voting. The chancellor said: "I think it is plainly my duty to interfere by injunction, to prevent the perpetration of the wrong here threatened. If the present directors

thorize the court to appoint a receiver at the instance of the minority.<sup>292</sup> "A court of equity has no power to

of the company continue their dissensions, so that the affairs of the company are not speedily attended to, upon a proper application I will care for the property, pending the determination of the suit, through the instrumentality of a receiver. Such actions will be supported by precedents and authority [citing the cases from L. R. 16 Eq.]. My interference, however, by injunction and receiver, will be limited to the imperative requirements of the present emergency." *Jasper Land Co. v. Wallis*, 123 Ala. 652, 26 South. 659, was a case of rival boards of directors. "The Jasper Land Company has two boards of directors, or rather there are two sets of men, each claiming to be and constitute its board of directors. Each of these alleged boards is attacking the integrity and existence of the other in divers proceedings at law and in chancery. . . . It is plain to us that neither set is so in possession and control of the property and affairs of the company as to be able to take the necessary steps to the effectuation of the relief the stockholders are entitled to [viz., relief to minority stockholders against mismanagement and misappropriation of funds of the corporation]. In such case the appointment of a receiver, even though the corporation be solvent, to take charge and control of its effects and concerns, at least until there is a recognized board of directors competent to faithfully and efficiently conserve the interests of all the stockholders, is within the proper exercise of the jurisdiction of the chancery court," citing many of the cases *supra*. For further instances where receivers were appointed because of dissensions, or the existence of rival boards of directors, see *Powers v. Blue Grass Building etc. Ass'n*, 86 Fed. 705; *Tompkins Co. v. Catawba Mills*, 82 Fed. 780 (in suit by creditors); *Gibbs v. Morgan*, 9 Idaho, 100, 72 Pac. 733; *Sheridan Brick Works v. Marion Trust Co.*, 157 Ind. 292, 87 Am. St. Rep. 207, 61 N. E. 666. As to the appointment of a receiver where there is no governing body of the corporation, see *In re Belton*, 47 La. Ann. 1614, 30 L. R. A. 648, 18 South. 642; *Brown v. Union Ins. Co.*, 3 La. Ann. 177.

The rule of *Featherstone v. Cooke and Auxiliary Co. v. Vickers*, as stated in the text, thus appears to have met with abundant recognition in this country, save in the case in 105 Ala., where the court's attention was probably not called to these cases, and in the case in 101 Iowa, where they are expressly distinguished.

<sup>292</sup> *Flecker v. Emporia City R'y Co.*, 48 Kan. 577, 30 Pac. 18; *Bridgeport Development Co. v. Tritsch*, 110 Ala. 274, 20 South. 16; *Hill v. Gould*, 129 Mo. 106, 30 S. W. 181; *Peatman v. Centerville*

interpose its authority for the purpose of adjusting controversies that have arisen among the shareholders or directors of a corporation relative to the proper mode of conducting the corporate business, as it may do in case of a similar controversy arising between the members of an ordinary partnership. Corporations are in a certain sense legislative bodies. They have a legislative power when the directors or shareholders are duly convened that is fully adequate to settle all questions affecting their business interests or policy, and they should be left to dispose of all questions of that nature without applying to the courts for relief. A stockholder in a corporation cannot successfully invoke the power of a chancery court to control its officers or board of managers, or to wrest the corporate property from their charge through the agency of a receiver, so long as they neither do nor threaten to do any fraudulent or *ultra vires* acts, and so long as they keep within the limits of by-laws which have been prescribed for their governance.' 293

Light etc. Co., 100 Iowa, 245, 69 N. W. 541; Republican Mountain Silver Mines v. Brown, 58 Fed. 647, 24 L. R. A. 776, 7 C. C. A. 412; Hunt v. American Grocery Co., 80 Fed. 70. See, also, Birmingham Disinfectant Co. v. Smith (Smith v. Birmingham Disinfectant Co.), 174 Ala. 374, 56 South. 721; Howeth v. Colbourne Bros. Co., 115 Md. 107, 80 Atl. 916; Indiana Co-op. Canal Co. v. Darling (Tex. Civ.), 185 S. W. 1039; Bergman Clay Mfg. Co. v. Bergman, 73 Wash. 144, 131 Pac. 485.

293 Republican Mountain Silver Mines v. Brown, 58 Fed. 647, 24 L. R. A. 776, 7 C. C. A. 412. Compare Platner v. Kirby, 138 Iowa, 259, 115 N. W. 1032. See, also, Stockholders of Jefferson County Agr. Ass'n v. Jefferson County Agr. Ass'n, 155 Iowa, 634, 136 N. W. 672. Mere disagreements among the directors will not justify the appointment of a receiver. He should be appointed only under such special or peculiar circumstances as demand summary relief: Jacobs v. Jacobs Mercantile Co., 37 Mont. 321, 96 Pac. 723. A receiver was appointed in Green v. National Advertising & Amusement Co., 137 Minn. 65, 162 N. W. 1056.



§ 1546. (§ 125.) **Receiver on Application of Creditors.**—The question of a general creditor's right to a receiver is practically a question of his right to maintain a creditor's bill, and is, therefore, more appropriately considered in another place.<sup>294</sup> The defendant corporation may lose its right to make the objection that the plaintiff creditors have not exhausted their legal remedy, by acquiescence, for a term of several months, in the appointment and possession of a receiver in behalf of general creditors.<sup>295</sup> The general rule is, of course, that a court of equity will not appoint a receiver of a corporation, upon the application of a creditor without a lien who has not reduced his claim to judgment.<sup>296</sup>

<sup>294</sup> See *post*, vol. II, chapter on "Creditors' Bills"; *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 37 L. Ed. 1113, 14 Sup. Ct. 127. In general, see *Richardson v. People's Life & Acc. Ins. Co.*, 28 Ky. Law Rep. 919, 92 S. W. 284.

<sup>295</sup> *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 33 L. Ed. 1021, 10 Sup. Ct. 604. See, also, *Robinson v. Mutual Reserve Life Ins. Co.*, 162 Fed. 794; *Union Trust Co. v. Southern S. & L. Co.*, 166 Fed. 193, 92 C. C. A. 101. A party who does not know of disqualification of judge who appointed a receiver does not waive his right to object by delay of six weeks, when he acts promptly on discovering the facts: *Davis Colliery Co. v. Charlevoix Sugar Co.*, 155 Mich. 228, 118 N. W. 929.

<sup>296</sup> *Texas Consol. etc. Ass'n v. Storrow*, 92 Fed. 5, 34 C. C. A. 182; *Leary v. Colombia etc. Nav. Co.*, 82 Fed. 775; *Nowell v. International Trust Co.*, 169 Fed. 497, 94 C. C. A. 589; *Smith-Dimmick Lumber Co. v. Teague*, 119 Ala. 385, 24 South. 4; *Smith v. Superior Court*, 97 Cal. 348, 32 Pac. 322; *French Bank Case*, 53 Cal. 495; *Hobson v. Pacific States Mercantile Co.*, 5 Cal. App. 94, 89 Pac. 866; *International Trust Co. v. United Coal Co.*, 27 Colo. 246, 83 Am. St. Rep. 59, 60 Pac. 621; *Dodge v. Pyrolusite Manganese Co.*, 69 Ga. 665; *Cronan v. District Court of Kootenai County*, 15 Idaho, 184, 96 Pac. 768; *Klee v. E. H. Steele Co.*, 60 Minn. 355, 62 N. W. 399; *Gabbert v. Union Gas & Traction Co.*, 140 Mo. App. 6, 123 S. W. 1024; *Guilbert v. Kessinger*, 173 Mo. App. 680, 160 S. W. 17; *Mann v. German-American Inv. Co.*, 70 Neb. 454, 97 N. W. 600; *Galvin v. McConnell*, 53 Tex. Civ. App. 486, 117 S. W. 211; *Davis v. Edwards (Consolidated Coal Co.)*, 41 Wash. 480, 84 Pac. 22; *Rainey*

It is held in Ohio that a receiver may properly be appointed, by virtue of the general usages of equity, in the equitable action to enforce payment of the statutory

*v. Freeport Smokeless Coal & Coking Co.*, 58 W. Va. 424, 52 S. E. 528. See, also, *Falmouth Nat. Bank v. Cape Cod Ship Canal Co.*, 166 Mass. 550, 44 N. E. 617. In *Nunnally v. Strauss*, 94 Va. 255, 26 S. E. 580, however, it was held that a simple contract creditor of an insolvent corporation which has ceased to do business and has been abandoned by its officers may sue on behalf of himself and other creditors for a receiver. "In the case of *Fainey v. Bennett*, 27 Gratt. 365, this court has very aptly likened an insolvent corporation that has ceased to do business to an insolvent decedent's estate, and has argued with much force that, upon the same principle that a court of equity administers a dead man's estate under a bill filed by simple contract creditors for that purpose, it should administer the affairs of a corporation that has ceased to do its life work. That was the case of an insolvent banking institution. Its assets remained in the hands of one or more of the officers last elected by the directors, but no one had been appointed by the directors or stockholders to take charge of its assets and wind up its affairs; and it was held proper, under the circumstances, by analogy to the administration of a dead man's estate, at the suit of simple contract creditors who had no lien, for a court of equity to take charge of the affairs of the abandoned corporation, administer its assets, and apply the same for the benefit of its creditors." See, also, *Doe v. Northwest Coal & Transportation Co.*, 64 Fed. 928; *Kentucky Racing & Breeding Ass'n v. Galbreath*, 25 Ky. Law Rep. 1212, 77 S. W. 371 (receiver appointed, "where the assets of an insolvent corporation, which a [general] creditor is entitled to have applied in satisfaction of his demands, will probably be lost or fraudulently disposed of by improvident or corrupt officials unless a receiver is appointed." The text-books relied upon by the court hardly warrant so broad a statement); *Barber v. International Co. of Mexico*, 73 Conn. 587, 48 Atl. 758 (where assets of corporation A were transferred to corporation B, under agreement that B would pay all the liabilities of A, jurisdiction to appoint receiver of A to enforce this agreement for the benefit of A's creditors; two judges dissenting).

In the well-considered case of *Darragh v. H. Wetter Mfg. Co.*, 49 U. S. App. 1, 23 C. C. A. 609, 78 Fed. 7, a suit in the federal court was sustained, by a contract creditor who had not reduced his claim to judgment, under the statutes of Arkansas, for the appointment

liability of stockholders.<sup>297</sup> A receiver is a means of effectuating the remedy of a judgment creditor of a corporation seeking to enforce, in behalf of himself and other creditors, the application of unpaid stock subscriptions to the discharge of the debts of the corporation.<sup>298</sup>

When the rents and profits of a bridge company for a certain period have been sold under execution to a judgment creditor of the company, the court may cause possession of the bridge to be taken by a receiver to collect the tolls and pay them into court for the purpose of discharging the judgment.<sup>299</sup>

An assignment for the benefit of creditors by a corporation after service of process on it in a suit by a creditor for a receiver does not affect the jurisdiction of the court to appoint a receiver.<sup>300</sup>

If fraud on the part of the corporate management is the ground on which relief is asked, the conduct and facts

of a receiver and the sale of the property of an insolvent corporation of that state and the distribution of its assets among its creditors. A policy-holder in a stock life insurance company is not entitled to a receiver on allegations of mismanagement: *Brown v. Equitable Life Assur. Soc.*, 142 Fed. 835. Where a corporation waives the defense, the appointment of a receiver at the instance of a simple contract creditor may be sustained: *American Can Co. v. Erie Preserving Co.*, 171 Fed. 540.

<sup>297</sup> *Zieverink v. Kemper*, 50 Ohio St. 208, 34 N. E. 250. In Montana, a receiver will not be appointed on account of the insolvency of a corporation where the judgment creditor has an adequate remedy at law by suits against stockholders. The statute authorizes the appointment of a receiver to carry a judgment into effect. But this does not apply where the plaintiff himself can take the necessary steps at law: *Forsell v. Pittsburg & Montana Copper Co.*, 42 Mont. 412, 113 Pac. 479.

<sup>298</sup> See *Adler v. Milwaukee etc. Mfg. Co.*, 13 Wis. 57, 62. See, also, *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. Ed. 349.

<sup>299</sup> *Covington Drawbridge Co. v. Shepherd*, 21 How. 112, 16 L. Ed. 38.

<sup>300</sup> *Belmont Nail Co. v. Columbia Iron etc. Co.*, 46 Fed. 8.

from which the conclusion of fraud is deduced must be averred.<sup>301</sup>

If the case is a proper one for a receiver, the denial by the defendant that the corporation has any property or effects of any kind is no bar to the exercise of the jurisdiction. If the denial in this respect ultimately proves true, the defendant is not injured, and the complainant proceeds at the peril of being obliged to pay costs.<sup>302</sup>

§ 1547. (§ 126.) **In Foreclosure of Mortgages on Corporate Property.**—The power of a court of chancery to appoint a receiver *pendente lite* in foreclosure cases is a part of its incidental jurisdiction, not depending upon any statute. This jurisdiction is not affected by the character of the mortgagor, whether an individual or a corporation. It rests upon grounds quite independent of the character of the parties to the instrument, or the nature of the mortgaged property.<sup>303</sup> Mere insolvency, arising from no proved fault in the management of pri-

<sup>301</sup> *Fort Payne Furnace Co. v. Fort Payne Coal etc. Co.*, 96 Ala. 472, 38 Am. St. Rep. 109, 11 South. 439. Thus, a creditors' bill which merely avers that the directors of the defendant corporation, acting in pursuance of a vote of the stockholders, had ordered the issue of bonds, secured by a trust deed on all its property, that a portion of those bonds had been issued and disposed of, that the directors afterwards voted to sell the corporate property at a public sale, that the directors then issued a circular letter appealing to the stockholders to purchase the bonds already disposed of, does not present a case for the appointment of a receiver, there being no allegations that any of the directors had an interest in the bonds or in the sale thereof, or that those bonds were not sold for their value and to *bona fide* purchasers, nor any facts stated which show that the proposed sale was not in strict compliance with the terms of the trust deed: *Id.*

<sup>302</sup> *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387, 21 N. W. 375.

<sup>303</sup> *United States Trust Co. v. New York, W. S. & B. R. Co.*, 101 N. Y. 478, 5 N. E. 316.



vate corporations, is not a sufficient ground.<sup>304</sup> But where the complainant set up mortgages of realty and personalty, the insolvency of the corporation being averred, and dissensions between the stockholders being alleged, tending to show that the condition of insolvency would continue and the assets of the corporation be exposed to deterioration, and the rights of creditors disregarded, it was held that the jurisdiction of the court was unquestionable, and that the complainant had established its right to the appointment of a receiver.<sup>305</sup>

<sup>304</sup> *Trust & Deposit Co. v. Spartanburg Waterworks Co.*, 91 Fed. 324 (suit for foreclosure by holder of bonds secured by second mortgage). The court further says: "There should be some evidence of waste or mismanagement or carelessness or fraud, or extravagance, wantonness, or collusion; some ground to apprehend that the property will suffer deterioration or serious injury; something to show that there is danger of probable loss, or that some rights may be substantially impaired." In *Stewart v. Chesapeake etc. Canal Co.*, 5 Fed. 149, 4 Hughes, 47, the holder of bonds secured by a first mortgage of the tolls and revenue of a canal applied for a receiver, alleging that the default in payment of the bonds was due to wasteful and corrupt management of the corporation. The mortgage provided that the corporation should remain in possession unless it should be shown that default was from other causes than failure of business. It was held that to justify a receiver to manage for an indefinite time an enterprise attended with such risk and difficulty, it must be shown beyond question that the default was due to mismanagement, or that the safety of the property was threatened by corporate mismanagement, and that a receivership probably would result in effectual relief. See, also, *City of Cape May v. Cape May etc. Co.*, 59 N. J. Eq. 59, 49 Atl. 973.

<sup>305</sup> *De La Vergne etc. Co. v. Palmetto Brewing etc. Co.*, 72 Fed. 579, citing *Kountze v. Hotel Co.*, 107 U. S. 378, 27 L. Ed. 609, 2 Sup. Ct. 911. For another case where dissensions between the officers of a company, greatly embarrassed by its debts, the value of whose property, franchises, etc., largely depended upon the continuation of its business, rendered a receiver almost a necessity in an action to foreclose a chattel mortgage of the company's property, see *State Journal Co. v. Commonwealth Co.*, 43 Kan. 93, 22 Pac. 982. In *Etna Steel & Iron Co. v. Hamilton*, 137 Ga. 232, 73 S. E. 8, the bill averred that plaintiff was a bondholder, that default had been made in payment

While it is true, as a general rule, that appointing a receiver is auxiliary to the main purpose of the suit, and that no suit can be brought until the debt is due, it is held that there is no reason for limiting to railroad companies the doctrine that "where default is imminent and manifestly inevitable, though none has taken place, a receiver of a railroad company may be appointed, on the application of a mortgage bondholder, in order to prevent the breaking up and destruction of its business, and to protect the property against attachments and executions in favor of other creditors."<sup>306</sup>

A formal mortgage is not essential in order to give holders of bonds which are a lien on the property of the corporation standing to apply for a receivership; as in a case where the bonds of a canal company pledged the effects, real and personal, of the company, and contained recitals that they should have preference over all debts to be thereafter contracted, and that in default of the payment of interest the holder of the bonds might enter into possession of the tolls, water rates, and other incomes of the company, and might apply for the appointment of a receiver.<sup>307</sup>

of interest, that demand had been made on the trustee and it had refused to foreclose, and that therefore plaintiff had a right to sue; that it was necessary that a receiver be appointed to prevent serious loss from an impending tax sale. It was held that a receiver should be appointed. Compare *Adams v. Farmers' Nat. Bank*, 167 Ky. 506, 180 S. W. 807.

<sup>306</sup> *Thompson v. Natchez Water etc. Co.*, 68 Miss. 423, 9 South. 821.

<sup>307</sup> *White Water Valley Canal Co. v. Vallette*, 21 How. 414, 16 L. Ed. 154.

As to the appointment of receivers and managers on the application of debenture holders, under the liberal terms of the English Judicature Act, see *In re Pound*, 42 Ch. D. 402; *In re Joshua Stubbs, Limited*, [1891] 1 Ch. 187, 475; *McMahon v. West Kent Iron Works Co.*, [1891] 2 Ch. 148; *Strong v. Carlyle Press*, [1893] 1 Ch. 268; *British Linen Co. v. South American & Mexican Co.*, [1894] 1 Ch. 108; *Bartlett v. West Metropolitan Tramways Co.*, [1893] 3 Ch. 437; *Marshall*

§ 1548. (§ 127.) **Receivers Authorized by Statutes.**

The statutes of the states that have legislated on the subject of receivers of corporations vary so greatly, not only in details, but in their whole scope and purpose, that no attempt will here be made to classify the many and important cases interpreting this mass of legislation. Perhaps the commonest provision is that allowing the court to appoint a receiver "in the cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights"; but the courts are by no means unanimous in deciding upon the effect to be given to this statute.<sup>308</sup> The remarks of a very able judge in description of this legislation may be of interest: "In the absence of any statute regulating the matter, a court of equity would have the undoubted right, in a proper proceeding instituted by a creditor or stockholder, to appoint a receiver to administer the property [of a corporation that has ceased to exist]. But in many of the states, statutes have been passed expressly providing for the appointment of receivers, or trustees exercising the same functions, though sometimes called by other names. In all cases it is made their duty to collect the assets, pay the debts, and distribute the surplus *pro rata* to the stockholders. As this is precisely what a court of equity would have done in the absence of a statute, it is to be inferred that the motive of such legislation has been to accomplish some other object,—some object, that is to say, for which express legislation was necessary. This inference is fully justified and amply borne out by reference to the different statutes. They seem to have been enacted with the object, in some instances, of abrogating

v. South Staffordshire Tramways Co., [1895] 2 Ch. 36; and cases cited, *ante*, § 92, note 134.

<sup>308</sup> Compare the California cases cited below with those from Idaho, Indiana and Texas.

the old law of forfeiture, and reversion; in others, of committing the administration to other courts than courts of equity; in others, to provide general and uniform rules of procedure, as to giving notice to creditors, etc., to take the place of rules of court and specific orders to be made by the chancellor in each particular case; in others, to keep the matter out of the courts altogether, as by allowing the dissolved corporation to continue its existence for a term for purposes of liquidation, but for no other purpose. The whole mass of this legislation seems to be pervaded by the one idea of simplifying, expediting, and cheapening the means of accomplishing the one object of transferring to the stockholders of a defunct corporation their full share of its surplus assets. There is, from beginning to end, no suggestion of added penalties or punishment after death.”<sup>309</sup>

The more important of these statutes, and the cases interpreting them that appear to be of most general interest, are given at some length in the note.<sup>310</sup>

309 Beatty, C. J., in *Havemeyer v. Superior Court*, 84 Cal. 327, 363, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

310 **Alabama.**—The statute relating to proceedings for the voluntary dissolution of corporations provides for the appointment of a receiver upon a decree of dissolution: Code 1886, § 1686; see 2 Stimson's Am. St. Law, §§ 8332, 8335. This statute has no operation upon a corporation dissolved by adversary proceeding, and furnishes no guide for the interpretation of statutory provisions relating thereto. § 1691 (Code 1896, § 1299) provides that trustees shall settle the affairs of a dissolved corporation unless other persons are appointed by a court of competent authority. This section neither enlarges nor restricts the inherent power of the courts to appoint a receiver for a corporation which has been dissolved by *quo warranto* proceedings, except so far as it renders such appointment, in most cases, unnecessary: *Weatherly v. Capital City Water Co.*, 115 Ala. 156, 22 South. 140. “The manifest general purpose of the legislature was to commit the affairs and properties of a corporation so dissolved to the persons who were its managers at the time of the dissolution; but the law-makers recognized that there might be special circumstances or peculiar



exigencies in a given case which would breed a necessity to take the corporate affairs and property out of the hands of such managers, and, to exclude any idea that the statutory designation of trustees should have the effect of ousting the ordinary jurisdiction of courts of chancery to appoint receivers upon such circumstances on exigencies being made to appear, they expressly saved this jurisdiction, though doubtless such reservation was in fact unnecessary. . . . The rule is created by the act. The exception exists apart from the act, and is merely recognized by it. This mere recognition in and of itself neither adds to nor takes from the powers of the courts. It neither confers upon them authority which they had not before, nor takes from them authority which they had before, to appoint receivers, except only that the affirmative provision of the act, committing the estate of the corporation to those who were its managers at the time of dissolution, as trustees for its creditors and bondholders, emasculates the mere fact of dissolution, so far as it might otherwise have been considered as a ground for such intervention of the courts, since the statutory creation of these trustees of the assets and concerns of the defunct corporation supplies the means of settling its affairs, which, in the absence of a statute, could probably be furnished only through the appointment of a receiver. So that under the statute a bill praying the appointment of a receiver must aver facts which, upon general principles of equity jurisprudence and procedure, would call into exercise the power of the court to the end sought. A state of things must be alleged which imports a necessity for the appointment of a receiver. . . . The facts alleged must be of a character to show that the trustees are incompetent or unfaithful, or are mismanaging the property to the injury of the complainant, or are without power and authority to subserve some peculiar interest or right of the party complaining, and that he is being injured thereby, or other like situation"; citing *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; *New Foundland R. R. Construction Co. v. Schack*, 40 N. J. Eq. 222, 1 Atl. 23. See, also, *Anderson v. Buckley*, 126 Ala. 623, 28 South. 729; *S. C.*, on second appeal, *Buckley v. Anderson*, 137 Ala. 325, 34 South. 238; *Hayes v. Jasper Land Co.*, 147 Ala. 340, 41 South. 909. A minority stockholder may maintain a bill to wind up the corporation and appoint a receiver where the property from which the income is derived is gradually deteriorating and in a short time will be insufficient to meet expenses, the corporation is a failure, and the purposes for which it was organized are impossible of attainment: *Central Land Co. v. Sullivan*, 152 Ala. 360, 15 Ann. Cas. 420, 44 South. 644. But a receiver will not be appointed for a corporation being dissolved in

Florida, upon the mere allegation of mismanagement, when the plaintiff stockholder has consented to the dissolution proceedings: *Black v. Sullivan Timber Co.*, 147 Ala. 327, 40 South. 667. Under the statute allowing a creditor or stockholder to bring an action when the corporation is insolvent, the corporation must be insolvent in the sense that its liabilities exceed its assets: *Alabama Cent. R'y Co. v. Stokes*, 157 Ala. 202, 47 South. 336.

**California.**—The provisions of the Code of Civil Procedure relating to receivers of corporations are:

§ 564. "A receiver may be appointed by the court in which an action is pending or by the judge thereof: . . . 5. In the cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights."

§ 565. (Amendment of 1880): "Upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members."

In the "*French Bank Case*" (*La Societe Francaise etc. v. District Court*), 53 Cal. 495, it was held that subd. 5 of § 564, *supra*, did not warrant the appointment of a receiver at the suit of a stockholder or creditor for the purpose of winding up the affairs of an insolvent corporation; that this subdivision created no cause of action for such a purpose. It was pointed out that the New York statute from which this provision was copied (N. Y. Code of Procedure, § 244) read: "A receiver may be appointed. . . (4) In the cases *provided in this code and by special statutes*, where a corporation has been dissolved, or is insolvent," etc.; that such provision existed in the code and statutes of New York, while, except in § 564, the codes and statutes of California were silent on the subject of the appointment of receivers. The arguments of the eminent counsel engaged in this case are of much interest. See, also, *Fischer v. Superior Court*, 110 Cal. 129, 141, 42 Pac. 561.

The opinion of Beatty, C. J., in *Havemeyer v. Superior Court*, 84 Cal. 327, 342-389, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121, is by far the longest and most elaborate to be found in any report on the subject of the appointment of receivers of corporations. The

proceeding was an application for a writ of prohibition to a court which had appointed a receiver of the property of a corporation in a *quo warranto* proceeding upon judgment of forfeiture of its corporate charter. The following abstract of the opinion, so far as it deals with this subject, follows the order of discussion in the opinion instead of the reporter's syllabus. After conceding the inherent power of a court of equity, in the absence of any statute regulating the matter, in a proper proceeding instituted by a creditor or a stockholder, to appoint a receiver to administer the property of a defunct corporation (p. 362), § 400 of the Civil Code (the usual provision making the directors of the dissolved corporation managers of its affairs and trustees for the creditors and stockholders, with full power of settlement; see *ante*, § 123) is declared to establish the general policy of the state with reference to winding up the affairs of a corporation in all cases of dissolution, whether voluntary or involuntary; and the wisdom of this policy is earnestly defended. (P. 365:) "Under our codes, on the contrary, the rule is not to appoint a receiver, but to leave the whole matter of liquidation and distribution to the exclusive control of the directors of the corporation in office at the date of dissolution. The appointment of a receiver is the exception, not the rule, and is not to be made unless some party interested, either a creditor or a stockholder, can show that for the protection of his rights the appointment of a receiver and the administration of the assets under the control and superintendence of a court of equity is necessary." In reply to the suggestion of absurdity in thus interpreting the legislation so as to leave to directors convicted of violating their duty to the state the trust of administering and distributing the assets of the dissolved corporation, the court uses this vigorous language (p. 369): "We confess there does not appear to us to be any absurdity in this supposition. Because a corporation has violated its duty to the public, it does not follow that its members cannot be trusted to look out for their own interests. Quite the contrary; for it is usually a too exclusive regard for their own interests that constitutes their dereliction to the public. As to creditors, their interests must in most cases be opposed to the appointment of a receiver. They will be paid more quickly and more certainly without a receiver than with one. If there is any one thing more certain than another, it is that the appointment of a receiver implies a material diminution of the fund out of which creditors are to be paid. For, in the first place, the fees of the receiver, his counsel, and assistants, are to be subtracted. Then the estate must, in many cases, as it has been in this case, be condemned to unproductive idleness and disuse, and exposed to danger of loss and dilapidation from rust and decay during the long and

tedious progress of the legal proceedings that are necessarily entailed. And all this time the creditors must wait and look on, while the fund upon which they rely for payment is being depleted by the processes above referred to. On the other hand, supposing the affairs of the defunct corporation to be under the control of its late directors as trustees for its creditors and stockholders, the creditors have nothing to do but present their demands and receive payment in the ordinary course of business, or if payment is refused or delayed, they may proceed to enforce their demands. How much better this is for the creditors than to have to wait upon the motions of a receiver and the court, under whose order he acts, everyone knows who has had any experience of the two methods of settling the business of a partnership or a corporation. And then it is, as we have seen, always at the option of a creditor or a stockholder to have a receiver, if they can allege facts showing that a receiver is necessary." The contention that the people of the state have an interest in the appointment of a receiver, whenever the charter of a corporation has been forfeited, was met (p. 374) by a reference to the express enumeration, in § 565 (*supra*), of creditors and stockholders as the persons who are entitled to apply for a receiver in such circumstances, and by the argument (pp. 375 *et seq.*) that a receivership is not designed or prescribed by the legislature as a penalty or part of the punishment to be visited upon the stockholders of the corporation in a proceeding in *quo warranto*; but that the punishment is limited to the forfeiture of the charter, and the fine which the court may in its discretion impose; and that the court cannot further affect the corporate property by its judgment, or confiscate or take it away from the stockholders. (P. 377:) "If it is really true that our laws, as they are written, provide no adequate punishment for corporate transgressions, let the legislature take the matter in hand. It is no part of the function of a court to supply the want of penal legislation." (P. 379:) "What is forfeited to the state, and all that is forfeited, is the charter—the right to be a corporation; and this is resumed solely upon the ground that the condition upon which it was granted has been violated. The doctrine is, that corporate charters are granted upon the implied condition that the privilege conferred will be used for the advantage, or at least not to the disadvantage, of the state. If this condition is broken, the charter which the state has given is taken back by the state; but the property which the corporation has acquired with its own means goes to those who have paid for it, and they have the right to deal with it just as others similarly situated may deal with their property. Whatever the law prevents other natural persons from doing they are prevented from doing,—nothing more." The conclusion



is reached (p. 380) that the rendition of the judgment authorized by the statute in *quo warranto* proceedings (viz., exclusion from the franchises, and a fine) ends the proceedings, and that no receiver of the corporate property can be appointed unless a new and distinct proceeding is commenced by a creditor or stockholder of the corporation, under § 565 of the Code of Civil Procedure (*supra*).

The Havemeyer case has been followed in *State Investment and Insurance Co. v. Superior Court*, 101 Cal. 135, 35 Pac. 549, holding (p. 148) that "the power of a court to appoint any persons in the place of those who are directors of the corporation at the time of its dissolution is given in § 565 of the Code of Civil Procedure, and the authority given therein is the measure of its power"; in *Yore v. Superior Court*, 108 Cal. 431, 41 Pac. 477, holding that the "dissolution" which is a prerequisite to the appointment means the exclusion of the corporation from the franchise of being a corporation, not merely from the franchise of making certain contracts; and in *People v. Union Building & Loan Ass'n (Cal.)*, 58 Pac. 822, holding that a receiver should not be appointed in the absence of any fraud or mismanagement on the part of the directors or officers of the corporation, or any want of competency on their part to liquidate and settle up its affairs economically and in the interest of its creditors and stockholders. See, also, *Murray v. American Surety Co.*, 70 Fed. 341, 17 C. C. A. 138, affirming 59 Fed. 345, and 61 Fed. 273. To the effect that the statutory grounds are exclusive, see *Dabney Oil Co. v. Providence Oil Co.*, 22 Cal. App. 233, 133 Pac. 1155.

**Delaware.**—The statute authorizes the appointment of receivers for corporations when insolvent, excepting corporations organized for public improvement. Where a water company's income is taken up with interest payments, and there is no one within the state authorized to make repairs, it is proper to appoint a receiver: *Thoroughgood v. Georgetown Water Co.*, 9 Del. Ch. 330, 82 Atl. 689.

**Georgia.**—For cases construing the "Insolvent Traders' Act" (Code, §§ 3149a *et seq.*), whereby the assets of an insolvent corporation are subject to seizure under a creditors' bill, see *Hale-Berry Co. v. Diamond State Iron Co.*, 94 Ga. 61, 22 S. E. 217; *National Bank of Augusta v. Richmond Factory*, 91 Ga. 284, 18 S. E. 160 (corporation need not be a "trader"). The act is in derogation of the common law and should be strictly construed: *Farmers' Union Warehouse Co. v. Coweta Fertilizer Co.*, 133 Ga. 132, 65 S. E. 291.

**Idaho.**—In *Security Savings & Trust Co. v. Piper*, 4 Idaho, 463, 40 Pac. 144, it was held that a receiver may be appointed pending proceedings for the voluntary dissolution of a corporation, by virtue

of a provision identical with § 564, subd. 5, of the California Code of Civil Procedure, *supra*. The French Bank Case, 53 Cal. 550, was distinguished by the fact that there the suit was by a private individual against the corporation, while in the case at hand the action was by the officers of the corporation, duly authorized by the stockholders. In *Gibbs v. Morgan*, 9 Idaho, 100, 72 Pac. 733, it was distinctly held that this code provision was not intended as an exhaustive enumeration of the cases in which a receiver of a corporation might be appointed. In general, see *Hall v. Nieu Kirk*, 12 Idaho, 33, 118 Am. St. Rep. 188, 85 Pac. 485; *Rowe v. Stevens*, 25 Idaho, 237, 137 Pac. 159 (may be appointed for foreign corporation); *Cronan v. District Court of Kootenai County*, 15 Idaho, 184, 96 Pac. 768 (cannot be appointed for lumber company unless it is in imminent danger of insolvency; imminent danger defined); *Idaho Fruit Land Co. v. Great Western Beet Sugar Co.*, 17 Idaho, 273, 105 Pac. 562.

**Illinois.**—Rev. Stats. 1893, c. 32, § 25: "If any corporation or its authorized agents shall do, or refrain from doing, any act which shall subject it to a forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record, for a payment of money, after demand made by the officer, to be returned 'No property found,' or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time, or liable in any way, for the debts of the corporation, by joining the corporation in such suits; and each stockholder may be required to pay his *pro rata* share of such debts or liabilities to the extent of the unpaid portion of his stock, after exhausting the assets of such corporation. And if any stockholder shall not have property enough to satisfy his portion of such debts or liabilities, then the amount shall be divided equally among all the remaining solvent stockholders. And courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver thereof who shall have authority, by the name of the receiver of such corporation (giving the name), to sue in all courts and do all things necessary to closing up its affairs, as commanded by the decree of such court." It is held that the "good cause" which must be shown to warrant the appointment of a receiver and the dissolution of the corporation means some one or more of the causes mentioned in the first sentence: *People v. Weigley*, 155 Ill. 491, 40 N. E. 300; *Wheeler v. Steel Co.*, 143 Ill. 197, 17 L. R. A. 818, 32 N. E. 420; *Hunt v. Skating Rink Co.*, 143 Ill. 118, 32 N. E. 525. "To justify the appointment of a receiver upon a bill filed

under this section, something more is necessary than a mere allegation that it has 'ceased doing business.' It must be shown that such cessation has been for such time that the court may infer more than a temporary suspension; or facts must be set forth from which it appears that the suspension is more than an interruption of its usual course by reason of some emergency': *Brabrook Tailoring Co. v. Belding Bros.*, 40 Ill. App. 326.

Indiana.—In § 1236, Rev. Stats. 1894 (§ 1222, Rev. Stats. 1881), clause 3, it is provided that a receiver may be appointed where the property in controversy is in danger of being "materially injured"; in clause 5, where a corporation "has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights"; and in clause 7, when, in the discretion of the court or the judge in vacation, "it may be necessary to secure ample justice to the parties." *Goshen Woolen Mills Co. v. City Nat. Bank*, 150 Ind. 279, 49 N. E. 154. It is held in this case that a receiver may be appointed on the application of a creditor where the corporation has assigned property for the benefit of certain creditors, although no fraud is shown in such assignment, when the complaint contains allegations as to material injury to the property, and as to the insolvency of the corporation and the want of business capacity and financial responsibility on the part of those left in charge of its affairs by the nominal trustee. In *Supreme Sitting of the Order of Iron Hall v. Baker*, 134 Ind. 293, 20 L. R. A. 210, 33 N. E. 1128, it was held that under clause 5, *supra*, the court had jurisdiction to appoint a receiver of a corporation alleged to be insolvent in a suit to secure an accounting of the officers, and the application of the funds to the proper objects of the corporation. A further statute (Rev. Stats. 1881, § 3012; Rev. Stats. 1894, § 3435) authorizes, on the application of any creditor or stockholder, the appointment of a receiver for a corporation whose charter has expired within the three years thereafter allowed by statute for the winding up of its affairs. This statute, it is held, does not require the appointment to be made before the expiration of the three years, if the application is made within the three years: *Lime City Bldg., Loan & Sav. Ass'n v. Black*, 136 Ind. 544, 35 N. E. 829; *Hatfield v. Cummings*, 140 Ind. 547, 40 N. E. 53.

Iowa.—The Code, § 2903, provides: "On the petition of either party to a civil action or proceeding, wherein he shows that he has a probable right to or interest in any property, which is the subject of the controversy, and that such property or its rents or profits are in danger of being lost or materially injured or impaired, . . . the court, or in vacation, the judge thereof, if satisfied that the interests

of one or both parties will be thereby promoted, and the substantial rights of neither unduly injured, may appoint a receiver to take charge of, and control such property under its direction during the pendency of the action." In *Dickerson v. Cass County Bank*, 95 Iowa, 392, 64 N. W. 395, it was held that under this section the court has power to appoint a receiver of a state banking corporation on the application of a stockholder. His statutory liability to the creditors constitutes a "probable right to or interest in" the property, if his petition shows that there will be no surplus for distribution to the stockholders; and a showing that the bank was insolvent and that those in charge of it were continuing the business at a loss, and had allowed the assets to become of such a character, and so scattered, that they could not readily be realized on without great sacrifice, supplies the remaining elements required by this section. Statutes providing for ousting corporations from their franchises and winding up their affairs do not exclude any rights given to private individuals under this general statute. As to appointment of receiver in suit by state, see *State v. Syndicate Land Co.*, 142 Iowa, 22, 120 N. W. 327. In general, see *Paine v. Mueller*, 150 Iowa, 340, 130 N. W. 133.

**Kansas.**—As to statutory right of attorney general to apply for receiver of a foreign corporation, see *McKinney v. Landon*, 209 Fed. 300, 126 C. C. A. 226; *McKinney v. Kansas Natural Gas Co.*, 206 Fed. 772.

**Louisiana.**—By act of 1898, No. 159, § 1, par. 2, the "civil district court of the parish of Orleans is empowered to appoint receivers to take charge of the property and business of corporations . . . at the instance of any stockholder or creditor when the directors or other officers of the corporation are jeopardizing the rights of stockholders or creditors by grossly mismanaging the business, or by committing acts *ultra vires*, or by wasting, misusing, or misapplying the property or funds of the corporation." For facts requiring the appointment of a receiver at the instance of stockholders under this statute, see *Sincer v. Alverson*, 51 La. Ann. 951, 25 South. 650; for the meaning of "grossly mismanaging," see *North American L. & T. Co. v. Watkins*, 109 Fed. 101, 48 C. C. A. 254. In general, see *Varnado v. Banner Cotton Oil Co.*, 126 La. 590, 52 South. 777 (may be appointed where managers have administered affairs without regard to charter provisions as to meetings and notices, have refused to pay declared dividends, and are proceeding to liquidate the business in a manner not authorized by the charter); *Brock v. Automobile Livery & Sales Co.*, 130 La. 404, 414, 58 South. 21, 25; *Van Vleet v. Evangeline Oil Co.*, 127 La. 919, 54 South. 286. A stockholder need not make any demand



before bringing suit; but a creditor must first make demand: *Van Vleet v. Evangeline Oil Co.*, 127 La. 919, 54 South. 286.

**Michigan.**—How. Stats., c. 281, § 6, provides: "Whenever judgment at law or decree in chancery shall be obtained against any corporation incorporated under the laws of this state, and an execution issued thereon shall have been returned unsatisfied, in part or in whole, upon the petition of the person obtaining such judgment or decree, or his representatives, the circuit court within the proper county may sequester the stock, property, things in action, or effects of such corporation, and may appoint a receiver of the same." See this section applied in *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387, 21 N. W. 375. In *Town v. Duplex-Power Car Co.*, 172 Mich. 519, 138 N. W. 338, it was held that the courts have power, derived from statute, to compel officers to account for official conduct in the management and disposition of corporate funds, to suspend and remove them, to order new elections of directors, to set aside and restrain alienations of corporate assets, and to appoint a receiver to take charge of the assets. See, also, *Woodmansee v. Ann Arbor Brick Co.*, 164 Mich. 688, 130 N. W. 311; *Travis v. McBride*, 166 Mich. 126, 131 N. W. 520; *Fuller v. McCormick*, 156 Mich. 518, 121 N. W. 280.

**Minnesota.**—Gen. Stats., c. 76, § 9, gives judgment creditors the right to the appointment of a receiver of the corporate property and effects in aid of their judgments after execution returned unsatisfied. It is held that the return of the execution unsatisfied by the sheriff is conclusive, so long as it remains of record in force, as respects the judgment creditor's right to a receiver, and that the court will not entertain inquiries as to the diligence of the officer in endeavoring to find property upon which to levy. If there is any good ground for setting aside the return of the officer, because of its falsity, the defendant in execution should apply directly to the court on motion. See, further, as to the necessity of exhausting the legal remedies of the creditor, *Klee v. E. H. Steele Co.*, 60 Minn. 355, 62 N. W. 399. A receivership in a suit to foreclose a mortgage on property of a corporation will not prevent another receivership, under this same chapter, to sequester all the property of the corporation for the benefit of all its creditors. "The powers of the receivers in the two cases are entirely different. There are various classes of property that can be reached by a receiver under chapter 76 which could not be reached by a receiver appointed in a foreclosure suit. The former has substantially all the powers and functions of an assignee in bankruptcy": *St. Louis Car Co. v. Stillwater St. R'y Co.*, 53 Minn. 129, 54 N. W. 1064. And where a creditor has commenced an action under

this chapter, an assignment by the corporation under the insolvent law will not defeat or impair his right to a receivership: *State v. Bank of New England*, 55 Minn. 139, 56 N. W. 575; but where, at the time of commencing such action an assignee in insolvency, previously appointed, has for some time been actively engaged in collecting the assets of the corporation and converting them into cash, the plaintiff creditor is not entitled, as a matter of absolute right, to have a receiver appointed: *Walther v. Seven Corners Bank*, 58 Minn. 434, 59 N. W. 1077; *International Trust Co. v. American Loan etc. Co.*, 62 Minn. 501, 65 N. W. 78, 632. As to what constitutes "insolvency" of a building and loan association under this chapter, see *Sjoberg v. Security Savings and Loan Ass'n*, 73 Minn. 203, 72 Am. St. Rep. 616, 75 N. W. 1116. As to appointment where there are irreconcilable differences between the stockholders, see *Green v. National Advertising & Amusement Co.*, 137 Minn. 65, 162 N. W. 1056.

**Missouri.**—The supervisor of building and loan associations may be appointed receiver of such associations, when insolvent, on his own application: *Wehrs v. Sullivan*, 217 Mo. 167, 116 S. W. 1104. In general, see *Price v. Bankers' Trust Co. (Mo.)*, 1178 S. W. 745.

**New Jersey.**—Cases under the New Jersey statute conferring power on the courts of equity to dissolve and wind up an insolvent corporation are of more than local interest. The power "was conferred by a statute passed in 1829 [Act of February 16th], and the language by which it was conferred has remained unchanged from that time to the present [1892]. *Elmer, Dig.*, p. 32, §§ 11, 13; *Revision*, p. 189, §§ 70, 72. This statute empowers the chancellor, on the application of a creditor or stockholder, alleging that the corporation in which he is interested has become insolvent, to proceed in a summary way to inquire into the truth of such allegation, and if, upon such inquiry, it shall be made to appear that the corporation has become insolvent, and shall not be about to resume its business in a short time, with safety to the public and advantage to the stockholders, he may enjoin it from the further exercise of its franchises, and also from the further transaction of business; and he may also, at the same time, or at any subsequent time during the continuance of the injunction, if, in his judgment, the circumstances of the case and the ends of justice require, appoint a receiver to dispose of its assets and distribute the proceeds": *Atlantic Trust Co. v. Consolidated Electric Storage Co.*, 49 N. J. Eq. 402, 23 Atl. 934. "The ordering of the statutory injunction which places the corporation under disabilities with reference to the exercise of its franchises, is the jurisdictional fact—the condition precedent—which must occur before any statutory receiver can

be appointed": *Gallagher v. Asphalt Co. of America* (N. J. Eq.), 58 Atl. 403.

It was held in *Parsons v. Monroe Manufacturing Co.*, 4 N. J. Eq. 187, 206, that "the foundation of this whole proceeding [under the act of February 16, 1829] must rest on the question of insolvency; for unless that is satisfactorily made out, the court has no jurisdiction; and when made out, there still resides, and must reside in the chancellor, a discretion as to the ordering of the injunction and the appointment of receivers, to be governed by the facts of the case." The court is authorized by this act to appoint receivers at the time of declaring the company insolvent and ordering an injunction, "if the circumstances of the case and the ends of justice require it." It does not follow, therefore, that because an injunction is granted, receivers should be appointed: *Oakley v. Paterson Bank*, 2 N. J. Eq. 178; *Rawnsley v. Trenton Mutual Life Ins. Co.*, 9 N. J. Eq. 347, 350; *Nichols v. Perry Patent Arm Co.*, 11 N. J. Eq. 126; *Newfoundland R. R. Construction Co. v. Schack*, 40 N. J. Eq. 222, 1 Atl. 23; and the appointment will not be made where the protection of the public and the interest of the creditors and the stockholders does not require it, where, on the contrary, no one who is a stranger to the extensive business of the company can advantageously wind up its concerns and where the charges of fraud against the directors are not sustained; in such a case the management will be left in the hands of the directors, under the immediate control and direction of the court: *Rawnsley v. Trenton Mutual Life Ins. Co.* Still, as a general rule, where there is a decree of insolvency, receivers will be appointed; and where it appears that after the insolvency of the company was beyond dispute, and well known to all the directors, unlawful sales of all the company's property were made to various directors, no discretion is left to the court, and the appointment is a matter of duty: *Nichols v. Perry Patent Arm Co.*, 11 N. J. Eq. 126. Where the directors of the insolvent corporation are winding up its affairs, where they are men of property and of experience in business, and there is every reason to believe that their closing of the enterprise will be more advantageous to the stockholders and creditors than the management of a stranger in this respect would be likely to prove, and all the creditors and stockholders of the company, with the single exception of the petitioner, are satisfied with the management, an order appointing a receiver should be reversed: *City Pottery Co. v. Yates*, 37 N. J. Eq. 543.

On the question of the necessity of showing insolvency, the opinion of Van Fleet, V. C., in *Atlantic Trust Co. v. Consolidated Electric Storage Co.*, 49 N. J. Eq. 402, 23 Atl. 934, is valuable. "The statute

makes insolvency the jurisdictional fact. The court can do nothing—neither issue an injunction nor appoint a receiver—until insolvency is first established [citing *Oakley v. Bank*, *supra*; *Parsons v. Manufacturing Co.*, *supra*; *Brendred v. Machine Co.*, 4 N. J. Eq. 294, 305; and *Goodheart v. Mining Co.*, 8 N. J. Eq. 73, 77]. And Mr. Justice Depue, in pronouncing the opinion of the court of errors and appeals in *Construction Co. v. Schack*, 40 N. J. Eq. 222, 226, 1 Atl. 23, declared, in describing what averments a bill in such a case must contain, that it was not sufficient that the bill should merely allege that the corporation had become insolvent and had suspended its business for want of funds to carry on the same, but that the facts and circumstances on which the complainant relies to prove insolvency must be set out. . . . The proof in support of a jurisdictional fact must always be clear and convincing, for the court derives its power from the fact; and hence, until the fact is shown to exist, it has no power. To doubt in such a case is to deny. . . . Nor is it the duty of the court to use its power in all cases where insolvency is shown. Something more is required. The prerequisites prescribed by the statute are that it shall be made to appear that the corporation has become insolvent, and also that it will not be able to resume its business in a short time with safety to the public and advantage to the stockholders. The power is only to be used when the ends of justice require its exercise. The court should strive in such cases to foster and preserve, rather than to strangle or destroy. . . . The principle which I think should control the court in the exercise of this power is this: never to appoint a receiver unless the proof of insolvency is clear and satisfactory, and unless it also appears that there is no reasonable prospect that the corporation, if let alone, will soon be placed, by the efforts of its managers, in a condition of solvency. To illustrate: Where the corporation attacked is shown to be insolvent, but it also appears that its managers are honest and capable, and that they are striving to the best of their ability, with a fair prospect of success, to relieve the corporation from its embarrassment, and to put it in a condition where it may prosecute its business successfully, and the property of the corporation is free from judgment or other lien under which it may be sold speedily, at a sacrifice, the court should not interfere." See, also, to the same effect, *Ft. Wayne Electric Corp. v. Franklin Electric Light Co.* (N. J.), 40 Atl. 441, 57 N. J. Eq. 16, 41 Atl. 217. The mere suspension of business by the corporation, even though it does not appear that it is about to resume in a short time, does not afford sufficient warrant for the court to assume jurisdiction, when it is not clearly established that the corporation is insolvent: *Cook v. East Trenton Pottery Co.*, 53 N. J. Eq. 29, 30 Atl.



534. On the other hand, while the statute predicates some interruption of the insolvent's business as an element of insolvency, it does not contemplate an entire suspension of all its workings. An insolvent corporation, therefore, is within the scope of the statute, although its business is continuing, and receipts therefore coming into the treasury: *Ft. Wayne El. Corp. v. Franklin Electric Light Co.*, 57 N. J. Eq. 16, 41 Atl. 217; affirmed, 58 N. J. Eq. 579, 43 Atl. 1098.

The statute authorizing the appointment at suit of any creditor or stockholder when the corporation is insolvent, creates a new equitable right which will be enforced by the federal courts: *United States Shipbuilding Co. v. Conklin*, 126 Fed. 132, 60 C. C. A. 680.

Where a receiver is sought for a corporation that has been dissolved by proclamation of the governor, under § 56 of the Corporation Act of 1896, the discretionary power of the chancellor is invoked, and should be exercised either to continue the directors as trustees to settle the corporate affairs under said section, or to appoint a receiver for that purpose. Discretion to appoint a receiver should not be disclaimed because of failure of proof of breaches of trust by the directors, since the governor's proclamation; their unfitness to exercise the trust may also be shown by proof of misconduct or breaches of trust previous thereto, or of incapacity to perform the duties of the trust, or of conduct indicating unwillingness to properly perform such duties: *American Surety Co. v. Great White Spirit Co.*, 58 N. J. Eq. 526, 43 Atl. 579.

See *Bettle v. Republic Sav. & L. Ass'n*, 63 N. J. Eq. 578, 53 Atl. 11, for an instance of the appointment of a receiver for an insolvent building and loan association under a special statute governing such corporations. As to appointment of a receiver for a corporation because of ownership of stock by alien enemies, see *Posselt v. D'Espard*, 87 N. J. Eq. 574, 101 Atl. 178.

**New York.**—The provisions of the New York statutes and Code of Procedure relating to receivers of corporations are so numerous, and have been subject to so many changes that any account of them must exceed the limits of an elementary treatise. See, for a statement of these provisions as they existed in 1868, *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 96 Am. Dec. 747; in 1892, 2 *Stimson's Am. Stat. Law*, §§ 8330-8367, and addenda. See, also, for a history of the legislation, *United States Trust Co. v. New York, W. S. & B. R. Co.*, 101 N. Y. 478, 5 N. E. 316. The case of *Bangs v. McIntosh*, 23 Barb. 591, has been cited by courts and text-writers as establishing the principle that the prescribed method of obtaining jurisdiction of the person and of the subject-matter under these statutes must be strictly followed; but the published opinion in that case was not con-

curred in by a majority of the court. That a creditor before judgment is not entitled to a receiver in an action for a dissolution of the corporation on the ground of insolvency, see *Galwey v. United States Steam Sugar Refining Co.*, 13 Abb. Pr. 211; *Rodbourn v. Utica, I. & E. R. Co.*, 28 Hun, 369 (where the creditor's judgment is opened, the order appointing the receiver should be vacated); *Lehigh Coal etc. Co. v. Central N. J. R. Co.*, 43 Hun, 546. That in proceedings by the attorney-general for the dissolution of a corporation and the forfeiture of its franchises the court has no power to appoint a receiver before judgment of forfeiture, see *People v. Washington Ice Co.*, 18 Abb. Pr. 382. That the provision relating to the forfeiture of the corporate charter on the ground of discontinuance of business for a year contemplates proceedings by the attorney-general, not by a stockholder, see *Gilman v. Greenpoint Sugar Co.*, 4 Lans. 483. As to the time when the appointment may be made in proceedings for the voluntary dissolution of a corporation, see *Chamberlain v. Rochester S. P. V. Co.*, 7 Hun, 557; *Matter of Boynton Saw and File Co.*, 34 Hun, 369 (no power to appoint a temporary receiver); *Re Hitchcock Mfg. Co.*, 1 App. Div. 164, 37 N. Y. Supp. 834. As to the appointment of a receiver "to carry the judgment into effect," see *King v. Barnes*, 51 Hun, 550, 4 N. Y. Supp. 247, affirmed 113 N. Y. 655, 21 N. E. 184 (in aid of judgment directing defendants to transfer to plaintiffs certain shares of stock in a corporation, by means of which they had been assuming control of the company in fraud of plaintiffs' rights). It has been held that Code Civ. Proc., § 1810, subd. 3, authorizing the appointment when there is no officer to take charge of the assets, does not apply when officers resign for the purpose of having a receiver appointed: *Zeltner v. Zeltner Brewing Co.*, 174 N. Y. 247, 95 Am. St. Rep. 574, 66 N. E. 810.

**North Carolina.**—It is sufficient to show that the corporation is being so managed as to be in imminent danger of insolvency: *Mitchell v. Aulander Realty Co.*, 169 N. C. 516, 86 S. E. 358.

**Oregon.**—The Oregon statute is intended to enlarge the powers of the court to appoint a receiver: *Baillie v. Columbia Gold Min. Co.*, 86 Or. 1, 166 Pac. 965, 167 Pac. 1167.

**Pennsylvania.**—In *quo warranto* proceedings against a corporation the court has no jurisdiction, upon motion of the commonwealth, to appoint a receiver: *Fraternal Guardian's Estate*, 159 Pa. St. 603, 28 Atl. 479; *Commonwealth v. Order of Vesta*, 156 Pa. St. 531, 27 Atl. 14 (construing act of 1893).

**Texas.**—The courts of Texas have several times been called upon to interpret a provision of their statutes relating to the appointment of

receivers of corporations similar to that of the California code, and have reached a conclusion directly opposite to that reached in *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121. In Texas, therefore, under the familiar code provision that receivers may be appointed "in cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights," a receiver may be appointed on the application of the state after judgment in *quo warranto* proceedings against the corporation: *East Line & Red River R. Co. v. State*, 75 Tex. 434, 12 S. W. 690; *Texas Trunk R. Co. v. State*, 83 Tex. 1, 18 S. W. 199; *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118, 54 S. W. 289. In *Texas Trunk R. Co. v. State*, the court says, in speaking of this section of the statute: "The fact that it does not limit the power to appoint, as do the former sections of the act, to cases in which this is asked by creditors or others having a direct pecuniary interest in the subject-matter to which the receivership will relate, evidences an intention to confer upon the courts the power to appoint receivers in all cases to which the law applies, whenever the interest of individuals or public interest may require this to be done. The power of the court, adjudging the forfeiture of a corporate franchise and the dissolution of the corporation, to appoint a receiver is too clear, and although the state may not be a creditor the public has such an interest in the proper management of the property of a dissolved railway company as makes it proper that a receiver should be appointed to manage and control its property, to the end that it shall be faithfully applied to the public purpose for which the corporation was originally created, and that this should be done is the more apparent when the mismanagement or disregard of duty on the part of the governing body of a railway corporation has been such as to require its dissolution." In *San Antonio Gas Co. v. State*, the court observes: "To place the property again in the hands of the officers of the corporation would be to return it to the custody of those who had failed to perform their trust, and had violated the laws of the state, and the public interests would not be subserved thereby. . . . That the appointment of a receiver will have the effect of a fine inflicted upon the shareholders in the defunct corporation can have no weight in the decision of a court. The statute plainly confides the authority to the court to make the appointment, and that it will bear heavily upon the shareholders is a matter for legislative, and not judicial, consideration. In this case at least, the violators of the law will be the ones who will suffer from the appointment of a receiver."

This statute, however, does not make insolvency or imminent danger thereof a cause of action, and does not entitle a stockholder or lien creditor of a corporation which is still a going concern to have a receiver appointed on the ground of its insolvency, or imminent danger of insolvency, alone; but such stockholder must show, to entitle himself to such appointment, that he has a cause of action against the corporation, independently of the receivership; that the corporation is insolvent, or in imminent danger thereof; and that his interest as such stockholder requires the appointment to be made: *People's Investment Co. v. Crawford* (Tex. Civ. App.), 45 S. W. 738; *Espuela Land etc. Co. v. Bindle*, 5 Tex. Civ. App. 18, 23 S. W. 819, following *French Bank Case*, 53 Cal. 553; *New Birmingham Iron etc. Co. v. Blevins*, 12 Tex. Civ. App. 410, 34 S. W. 828; *Kokernot v. Roos* (Tex. Civ. App.), 189 S. W. 505. A receiver may properly be appointed in a suit to foreclose a deed of trust securing bonds of an insolvent corporation: *Childress v. State Trust Co.* (Tex. Civ. App.), 32 S. W. 330. The jurisdiction of the court to appoint a receiver in suits by creditors cannot be defeated by a transfer of the property of the insolvent corporation to an assignee: *Milam County etc. Alliance v. Tennent-Stribling Shoe Co.* (Tex. Civ. App.), 40 S. W. 331. It is held not to be essential, under the statute, that the claim of the creditor of an insolvent corporation should have become a judgment, or that he should have an express lien upon the property of the corporation: *San Antonio & G. S. R. Co. v. Davis* (Tex. Civ. App.), 30 S. W. 693; compare *Brenton & McKay v. Peck* (Tex. Civ. App.), 87 S. W. 898. In general, see *Shaw v. Shaw*, 51 Tex. Civ. App. 55, 112 S. W. 124.

**Washington.**—The usual code provision, that a receiver may be appointed "where a corporation has been dissolved or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights," is interpreted as meaning that the court is authorized to appoint such receiver whenever any of these facts is made to appear, at the instance of any party interested. "No other conditions are imposed by the statute, and to import any other would be judicial legislation." A receiver may, therefore, be appointed on the application of any creditor of the corporation, when its insolvency is established to the satisfaction of the court, and this, notwithstanding that the corporation has made a voluntary assignment for the benefit of creditors: *Olson v. Bank of Tacoma*, 15 Wash. 148, 45 Pac. 734. That a receiver can be appointed in an action by the state to exclude defendants from corporate rights and franchises, only after judgment in such action, see *State v. Superior Court*, 15 Wash. 688, 55 Am. St. Rep. 907, 47 Pac. 31. Upon involuntary dissolution, a receiver may



be appointed without any showing of necessity: *Conlan v. Oudin*, 49 Wash. 240, 94 Pac. 1074. A receiver should not be appointed merely because of the misconduct of officers, when the corporation is not in danger of insolvency: *Secord v. Wheeler Gold Min. Co.*, 53 Wash. 620, 17 Ann. Cas. 914, 102 Pac. 654. In general, see *Kelso v. American Inv. & Imp. Co.*, 50 Wash. 381, 97 Pac. 294; *Boothe v. Summit Coal Min. Co.*, 55 Wash. 167, 19 Ann. Cas. 1255, 104 Pac. 207; *Bergman Clay Mfg. Co. v. Bergman*, 73 Wash. 144, 131 Pac. 485.

**West Virginia.**—A receiver may be appointed for a corporation hopelessly insolvent where there is danger of depreciation and loss of assets: *Parr v. Blue Ridge Coal Co.*, 72 W. Va. 174, 77 S. E. 894; *Waggy v. Jane Lew Lumber Co.*, 69 W. Va. 666, 72 S. E. 778; *Ward v. Hotel Randolph Co.*, 65 W. Va. 721, 63 S. E. 613.

**Wisconsin.**—Rev. Stats., § 3216, provides that an action may be brought against a corporation by a judgment creditor after an execution has been returned unsatisfied in whole or in part, and the court may sequester its stock, property, things in action, and effects, and appoint a receiver. Section 3217 provides for a just and fair distribution of the property among the fair and honest creditors, according to § 3245. § 3221 allows directors and stockholders to be made parties. By § 3226, stockholders may be adjudged to pay what is due on their unpaid stock. By § 3227, an injunction may be issued to restrain proceedings by any other creditor against the defendant corporation. Several other sections provide for making the directors, officers, and stockholders parties, if in any event they may be liable to the creditors. For instances of suits under these sections, see *Powers v. C. H. Hamilton Paper Co.*, 60 Wis. 23, 18 N. W. 20; *Ballin v. Loeb*, 78 Wis. 404, 10 L. R. A. 742, 47 N. W. 516 (the suit may be founded on a judgment of the federal court in the state); *Garden City Bank etc. Co. v. Geilfuss*, 86 Wis. 612, 57 N. W. 349; *Seering v. Black*, 140 Wis. 413, 122 N. W. 1055; *Ford v. Plankinton Bank*, 87 Wis. 363, 58 N. W. 766. In the last case it was held that where a banking corporation has made a valid voluntary assignment of all its assets, in the manner and form, and to the effect, prescribed by statute, a receiver cannot be appointed under these sections to supersede the assignment and change the rule for the distribution of the proceeds of the assignment to the rule prescribed by statute in receivership cases. Where, however, such assignment is fraudulent, the cause of action under § 3216 is not destroyed, but rather strengthened, by averments in respect thereto: *Powers v. C. H. Hamilton Paper Co.*

§ 1549. (§ 128.) **Railroad Receivers; in General.**—It is not uncommon, in railroad receivership cases, to find strong statements as to the great reluctance of courts to undertake the management of railroads, except in the most urgent cases;<sup>311</sup> but the experience of the last twenty-five years has tended to raise the question in some minds whether these expressions are to be taken very seriously, or whether the magnitude of the interests involved actually does—if, indeed, it should—exercise any strong deterring influence on the action of the courts.<sup>312</sup>

311 “The appointment of receivers by a court to manage the affairs of a long line of railroad, continued through five or six years, is one of those judicial powers the exercise of which can only be justified by the presence of an absolute necessity”: Per Miller, J., in *Milwaukee & Minnesota R. Co. v. Soutter*, 2 Wall. 510. “The appointment of a receiver in a suit for the foreclosure of a mortgage on a railroad is not a matter of right, but rests in the sound discretion of the court, and is a power to be exercised sparingly, and with great caution”: Per Caldwell, Cir. J., in *Farmers’ Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. 182, 184. “Whether a receiver shall be appointed is always a matter of discretion, to be exercised sparingly and with great caution in the case of *quasi* public corporations operating a public highway, and always with reference to the special circumstances of each case as it arises”: *Sage v. Railroad Co.*, 125 U. S. 361, 31 L. Ed. 694, 8 Sup. Ct. 887. See, also, *Overton v. Memphis etc. R. Co.*, 10 Fed. 866, 3 McCrary, 436; *Kelly v. Alabama etc. R. R.*, 58 Ala. 489; *Merriam v. St. Louis, C. G. & Ft. S. R. Co.*, 136 Mo. 135, 36 S. W. 630; *Stevens v. Davison*, 18 Gratt. 819, 98 Am. Dec. 692. In general, see *Farmers’ Loan & Trust Co. v. Central Park, N. & E. R. Co.*, 165 Fed. 503; *United States & Mexican Trust Co. v. Delaware Western Construction Co.* (Tex. Civ. App.), 112 S. W. 447.

312 “In actions to foreclose railway mortgages, it has come to be the fact that receivers are appointed, especially in the Federal courts, almost as a matter of course; and in these and other cases courts have often shown a discreditable eagerness to possess themselves of so much jurisdiction and power, and a corresponding disinclination to relinquish it when once acquired”: 5 *Thomp. Corp.*, § 6833. Allowance should be made, of course, for Judge Thompson’s well-known antipathy to the federal courts; but the fact remains that out of the vast multitude of railroad receivership cases that have engaged the

While railroad receivers are usually appointed as an incident of foreclosure proceedings, they are occasionally appointed in other classes of cases; as, at the suit of a judgment creditor<sup>313</sup> or of a shareholder;<sup>314</sup> but not on

attention of these courts in late years, in a very small number only does the court take the trouble to justify its action in appointing the receiver.

313 *Sage v. Memphis etc. R. R. Co.*, 125 U. S. 361, 31 L. Ed. 694, 8 Sup. Ct. 887, holding that the suing out of execution was not a prerequisite where it would be useless, and no objection was made on this ground. In *Milwaukee & M. R. R. Co. v. Soutter*, 2 Wall. 510, 523, 17 L. Ed. 860, Mr. Justice Miller remarks: "The idea of appointing or continuing a receiver for the purpose of taking ninety-five miles of railroad from its lawful owners, which is earning a gross revenue of \$800,000 per annum, to enforce the payment of a judgment of \$16,000, the lien of which is seriously controverted, is so repugnant to all our ideas of judicial proceedings that we cannot argue the question. If the creditor has a valid judgment, the usual modes of enforcing that judgment are open to him, both at law and in chancery; but the extraordinary proceeding of taking millions of dollars' worth of property, of such peculiar character as railroad property is, from its rightful possessors, as one of the usual modes of collecting such a comparatively small debt, can find no countenance in this court." For a special statute in Kentucky authorizing the appointment of a receiver in aid of a judgment creditor whose execution has been returned unsatisfied, see *Ball v. Maysville & B. S. R. Co.*, 102 Ky. 486, 80 Am. St. Rep. 362, 43 S. W. 731.

314 *Stevens v. Davison*, 18 Gratt. 819, 829, 98 Am. Dec. 692 (receiver appointed in suit by shareholder to set aside an unauthorized lease of the road, until it could be ascertained, by proper inquiry, who are the legitimate stockholders of the company, to whom the custody and management of the railroad should be committed); *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809.

In the following special cases a receiver was sought and refused: in aid of an injunction restraining the consolidation of two companies, when it was not shown that the directors of the company intended to transfer its property in violation of such injunction: *Cleveland etc. R'y Co. v. Jewett*, 37 Ohio St. 649; in aid of an injunction against the performance of an agreement in restraint of trade: *Stockton v. Central R. Co.*, 50 N. J. Eq. 489, 25 Atl. 942; in aid of an in-

the application of the company itself,<sup>315</sup> nor in aid of an unsecured creditor who has not reduced his claim to judgment.<sup>316</sup>

§ 1550. (§ 129.) **In Foreclosure of Railroad Mortgages; in General.**—Whatever may be thought of the practice, the principle is well settled that a receiver is not to be appointed as a matter of course on the mere ground that the defendant corporation is in default.<sup>317</sup> “The right to foreclose does not carry with it the right to a receiver. There are many considerations that bear upon that question. Every case, of course, stands on its own merits. It is difficult to formulate any rule which, briefly stated, will control in all cases. It should appear that there is some danger to the property; that its protection, its preservation, the interests of the various holders, require possession by the court before a receiver should be appointed. It does not go as a matter of course; and yet it is not a matter that a court can refuse simply because it is an annoyance. If, looking at the

junction regulating the use of a common easement; *Delaware, L. & W. R. Co. v. Erie R. Co.*, 21 N. J. Eq. 298. As to receivers in aid of judgment creditors of railway companies in England under the Railway Companies Act of 1867, see *In re Birmingham & L. J. R. Co.*, 18 Ch. D. 155.

<sup>315</sup> See *ante*, § 118.

<sup>316</sup> *Guilmartin v. Middle Georgia & A. R. Co.*, 101 Ga. 565, 29 S. E. 189.

<sup>317</sup> *Williamson v. New Albany etc. R. Co.*, 1 Biss. 206, Fed. Cas. No. 17,753; *Union Trust Co. v. St. Louis, I. M. & S. R. Co.*, 4 Dill. 114, Fed. Cas. No. 14,402; *Farmers' Loan & Trust Co. v. Chicago & A. R. Co.*, 27 Fed. 146; *American Loan & Trust Co. v. Toledo, C. & G. R. Co.*, 29 Fed. 416; *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 36 Fed. 221, 1 L. R. A. 397. See, also, observations in *Blair v. St. Louis, H. & K. R. Co.*, 20 Fed. 348.

A bondholder cannot have the appointment of a receiver as against a lessee in possession under a lease prior in time to the mortgage: *Louisville & N. R. Co. v. Eakins*, 100 Ky. 745, 39 S. W. 416.



situation of the litigating parties, and of the property, with the prospect of the future, it should appear to a court that they would be benefited, that their interests would be subserved by the appointment of a receiver, no court—although a matter resting, as it is said, in its discretion—could refuse to make the appointment.”<sup>318</sup>

The reason why it has become the common practice to appoint receivers for the administration of the mortgaged property of railroads upon default in payment of interest on the bonds is lucidly explained in a recent case, in part as follows: “The fact that so many railroad corporations have issued bonds and mortgaged their property in advance of the construction of their railroads and the acquisition of the property mortgaged, greatly beyond its market value at forced sale, had inclined courts of equity to treat holders of railroad bonds, or the trustees in the mortgages, as the owners of the roads, rather than simply as lienholders, and to charge them as such owners, after default, with the unpaid expenses of operating the property. . . . It is true that such [forced]

<sup>318</sup> Per Brewer, J., in *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 36 Fed. 221, 224, 1 L. R. A. 397. A receiver was appointed in this case under the following circumstances: a railroad, mortgaged to the extent of \$28,000 a mile, had made several defaults in the payment of interest, aggregating over \$1,000,000; its business was decreasing, and was likely to decrease further from competition by new lines; it was in need of repairs and improvements; its bondholders were not in harmony; and no other way existed for applying the rents and profits of the road to the payment of its debts. See, further, as to the discretion of the chancellor in the matter of the appointment, *Pullan v. Cincinnati etc. R. Co.*, 4 Biss. 35, Fed. Cas. No. 11,461; *Pennsylvania Co. for Insurance v. Jacksonville etc. R’y Co.*, 55 Fed. 131, 2 U. S. App. 606, 5 C. C. A. 53; *Kelly v. Trustees etc.*, 58 Ala. 489; *Farmers’ Loan & Trust Co. v. Winona & S. W. R’y Co.*, 59 Fed. 960; *Sage v. Memphis & L. R. R. Co.*, 125 U. S. 361, 31 L. Ed. 694, 8 Sup. Ct. 887; *Tysen v. Wabash R’y Co.*, 8 Biss. 247, Fed. Cas. No. 14,315; *Williamson v. New Albany etc. R. Co.*, 1 Biss. 206, Fed. Cas. No. 17,753.

sales are not a reasonable test of the actual value of such property. It is, however, equally true that the conditions which generally affect such property have been found to render it not practicable to make a sale thereof in any other manner to any greater or to an equal advantage to all parties concerned therein. The practical result from these prevalent conditions is that, when a railroad corporation is unable to pay its currently accruing interest, it is actually, as well as technically, insolvent, and its property inadequate security for its mortgage debt. The larger part of the value of the property is dependent upon its continued operation as a public carrier. Its successful operations and ability to earn income are in most cases largely dependent on the railroad's connections, and its friendly relations with other carriers, and on the good will it has secured. And while the appointment of a receiver is not a matter of strict right, and such applications always call for the exercise of judicial discretion, these imminent conditions bearing upon such property, after default by the mortgagor in the payment of interest on the mortgage debt, give to an application for the appointment of a receiver great force, and the practice to grant the prayer therefor in such cases has become settled."<sup>319</sup>

<sup>319</sup> *Central Trust Co. v. Chattanooga, R. & G. R. Co.*, 94 Fed. 275, 36 C. C. A. 241. In *Farmers' Loan & Trust Co. v. Winona & S. W. R'y Co.*, 59 Fed. 957, the allegations of the bill and answer were in conflict as to the solvency of the company, the condition and care of its property, and the wisdom and economy of its methods of operation, but it appeared that the majority of its stock was in the hands of a construction company, which had substantially the same officers, and whose interests were adverse to those of the mortgage bondholders. It was held, by Caldwell, Cir. J., that these facts presented a case for the appointment of a receiver upon default in payment of interest on the bonds. In *Kennedy v. St. Paul & Pacific R. Co.*, 2 Dill. 448, Fed. Cas. No. 7706, a ground for the appointment was found in the fact that the financial condition of the company was such as

§ 1551. (§ 130.) **Same; at What Stage Appointed.**—

A receiver ought not ordinarily to be appointed unless the right of foreclosure is clear and indisputable; the existence of a reasonable dispute as to whether the conditions of the mortgage have been broken is sufficient to cause the court to refuse the appointment.<sup>320</sup>

After the decree of foreclosure has been rendered, but under the laws of the state no sale can be had until the expiration of six months from the date, the bondholders

to prevent it from constructing a few miles of road, the completion of which within a given time was necessary to prevent the lapsing of a land-grant which formed an essential part of the bondholders' security. See, also, *Allen v. Dallas & W. R. Co.*, 3 Woods, 316, Fed. Cas. No. 221. In *Putnam v. Jacksonville, L. & St. L. R'y Co.*, 61 Fed. 440, default in payment of taxes to a large amount was held an important circumstance pointing to the propriety of a receivership, in connection with a large indebtedness for wages and supplies, although the company had not yet made default in the payment of interest.

A petition by a minority of bondholders of a street railway company showing that the company had failed to pay accrued interest; that it was allowing claims against it to accumulate; that executions had been levied on the property; that the company was without officers; that the trustees had filed resignations, and had refused to act; and that the franchises were in danger of being repealed because of the mismanagement of the road—shows sufficient grounds for the appointment of a receiver: *Ralph v. Shiawassee Circuit Judge*, 100 Mich. 164, 58 N. W. 837.

<sup>320</sup> *American Loan & Trust Co. v. Toledo, C. & S. R'y Co.*, 29 Fed. 416. In this case there had been default in the payment of interest coupons, but it appeared that there was a fair and reasonable claim by the defendant company, growing out of contemporaneous contracts, that the time of payment had been extended, or that the plaintiffs were precluded from relying on the default. In *Brassey v. New York & N. E. R. Co.*, 19 Fed. 663, a receiver was appointed by consent before default, when it appeared that the company was insolvent, was unable to pay either its mortgage debt, its floating debts, or the sums due connecting roads; that by virtue of numerous attachments it was in danger of the destruction of its business; and that default in the payment of interest was imminent.

have a right to claim that the net income shall be received by a disinterested trustee.<sup>321</sup>

A receiver to preserve the franchise of a street railroad company from forfeiture was held to be properly appointed at the prayer of the mortgagee under the following circumstances: the city had power to enforce such forfeiture for failure to make certain repairs; the company confessed its inability to make such repairs; and the mortgagee, a party to the suit between the company and the city, stood ready to advance the necessary funds in case a receiver should be appointed with power to borrow money.<sup>322</sup>

§ 1552. (§ 131.) **Same; Trustee's Right to Take Possession on Default as Affecting the Question of Appointment.**—A provision frequently found in railway deeds of trust empowers the trustee, on default in payment of principal or interest, to take possession of and manage the property, and apply the net income to the payment of the principal and interest. Such provisions have frequently been passed upon by the courts, with reference to their effect upon the trustee's or bondholders' right to a receiver, with considerable lack of agreement in the results arrived at. In an early case it was held that the trustee may waive his right under this provision and file a bill to foreclose, but that in such a suit the court, in the exercise of its discretion, would refuse to appoint a receiver where no mismanagement or misapplication of the revenue of the road was shown.<sup>323</sup> In a series of cases

<sup>321</sup> *Benedict v. St. Joseph & W. R. Co.*, 19 Fed. 173. In this case hostile bondholders were in possession of the road, which was therefore placed in the hands of a receiver until the sale.

<sup>322</sup> *Union St. R. Co. v. Saginaw*, 115 Mich. 300, 73 N. W. 243, distinguishing the Michigan cases denying the right to a receiver in foreclosure. See *ante*, § 94.

<sup>323</sup> *Williamson v. New Albany etc. R. Co.* (1857), 1 Biss. 198, Fed. Cas. No. 17,753. No misapplication was shown where the revenues had



in one of the circuits the appointment seems to have been looked upon almost as a matter of right on the mere showing of a default by the company; thus, it was decided that where the trustee has failed to take possession after default and a request by the bondholders, a receiver may be appointed on the ground of such neglect, in their suit to enforce performance of the trust;<sup>324</sup> and that when the deed of trust mortgaged the income and profits, a receiver may be claimed by the trustees on the mere ground of a default, irrespective of any showing as to the insufficiency of the property as a security, or that it is in jeopardy, or that the company is insolvent.<sup>325</sup> A ruling similar to the last has been made by a state court, in a case where the suit was by the trustee to obtain possession, not to foreclose.<sup>326</sup> A distinguished federal judge has held that such a suit for specific enforcement of the mortgagee's right is the proper procedure where the mortgage embraces real, personal and mixed property, which cannot be transferred as a whole by the inflexible form and processes of a court of law; and that a receiver should be appointed during the pendency of the suit,

been applied to the reduction of a floating debt incurred for the completion and equipment of the road, whereby the security of the bondholders had been improved. The principle of this case furnished a "perfect analogy" in the decision in *Union Trust Co. v. St. L. I. M. & S. R. Co.*, 4 Dill. 114, Fed. Cas. No. 14,402, per Miller, J.

324 *Wilmer v. Atlanta & R. A. R. Co.*, 2 Woods, 409, Fed. Cas. No. 17,775; *Warner v. Rising Fawn Iron Co.*, 3 Woods, 514, Fed. Cas. No. 17,188.

325 *Allen v. Dallas & W. R. Co.*, 3 Woods, 316, Fed. Cas. No. 321. This case, however, presented the additional grounds that the company was insolvent, and that a land grant was in danger of lapsing and the charter of being forfeited, owing to the inability of the company to complete the road.

326 *McLane v. Sacramento & Placerville R. Co.*, 66 Cal. 606, 6 Pac. 748; *Sacramento & Placerville R. Co. v. Superior Court*, 55 Cal. 453. The statutory provisions relating to receivers in foreclosure were held not applicable.

where the mortgaged property is an inadequate security, and the company is insolvent and appropriating its earnings to its own use.<sup>327</sup> A single state court has held, on the contrary, that the legal remedies for the recovery of possession are adequate in such a case, and that no ground exists for the appointment of a receiver where the trustee has made no attempt to enforce his rights at law.<sup>328</sup>

§ 1553. (§ 132.) (11) **Receiver in Bankruptcy Proceedings.**—By the Bankruptcy Act of 1898, the courts of bankruptcy have jurisdiction (section 2, clause 3) to “appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed, or the trustee is qualified,” and to (clause 5) “authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates.”<sup>329</sup>

<sup>327</sup> *Dow v. Memphis & L. R. R. Co.*, 20 Fed. 260.

<sup>328</sup> *Rice v. St. Paul & P. R. Co.*, 24 Minn. 464.

<sup>329</sup> See *In re Sievers*, 91 Fed. 366; *In re Etheridge Furniture Co.*, 92 Fed. 329 (assignee may be appointed); *In re Fixen & Co.*, 96 Fed. 748; *In re Reliance Storage & Warehouse Co.*, 100 Fed. 619; *In re Kelly Dry Goods Co.*, 102 Fed. 747 (as to appointment by referee); *In re Floecken*, 107 Fed. 241 (same); *Booneville Nat. Bank v. Blakey*, 107 Fed. 891, 47 C. C. A. 43 (powers of such receiver limited by terms of the statute); *In re Rogers*, 125 Fed. 169, 60 C. C. A. 567; *In re T. E. Hill Co.*, 159 Fed. 73, 86 C. C. A. 263; *In re Oakland Lumber Co.*, 174 Fed. 634, 98 C. C. A. 388; *T. S. Faulk & Co. v. Steiner, Lobman & Frank*, 165 Fed. 861, 91 C. C. A. 547; *In re Desrochers*, 183 Fed. 991; *In re Standard Cordage Co.*, 184 Fed. 156. For the procedure in obtaining the appointment, and the functions and duties of such receivers, see Loveland, *Bankruptcy*, 2d ed., § 77a. As to appointment of receivers in connection with bankruptcy proceedings in England, see *Riches v. Owen*, L. R. 3 Ch. App. 820; *Ex parte Jay*, L. R.

§ 1554. (§ 133.) (12) **Alimony and Maintenance—Miscellaneous Cases.**—In a series of recent cases in California, the subject of receivers in suits for divorce or maintenance has been considered. The authority for the appointment of a receiver in a divorce suit is found in the Civil Code of that state.<sup>330</sup> It is held that the whole object of his appointment is to provide security for the payment of such allowance as is made for the maintenance of the divorced wife, and that this would be accomplished by investing him with the title and control of some productive property of the husband, out of the income of which he could pay such allowance, or by authorizing the sale of property to create a fund, the income of which would be applied to the same purpose.<sup>331</sup> Where a husband has failed to pay alimony pursuant to orders of the court, and has attempted to dispose of his property to prevent his wife from getting any part of it, the lien of the alimony upon the husband's estate may be enforced by appointing a receiver to collect the rents and profits, to sell the property, and pay the sums adjudged to be due.<sup>332</sup> But the court has no jurisdiction to continue the receiver after the entry of a final judgment in the action for permanent alimony in a single

9 Ch. App. 133; *Taylor v. Eckersley*, L. R. 5 Ch. D. 740; *Ex parte Rylands*, L. R. 6 Ch. D. 57; *Salt v. Cooper*, L. R. 16 Ch. D. 544.

<sup>330</sup> Cal. Civ. Code, § 140. "The court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter [concerning Divorce], and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case." As to the rule in Texas, see *Crawford v. Crawford* (Tex. Civ. App.), 163 S. W. 115; *Shaw v. Shaw*, 51 Tex. Civ. App. 55, 112 S. W. 124. And in Georgia, see *Stallings v. Stallings*, 127 Ga. 464, 9 L. R. A. (N. S.) 593, 56 S. E. 469. Compare *Johnson v. Garner*, 233 Fed. 756.

<sup>331</sup> *Petaluma Sav. Bank v. Superior Court*, 111 Cal. 488, 495, 44 Pac. 177.

<sup>332</sup> *Huellmantel v. Huellmantel*, 124 Cal. 583, 589, 57 Pac. 582.

sum of money; such judgment must be enforced not by a receiver, but by a writ of execution against the property of the husband.<sup>333</sup> It is also held that the right to a receiver in an equitable action by the wife for maintenance without divorce is not dependent upon this section, but is within the general provision of the code for such an officer in all cases "where receivers have been heretofore appointed by the usages of courts of equity"; and that such a receiver should be appointed, when occasion arises, for reasons like those on which a creditor, seeking to avoid fraudulent conveyances of a debtor, is permitted to employ the same instrumentality.<sup>334</sup>

A statute in Indiana authorizes a receiver in an action of replevin, when the property claimed has a peculiar value that cannot be compensated by damages.<sup>335</sup>

A receiver has been allowed, under peculiar circumstances, for the protection of a trade secret, where the usual remedy by injunction was inadequate. When parties become possessed in a wrongful and fraudulent manner of a knowledge of a secret code or system of letters, figures, and characters, and the key thereto, showing the cost and selling price of wares and merchandise, for use between the plaintiff and its traveling salesmen, and have

<sup>333</sup> *White v. White*, 130 Cal. 597, 80 *Am. St. Rep.* 150, 62 Pac. 1062. The provision of the Code of Civil Procedure, § 564, subd. 3, for a "receiver after judgment, to carry the judgment into effect," applies only to cases where the judgment affects specific property, and not to a simple money judgment, where the writ of execution furnishes an amply sufficient remedy: *Id.*

<sup>334</sup> *Murray v. Murray*, 115 Cal. 266, 56 *Am. St. Rep.* 97, 37 *L. R. A.* 626, 47 Pac. 37; as where the husband has endeavored and is endeavoring to sell or encumber his property in the state, and is a resident of another state, and cannot give personal attention to his properties in the state: *Anderson v. Anderson*, 124 Cal. 48, 56, 71 *Am. St. Rep.* 17, 56 Pac. 630, 57 Pac. 81.

<sup>335</sup> *Indiana Rev. Stats.* (1881), § 1270; *Hellebush v. Blake*, 119 Ind. 349, 21 N. E. 976.



copied the same into a catalogue of their own, a court of equity should take such marked catalogue into its possession, through a receiver, and retain it pending the action, where, in furtherance of justice and to prevent a fraudulent use of such code or system, such intervention becomes necessary.<sup>336</sup>

§ 1555. (§ 134.) **Fourth Class.**—"This class contains those cases in which a receiver is appointed after judgment for the purpose of carrying the decree into effect. In some instances the receiver appointed on motion pending the action is continued in his office after the decree; in others, he is appointed after the decree, when no appointment would be made before the final hearing. In all instances the object of a receiver is to carry into effect a special decree, which could not otherwise be efficiently executed by ordinary process. Among the most important cases in which a receiver may thus be appointed are creditors' suits and suits to enforce other equitable liens, suits to enforce the contracts of married women against their separate estates, and suits or proceedings generally statutory for the winding up of corporations."<sup>337</sup>

<sup>336</sup> *Simmons Hardware Co. v. Waibel*, 1 S. D. 488, 36 Am. St. Rep. 755, 11 L. R. A. 267, 47 N. W. 814. See, also, as to protection of trade secret by appointment of receiver, *Tuttle v. Blow*, 176 Mo. 158, 98 Am. St. Rep. 488, 75 S. W. 617.

<sup>337</sup> 4 Pom. Eq. Jur., § 1335. As to receivers in creditor's suits, see *ante*, §§ 106-109; receivers in proceedings for the winding up of corporations, *ante*, § 127, note; in mortgage foreclosure, after the decree, *ante*, § 98; *Connelly v. Dickson*, 76 Ind. 440; *Haas v. Chicago Bldg. Soc.*, 89 Ill. 498; to carry into effect a decree of alimony, *ante*, § 133. The classification of the preceding paragraphs has been based on the subject of the suit, regardless of the stage in the proceedings at which the appointment of a receiver was requested. A provision of most of the codes expressly authorizes the appointment of a receiver for the purpose of carrying into effect a judgment or decree: See *ante*, § 73. See, also, *Covington Drawbridge Co. v. Shepherd*, 21 How. (62 U. S.) 112, 16 L. Ed. 38 (where rents and profits for a

§ 1556. (§ 135.) **A Receiver is not Appointed Without Notice to the Defendant.**—The appointment of a receiver, to take property from one who is, *prima facie*, entitled to its possession, before the ultimate rights of the parties can be satisfactorily determined, is such a harsh and extraordinary proceeding that the courts will seldom allow it to be done without notice having been given to the adverse party. The leading case on the subject says: "By the settled practice of the court, in ordinary suits, a receiver cannot be appointed *ex parte*, before the defendant has had an opportunity to be heard in relation to his rights, except in those cases where he is out of the jurisdiction of the court or cannot be found, or where, for some other reason, it becomes absolutely necessary for the court to interfere, before there is time to give notice to the opposite party, to prevent the destruction or loss of the property."<sup>338</sup> This statement has been

given period sold under execution, receiver appointed to collect them); *Fox v. Hale & Norcross S. M. Co.*, 108 Cal. 475, 41 Pac. 328; *Stockton v. Central R. Co.*, 50 N. J. Eq. 489, 25 Atl. 942.

A receiver is not infrequently appointed after decree to preserve the property *during the pendency of an appeal*: See *Kreling v. Kreling*, 118 Cal. 421, 50 Pac. 549 (pending decision of motion for a new trial, to collect rents and profits of land directed by the judgment to be sold); *Corbin v. Thompson*, 141 Ind. 128, 40 N. E. 533 (not appointed, when question is one of disputed title); *Chicago & L. E. R. Co. v. St. Clair*, 144 Ind. 371, 42 N. E. 225; *Mitchell v. Roland*, 95 Iowa, 314, 63 N. W. 606; *Eastman v. Cain*, 45 Neb. 48, 63 N. W. 123; *Moran v. Johnston*, 26 Gratt. 108 (to collect rents and profits of land directed to be sold for benefit of creditors); *Beard v. Arbuckle*, 19 W. Va. 145 (same).

<sup>338</sup> *Verplank v. Mercantile Ins. Co. of N. Y.*, 2 Paige, 438, citing *People v. Norton*, 1 Paige, 17. To same effect, see *Sanford v. Sinclair*, 8 Paige, 372; *Simmons v. Wood*, 45 How. Pr. 262; *Strong v. Epstein*, 14 Abb. N. C. 322; *Whitney v. N. Y. & A. R. Co.*, 66 How. Pr. 436; *Whitney v. Welch*, 2 Abb. N. C. 442; *Ramsey v. Erie R'y Co.*, 7 Abb. Pr., N. S., 156; *Ettlinger v. Persian R. & C. Co.*, 66 Hun, 94, 20 N. Y. Supp. 772; see as to the effect of a statute, *Grace v. Curtiss*, 3 Misc. Rep. 558, 28 N. Y. Supp. 321; *Henry v. Furbish*, 30 Misc. Rep. 822, 62 N. Y. Supp. 247.

quoted approvingly and adopted by the courts of nearly every jurisdiction where the opportunity has arisen.<sup>339</sup>

339 The following cases uphold, or recognize, the principles stated, many of them in the words of the quoted case:

**England.**—In *re Potts*, [1893] 1 Q. B. 648 (holding a receiver should not be appointed *ex parte*).

**United States.**—*Barley v. Gittings*, 15 App. D. C. 427; *North Am. L. & T. Co. v. Watkins*, 109 Fed. 101, 48 C. C. A. 254 (“and to deprive him [the defendant] of the possession of his property, without notice, on the motion of his adversary, is a jurisdiction and a power that should be rarely used, and never except in a clear case of imperious necessity, when the right of the complainant, on the showing made by him, is undoubted, and when such relief and protection can be given in no other way”); *Joseph Dry Goods Co. v. Hecht*, 120 Fed. 760, 57 C. C. A. 64; *Huff v. Bidwell*, 151 Fed. 563, 81 C. C. A. 43; *Mann v. Gaddie*, 158 Fed. 42, 88 C. C. A. 1 (good statement of when receiver may be appointed *ex parte*); *T. S. Faulk & Co. v. Steiner, Lobman & Frank*, 165 Fed. 861, 91 C. C. A. 547.

**Alabama.**—*Crowder v. Moore*, 52 Ala. 220; *Ashurst v. Lehman*, 86 Ala. 370, 5 South. 731; *Thompson v. Tower Mfg. Co.*, 87 Ala. 733, 6 South. 928 (citing early cases); *Moritz v. Miller*, 87 Ala. 331, 6 South. 269; *Sims v. Adams*, 78 Ala. 395; *Werborn (Peter) v. Kahn*, 93 Ala. 201, 9 South. 729; *Dallins v. Lindsey*, 89 Ala. 217, 7 South. 234; *Irwin v. Everson*, 95 Ala. 64, 10 South. 320; *Bank of Florence v. U. S. Savings & Loan Co.*, 104 Ala. 297, 16 South. 110; *Capital City Waterworks Co. v. Weatherly*, 108 Ala. 412, 18 South. 841; see *Maxwell v. Peters Shoe Co.*, 109 Ala. 371, 19 South. 412; *Smith-Dimmick L. Co. v. Teague*, 119 Ala. 385, 24 South. 4; *Gilreath v. Trent Co.*, 121 Ala. 204, 25 South. 581; *Meyer v. Thomas*, 131 Ala. 111, 30 South. 89; *Walker County Coal & Mineral Land Co. v. Long (Ala.)*, 39 South. 770; *Birmingham Disinfectant Co. v. Smith (Smith v. Birmingham Disinfectant Co.)*, 174 Ala. 374, 56 South. 721; *Hurt v. Hurt*, 157 Ala. 126, 47 South. 260; *Ensley Development Co. v. Powell*, 147 Ala. 300, 40 South. 137.

**California.**—*Fisher v. Superior Court*, 110 Cal. 129, 42 Pac. 561 (it would be a “gross abuse of discretion”); *Hobson v. Pacific States Mercantile Co.*, 5 Cal. App. 94, 89 Pac. 866. In the event that a receiver is appointed *ex parte* without bond, the appointment is absolutely void: *Bibby v. Dieter*, 15 Cal. App. 45, 113 Pac. 874; *Davila v. Heath*, 13 Cal. App. 370, 109 Pac. 893.

**Colorado.**—*Belknap Sav. Bank v. Lamar Land etc. Co.*, 28 Colo. 326, 64 Pac. 212.

**Florida.**—*State v. Jacksonville P. & M. R. Co.*, 15 Fla. 201; *Fricker v. Peters etc. Co.*, 21 Fla. 254, approved in *Moyers v. Coiner*, 22 Fla. 422; see *Jacksonville Ferry v. Stockton*, 40 Fla. 141, 23 South. 557; *Stockton v. Harmon*, 32 Fla. 312, 13 South. 833; *Lehman v. Trust Co. of America*, 57 Fla. 473, 49 South. 502; *Jones v. Rakestraw*, 59 Fla. 537, 51 South. 927.

**Georgia.**—*Rogers v. Dougherty*, 20 Ga. 271.

**Idaho.**—*Cummings v. Steele*, 6 Idaho, 666, 59 Pac. 15.

**Illinois.**—*Gilbert v. Block*, 51 Ill. App. 516; *Nusbaum v. Locke*, 53 Ill. App. 242; *Craver & S. Mfg. Co. v. Whitman etc. Mfg. Co.*, 62 Ill. App. 313; *English v. People*, 90 Ill. App. 54.

**Indiana.**—*Wabash R. Co. v. Dykeman*, 133 Ind. 56, 32 N. E. 823; *Chicago & S. E. R. Co. v. Cason*, 133 Ind. 49, 32 N. E. 827 (citing many early cases); *Sullivan E. L. & P. Co. v. Blue*, 142 Ind. 407, 41 N. E. 805; *Winchester E. L. Co. v. Gordan*, 143 Ind. 681, 42 N. E. 914; *Ryder v. Shea*, 183 Ind. 15, 108 N. E. 104; *Marshall v. Matson*, 171 Ind. 238, 86 N. E. 339; *Henderson v. Reynolds*, 168 Ind. 522, 11 Ann. Cas. 977, 11 L. R. A. (N. S.) 960, 81 N. E. 494; *Continental Clay & Min. Co. v. Bryson*, 168 Ind. 485, 81 N. E. 210.

**Iowa.**—*French v. Gifford*, 30 Iowa, 148; approved in *Bisson v. Curry*, 35 Iowa, 72; *Howe v. Jones*, 57 Iowa, 130, 8 N. W. 451, 10 N. W. 299; see *Marsh v. Bird*, 59 Iowa, 207, 13 N. W. 298. Compare *Paine v. Mueller*, 150 Iowa, 340, 130 N. W. 133.

**Kansas.**—*Elwood v. First Nat. Bank*, 41 Kan. 475, 21 Pac. 673; *Guy v. Doak*, 47 Kan. 236, 366, 27 Pac. 968; *Feess v. Mechanics' State Bank*, 84 Kan. 828, L. R. A. 1915A, 606, 115 Pac. 563.

**Louisiana.**—*State ex rel. Brittin v. New Orleans*, 43 La. Ann. 829, 9 South. 643, approved in *Mestier v. Chevallier Pav. Co.*, 51 La. Ann. 142, 24 South. 799 (citing early cases); *Martin v. Blanchin*, 16 La. Ann. 237; *Ober v. Excelsior Planting Co.*, 44 La. Ann. 570, 10 South. 792 (as to construction of a statute in regard to notice). See, also, *In re Moss Cigar Co.*, 50 La. Ann. 789, 23 South. 544.

**Maryland.**—*Thompson v. Diffenderfer*, 1 Md. Ch. 489; *Blondheim v. Moore*, 11 Md. 365 (stating, "unless the necessity be of the most stringent character, the court will not appoint a receiver until the defendant is first heard in response to the application"); approved in *Triebert v. Burgess*, 11 Md. 452; see *Voshell v. Heaton*, 26 Md. 83; *Anderson v. Cecil*, 86 Md. 490, 38 Atl. 1074; *Dixon v. Dixon*, 119 Md. 413, 86 Atl. 1042; *Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 119 Md. 21, 85 Atl. 949; *Baltimore Skate Mfg. Co. v. Randall*, 112 Md. 411, 76 Atl. 491.



**Michigan.**—People ex rel. Port Huron & G. R. Co. v. St. Clair, 31 Mich. 456; Cook v. Detroit etc. R. Co., 45 Mich. 453, 8 N. W. 74; Goldman v. Manistee Circuit Judge, 155 Mich. 47, 118 N. W. 600.

**Minnesota.**—Haugan v. Netland, 51 Minn. 552, 53 N. W. 873.

**Mississippi.**—Mays v. Rose, Freem. Ch. 703; Whitehead v. Wooten, 43 Miss. 523 (“there must be strong and special reasons for the appointment before answer”); Hardy v. McClellan, 53 Miss. 507; Buckley v. Baldwin, 69 Miss. 804, 13 South. 851; Meridian N. & P. Co. v. D. & W. P. Co., 70 Miss. 695, 12 South. 702; Barber v. Manier, 71 Miss. 725, 15 South. 890; Whitney v. Hanover Nat. Bank, 71 Miss. 1009, 23 L. R. A. 531, 15 South. 33; Pearson v. Kendrick, 74 Miss. 235, 21 South. 37.

**Missouri.**—St. Louis & S. R. Co. v. Wear, 135 Mo. 230, 36 S. W. 357, 658; Merriam v. St. L. C. G. & Ft. S. R. Co., 136 Mo. 145, 36 S. W. 630; Tuttle v. Blow, 176 Mo. 158, 98 Am. St. Rep. 488, 75 S. W. 617.

**Montana.**—Thornton-Thomas M. Co. v. Second J. D. Ct., 20 Mont. 284, 50 Pac. 852; State v. District Court, 22 Mont. 241, 56 Pac. 281. It should not be made upon affidavit based upon information and belief: Benepe-Owenhouse Co. v. Scheidegger, 32 Mont. 424, 80 Pac. 1024.

**Nebraska.**—By express terms of the statute (Code, §§ 267, 274), the appointment is void, and subject to collateral attack, if the notice therein prescribed has not been given: Johnson v. Powers, 21 Neb. 292, 32 N. W. 62; see Farmers & Merchants’ Bank v. German Nat. Bank, 59 Neb. 229, 80 N. W. 820; Holcomb v. Tierney (Andrews v. Holcomb), 79 Neb. 660, 113 N. W. 204.

**Nevada.**—Maynard v. Railey, 2 Nev. 313.

**New York.**—See cases *supra*, note 338.

**North Carolina.**—Corbin v. Berry, 83 N. C. 27.

**North Dakota.**—Grandin v. Le Bar, 2 N. D. 206, 50 N. W. 151.

**Ohio.**—Schone v. Consolidated Bldg. & Sav. Co., 4 Ohio N. P. 216; Cleveland C. C. & I. R. Co. v. Jewett, 37 Ohio St. 649 (citing early cases). See, also, Devell v. Hinds, 8 Ohio Dec. 177.

**Oklahoma.**—Pyeatt v. Prudential Ins. Co., 38 Okl. 15, Ann. Cas. 1915C, 894, 131 Pac. 914.

**Oregon.**—Stacy v. McNicholas, 76 Or. 167, 144 Pac. 96, 148 Pac. 67; Anderson v. Robinson, 63 Or. 228, 126 Pac. 988, 127 Pac. 546.

**South Carolina.**—Dilling B. & Co. v. Foster, 21 S. C. 334; Allen v. Cooley, 53 S. C. 634, 31 S. E. 634.

§ 1557. (§ 136.) **Notice is Necessary Where Appointment Sought in Pending Suits.**—The rule as to appoint-

**Texas.**—Webb v. Allen, 15 Tex. Civ. App. 605, 40 S. W. 342; Butts v. Davis (Tex. Civ. App.), 146 S. W. 1015; Security Land Co. v. South Texas Development Co. (Tex. Civ. App.), 142 S. W. 1191; Williams v. Watt (Tex. Civ. App.), 171 S. W. 266.

**Virginia.**—Fredenheim v. Rohr, 87 Va. 764, 13 S. E. 193, 266 (citing cases); Va. Tenn. & C. S. I. & Co. v. Wilder, 88 Va. 942, 14 S. E. 806 (stating that appointment without notice would be “utterly at war with a sound, judicial, discretion”). Underwood v. McVeigh, 23 Gratt. 418, has the following to say of *ex parte* appointments: “The authorities on this point are overwhelming, and the decisions of all the tribunals of every country where an enlightened jurisprudence prevails, are all one way. It lies at the very foundation of justice, that every person who is to be affected by an adjudication should have the opportunity of being heard in defense, both in repelling the allegations of fact, and upon matters of law, and no sentence of any court, is entitled to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte* and without opportunity of defense.” And again, “A tribunal which decides without hearing the defendant, or giving him an opportunity to be heard, cannot claim for its decrees the weight of a judicial sentence”: Bristow v. Home Bldg. Co., 91 Va. 18, 20 S. E. 946, 947.

**Washington.**—Roberts v. Washington Nat. Bank, 9 Wash. 12, 37 Pac. 26. See Cole v. Price, 22 Wash. 18, 60 Pac. 153; Larsen v. Winder, 14 Wash. 109, 53 Am. St. Rep. 864, 44 Pac. 123. It has been held that an *ex parte* appointment has no force beyond the hearing: State v. Superior Court, 34 Wash. 123, 74 Pac. 1070; Libert v. Unfried, 47 Wash. 182, 91 Pac. 774.

**West Virginia.**—Ruffner v. Mairs, 33 W. Va. 655, 11 S. E. 5. Compare Batson v. Findley, 52 W. Va. 343, 43 S. E. 142; Ward v. Hotel Randolph Co., 69 W. Va. 197, Ann. Cas. 1913A, 607, 71 S. E. 105; Baltimore Bargain House v. St. Clair, 58 W. Va. 565, 52 S. E. 660.

**Wisconsin.**—Davelaar v. Blue Mound Inv. Co., 110 Wis. 470, 86 N. W. 185.

**Wyoming.**—See for notice dispensed with, O'Donnel v. First Nat. Bank, 9 Wyo. 408, 64 Pac. 337.

In addition to these cases, the principle is upheld in many of the cases cited in the following paragraphs, where it is applied to particular classes of cases.

ment without notice extends to a motion for the appointment of a receiver in a pending suit where the defendant has appeared, or for the extension of a receivership;<sup>340</sup> the ground being that the defendant's right to show why his property should not be taken from his possession should not be defeated merely because he is already a party to a suit in regard to it.<sup>341</sup> But in such cases the notice need not be as direct and explicit as in those instances where the defendant has had no means of knowing that his right to the possession of his property is contested.<sup>342</sup>

<sup>340</sup> *Cummings v. Steele*, 6 Idaho, 666, 59 Pac. 15 (holding that such appointment is not voidable, but void). See *Johnson v. Powers*, 21 Neb. 292, 32 N. W. 62; *State ex rel. Brittin v. City of New Orleans*, 43 La. Ann. 829, 9 South. 643 ("she is entitled to notice of all proceedings taken in that suit affecting her interest. The receivership was originally established, as appears on the order, only on her consent and joinder in the application therefor. It cannot be extended and enlarged without notice to her. The exception that the city was bound to proceed by petition has no merit"). Approved in *Mestier v. A. Chevallier Pavement Co.*, 51 La. Ann. 142, 24 South. 799.

In West Virginia the rules have been laid down as follows: "In every instance, before process served—and the application is thus *ex parte*—such notice must be given, except in cases of emergency, where it is impracticable, else the appointment will be reversible. And even after process served, during the pendency of the suit, if such application is made in vacation, there must likewise be such notice; but there need be no notice when made in term time in a decree on the merits. Where the bill prays for an appointment of a receiver, it may be done any time after process is served, without further notice": *Batson v. Findley*, 52 W. Va. 343, 43 S. E. 142.

<sup>341</sup> And where the code provided that a receiver could be appointed, without further notice, in a pending action, it was so construed as not to include an action pending before a referee, and notice was required: *Strong v. Epstein*, 14 Abb. N. C. 322.

<sup>342</sup> In *Clark v. Clark*, 11 Abb. N. C. 333, the notice was, "if the present receiver is discharged," motion will be made for the appointment of another one; this was held sufficient notice. So, where the defendant had had a hearing that served the purpose of a formal

§ 1558. (§ 137.) **To Whom Notice must be Given; Waiver; Review of Ex Parte Appointment.**—Not only must notice be given to the defendants generally, but the particular person to be dispossessed must be notified.<sup>343</sup> As the notice is given for the benefit of the defendant, who has possession of the property, the lack of notice, or the expiration of the required time after notice and before hearing, may be waived by the party affected, and it will be considered as waived if there is an appearance, without resisting the appointment for lack of notice.<sup>344</sup>

It has been held that the want of notice of the appointment is reviewable upon appeal only from the order granting the receiver.<sup>345</sup>

§ 1559. (§ 138.) **Cases Wherein Notice is not Necessary.**—The early and leading cases on the subject of

notice: *Hancock v. American Bonding & Trust Co.*, 86 Ill. App. 630, citing cases.

<sup>343</sup> *Gilbert v. Block*, 51 Ill. App. 516. It has been held that a defendant who has been notified cannot object that the other defendants have not had notice: *Rapp v. Riehling*, 122 Ind. 255, 23 N. E. 68. As to what constitutes sufficient service, or notice, see *Allen v. Cooley*, 53 S. C. 414, 31 S. E. 634; *Schileer v. Brock*, 124 Ala. 626, 27 South. 473.

<sup>344</sup> *Farmers & Merchants' Bank v. German Nat. Bank*, 59 Neb. 229, 80 N. W. 820; *Stacy v. McNicholas*, 76 Or. 167, 144 Pac. 96, 148 Pac. 67. Where a party answers within ten days, and all the testimony is taken within a month, he will not be held to have waived notice by delay: *Anderson v. Robinson*, 63 Or. 228, 126 Pac. 988, 127 Pac. 546.

<sup>345</sup> Thus the lack of notice was not inquired into on appeal, though the cause was remanded for further consideration, on other grounds: *Voshell v. Heaton*, 26 Md. 83. Where the record is silent on the subject, the court will presume that proper proceedings were had: *Elwood v. First Nat. Bank*, 41 Kan. App. 673, 21 Pac. 673; *Miller v. Shriner*, 86 Ind. 493. It was held in *Cummings v. Steele*, 6 Idaho, 666, 59 Pac. 15, that a writ of *certiorari* would lie to annul such appointment: See *O'Donnell v. First Nat. Bank*, 9 Wyo. 408, 64 Pac. 337; *In re Moss Cigar Co.*, 50 La. Ann. 789, 23 South. 544; *State v. Union Nat. Bank*, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585.



notice recognized exceptions to the general rule, that a receiver cannot be appointed before the defendant has had an opportunity to be heard in relation to his rights;<sup>346</sup> as, where he is out of the jurisdiction of the court or cannot be found; or where there is imminent danger<sup>347</sup> of loss, to some of the parties, if the court does not assume immediate control of the property. Thus, in case of a mortgage, where the mortgagor was insolvent, and refused to give up the possession, claiming the existence of a prior lien, and the crops were liable to be wasted, it was held that the appointment of a receiver without notice was proper.<sup>348</sup> The requisite in any case seems to be that there must be an urgent necessity for the assumption of control of the property by the court, and this may arise from various circumstances.<sup>349</sup> Where the

346 *People v. Norton*, 1 Paige, 17; *Verplank v. Mercantile Ins. Co.*, 2 Paige, 438; and see cases cited in preceding paragraph, approving the principle of the text.

347 *Ashurst v. Lehman*, 86 Ala. 370, 5 South. 731; *Moritz v. Miller*, 87 Ala. 331, 6 South. 269; *Thompson v. Tower Mfg. Co.*, 87 Ala. 733, 6 South. 928 ("it should be a strong case of emergency, and peril, well fortified by affidavit"). See, also, *Whitehead v. Wootens*, 43 Miss. 523; *Bristow v. Home Bldg. Co.*, 91 Va. 18, 20 S. E. 946 (case of mortgage, holding it must be an "obvious necessity").

348 *Ashurst v. Lehman*, 86 Ala. 370, 5 South. 731 ("considering the nature and character of the subject-matter of the controversy, the facility with which the crops may be disposed of, their liability to waste or destruction, the necessity of their preservation and application to the mortgage debt, the insolvency of the defendant, and his application of a part of the crop in disregard of the rights of the plaintiff, we are of the opinion that the bill makes a good *prima facie* case for the appointment of a receiver, and shows a good reason for failure to give notice of the application"). In the following cases, receivers were appointed on *ex parte* application in suits to foreclose chattel mortgages: *H. B. Clafin Co. v. Furtick*, 119 Fed. 429; *Haggard v. Sanglin*, 31 Wash. 165, 71 Pac. 711.

349 *State v. Jacksonville, P. & M. R. Co.*, 15 Fla. 201, approved in *Stockton v. Harman*, 32 Fla. 312, 13 South. 833; *Frickers v. Peters & Calham Co.*, 21 Fla. 254, approved in *Moyes v. Coiner*, 22 Fla.

defendant has acted, or is acting fraudulently,<sup>350</sup> or is about to remove his property from the jurisdiction, or is himself a non-resident,<sup>351</sup> the courts have considered the emergency sufficient to warrant the extraordinary relief of appointing a receiver on an *ex parte* application. In such cases the allegations of the bill must be such that the court can satisfy itself that a case of emergency really

422; Jacksonville Ferry Co. v. Stockton, 40 Fla. 141, 23 South. 557. See, also, Elwood v. First Nat. Bank, 41 Kan. 495, 21 Pac. 673 (insolvent bank); Barley v. Gittings, 15 App. D. C. 427 (holding the existence of the emergency not subject to collateral attack). For further illustration see the cases cited in the following paragraphs, where they are collected, in groups, with reference to the class to which they relate. While the rule of law on the subject is not seriously questioned, in its application to the special circumstances of the individual cases, different courts have arrived at opposite conclusions on what are, *apparently*, identical states of fact.

350 Maxwell v. Peters Shoe Co., 109 Ala. 371, 19 South. 412 (case of fraudulent assignment); Heard v. Murray, 93 Ala. 127, 9 South. 514 (conveyance in fraud of creditors); Sanborn v. Sinclair, 8 Paige, 373 (where the defendant fraudulently withdrew himself from the jurisdiction); May v. Rose, Freem. Ch. 703. See, also, Hutchinson v. First Nat. Bank, 133 Ind. 271, 36 Am. St. Rep. 537, 30 N. E. 952; Benjamin v. Staples, 93 Miss. 507, 47 South. 425.

351 State v. District Court, 22 Mont. 241, 56 Pac. 281 (imminent danger that property would be removed beyond the jurisdiction); Hendrix v. American Land & Mortgage Co., 95 Ala. 313, 11 South. 213 (mortgage); Hooper v. Davies, 70 Ill. App. 682 (defendant not in the jurisdiction); People v. Norton, 1 Paige, 17; Alford v. Berkeley, 29 Hun, 633 (notice to a non-resident partner not necessary); Grace v. Curtiss, 3 Misc. Rep. 558, 23 N. Y. Supp. 321 (debtor not to be found within the state); Henry v. Furbish, 30 Misc. Rep. 822, 62 N. Y. Supp. 247 (but allegation of search is not equal to "not to be found"); Morgan v. Van Kohnstamm, 60 How. Pr. 161, 9 Daly, 335; O'Connor v. Mechanics' Bank, 54 Hun, 272, 7 N. Y. Supp. 380. But see Whitney v. Welch, 2 Abb. N. C. 442, holding that though non-resident, the defendants were entitled to "some" notice; and Smith-Dimmick Lumber Co. v. Teague, 119 Ala. 385, 24 South. 4. It has been held that a successor to a receiver may be appointed *ex parte*: Taylor v. Easton, 180 Fed. 363, 103 C. C. A. 509.

exists, and is not founded on the mere apprehension, or information and belief of the plaintiff.<sup>352</sup>

§ 1560. (§ 139.) **Same; Tendency to Restriction of Ex Parte Appointments.**—The cases of emergency in which the courts have allowed a receiver have, in many instances, become quite well settled, and the frequency of *ex parte* appointments, without a due consideration of the rights of all parties interested, has led to much well-deserved criticism by some of the courts. Thus, it is said: “The right to appoint receivers vested in the court should only be exercised when it is clearly shown to be necessary to prevent the defeat of justice. There has been a tendency in recent years among the courts to appoint receivers almost as a matter of course, if the case as made by the plaintiff’s complaint seems to warrant such action. . . . In our opinion, it is the duty of the courts rather to restrict than to extend this growing tendency.”<sup>353</sup> The supreme court of Virginia says:<sup>354</sup> “This court has been emphatic in denunciation of decrees

<sup>352</sup> Verplank v. Mercantile Ins. Co., 2 Paige, 438; Anderson v. Robinson, 63 Or. 228, 126 Pac. 988, 127 Pac. 546. “In every case, where the court is asked to deprive the defendant of his property without a hearing, or an opportunity to oppose the application, the particular facts and circumstances which render such a proceeding necessary should be set forth.” This would seem to be obvious from the fact that the court, and not the plaintiff, is the one to judge of the sufficient emergency of the case: See Fricker v. Peters, 21 Fla. 254; Moyers v. Coiner, 22 Fla. 422; Jacksonville Ferry v. Stockton, 40 Fla. 141, 23 South. 557; Nusbaum v. Locke, 53 Ill. App. 242; Baltimore Bargain House v. St. Clair, 58 W. Va. 565, 52 S. E. 660; Marshall v. Matson, 171 Ind. 238, 86 N. E. 339; General Motors Oil Co. v. Matheny, 185 Ind. 114, 113 N. E. 4.

<sup>353</sup> Roberts v. Washington Nat. Bank, 9 Wash. 12, 37 Pac. 26; approved, Larsen v. Winder, 14 Wash. 109, 53 Am. St. Rep. 864, 44 Pac. 123.

<sup>354</sup> Fredenhien v. Rohr, 87 Va. 764, 13 S. E. 193, 266, citing Underwood v. McVeigh, 23 Gratt. 418, as a notable illustration of the wisdom of the law in setting its face against such orders.

and orders entered *ex parte*, and without hearing the parties interested and affected by such decrees and orders." And the general tendency of the courts at present seems to be in harmony with such criticism.<sup>355</sup>

§ 1561. (§ 140.) **Lack of Notice as Affecting the Appointment in the Various Classes of Cases—In Class I.** In those cases where the party entitled to possession is not competent to hold or manage the property during the litigation, notice of the application for the appointment is held to be necessary. Thus the general rule as to notice applies to the property of infants, so that in a suit by the vendor, a receiver to take charge of land sold to the deceased father of minors cannot be validly appointed upon notice to the minor's attorney.<sup>356</sup>

§ 1562. (§ 141.) **In Class II—Partnership; Conflict-ing Claimants of Land.**—These are cases where all the parties to the suit are equally entitled to the possession of the disputed property, yet, owing to the controversy, it is not just and proper that either of them should retain possession during the litigation.

On application for a receiver of a partnership it is necessary to give proper notice, unless some case of emergency be shown;<sup>357</sup> thus where the plaintiff partner

<sup>355</sup> In Illinois it is said (Gilbert v. Block, 51 Ill. App. 516): "Courts of equity are exceedingly averse to the appointment of receivers upon *ex parte* applications." See, also, Craver & S. Mfg. Co. v. Whitman etc. Mfg. Co., 62 Ill. App. 313 (same); Wabash R. Co. v. Dykeman, 133 Ind. 56, 32 N. E. 823; Chicago & S. E. R. Co. v. Cason, 133 Ind. 49, 32 N. E. 827. See Grandin v. Le Bar, 2 N. D. 206, 50 N. W. 151 (stating that to warrant an *ex parte* appointment the case must be such that the plaintiff is reasonably sure to succeed).

<sup>356</sup> Hardy v. McClellan, 53 Miss. 507.

<sup>357</sup> Maynard v. Railey, 2 Nev. 313; Mann v. Gaddie, 158 Fed. 42, 88 C. C. A. 1 (refused); Goldman v. Manistee Circuit Judge, 155 Mich. 47, 118 N. W. 600; Lawrence Lumber Co. v. A. J. Lyon & Co.,



obtained an *ex parte* receiver against the defendants, who kept the books and managed the partnership finances, the order of appointment was reversed as not being within the authority of the court.<sup>358</sup> But if the case is such that the court would appoint a receiver with notice, the defendant may waive the notice and the appointment will be valid.<sup>359</sup>

In suits between conflicting claimants of land, especially between parties claiming under legal titles, a receiver will not be appointed upon an *ex parte* application. Where an action was brought, in equity, to quiet title to real estate, a receiver was appointed to take charge of the growing crops. In reversing this order, the court said: "It was an abuse of discretion to make an *ex parte* order appointing a receiver of the crops sown and planted by defendant, upon land where defendant had long resided. The affidavit upon which the order was made showed no exigency which would justify such an arbitrary, harsh proceeding."<sup>360</sup>

93 Miss. 859, 47 South. 849; *Webb v. Allen*, 15 Tex. Civ. App. 605, 40 S. W. 542 (stating that in partnership cases the same emergency must be shown as in ordinary cases, in order to warrant appointment without notice); *Cole v. Price*, 22 Wash. 18, 60 Pac. 153 (stating the rule as generally applied, but the case was one of emergency); or if one of the partners be a non-resident: *Alford v. Berkele*, 29 Hun, 633. As to what constitutes sufficient notice, see *Allen v. Cooley*, 53 S. C. 414, 31 S. E. 634.

<sup>358</sup> *Martin v. Blanchin*, 16 La. Ann. 237; and where a partner sued for an accounting it was held that he could not have a receiver, nor an injunction restraining defendant from interfering with the firm property, until notice had been given: *Larsen v. Winder*, 14 Wash. 109, 53 Am. St. Rep. 864, 44 Pac. 123.

<sup>359</sup> *Longstaff v. Hurd*, 66 Conn. 350, 34 Atl. 91; *Veith v. Ress*, 60 Neb. 52, 82 N. W. 116. But see *Pressley v. Harrison*, 102 Ind. 19, 1 N. E. 188, and *Pressley v. Lamb*, 105 Ind. 171, 4 N. E. 682, to the point that mere consent cannot, in such cases, give the court authority to appoint a receiver.

<sup>360</sup> *Grandin v. Le Bar*, 2 N. D. 206, 50 N. W. 151; see *Pom. Eq. Jur.*, § 1333. See, also, *Miller v. Shriner*, 86 Ind. 493.

§ 1563. (§ 142.) **In Class III—Persons in Position of Trust or Quasi Trust.**—Even in those cases where the defendant is holding the property as a trustee or *quasi* trustee, and is violating his fiduciary duties by misusing, misapplying, or wasting the property, and is thereby endangering the rights of the parties beneficially interested, the application for a receiver is not granted without notice unless it be shown that the equitable right, sought to be protected, is in imminent danger of loss, or it is probable that the defendant will dispose of the trust property if he has notice, and thereby thwart the object of the application. Thus, on a bill by an assignor to charge an assignee, as trustee, for an excessive collection on a life insurance policy, the verified affidavit of the assignee's insolvency, and his conversion of the money into other property, showing clear probability of *immediate* loss, was the ground on which the application without notice was sustained.<sup>361</sup> And so, in a suit against an administrator for a contribution as co-surety due from the deceased, the ground supporting the bill was the fact that the administrator was rapidly selling the decedent's assets, and had no property of his own subject to execution, thus making it evident that the plaintiff would be damaged by delay; the receiver was therefore allowed, without notice.<sup>362</sup>

§ 1564. (§ 143.) **In Mortgage Foreclosure.**—As stated in a previous paragraph, the grounds on which a receiver is allowed in the case of mortgaged property, are gen-

<sup>361</sup> Culver v. Guyer, 129 Ala. 602, 29 South. 779; see Pollard v. Southern Fertilizer Co., 122 Ala. 409, 25 South. 169; and see Simmons v. Wood, 45 How. Pr. 262, for a case showing that the mere fact that the application is in regard to trust property does not give the court power to appoint a receiver, on an *ex parte* application, in cases where a sound discretion would require notice; also, Belknap Sav. Bank v. Lamar Land etc. Co., 28 Colo. 326, 64 Pac. 212.

<sup>362</sup> Werborn (Peter) v. Kahn, 93 Ala. 201, 9 South. 729.

erally said to be that (1) the security is inadequate, and (2) the mortgagor insolvent, committing acts of waste, or disposing of the property, or its crops or income, so that there is a depreciation of the value of the property, and security. These combined circumstances have, at times, given rise to such extraordinary emergency as justifies an *ex parte* application.<sup>363</sup> Thus where a chattel mortgagor was insolvent, and was squandering the proceeds of the property in riotous living, it was held proper to appoint a receiver without notice.<sup>364</sup> It appears on principle, as well as authority, that mere wasting of the property, insolvency, or inadequacy of security are none of them alone sufficient to justify an *ex parte* appointment, but that they must be combined, so as to present a case where there would be imminent danger of loss if the court did not assume control before notice could be properly given.<sup>365</sup>

§ 1565. (§ 144.) **In Creditors' Suits.**—In the case of creditors, having a judgment or other lien on the debtor's property, there must be shown some sufficient reason why notice should not be given, in order to warrant an *ex*

<sup>363</sup> See *ante*, §§ 93, 95; *Ashurst v. Lehman*, 86 Ala. 370, 5 South. 731; *Hendrix v. American Freehold L. & M. Co.*, 95 Ala. 313, 11 South. 213 (allowing a receiver without notice), citing early cases. See *Gilbert v. Block*, 51 Ill. App. 516 (citing cases); *Maish v. Bird*, 59 Iowa, 307, 13 N. W. 298 (allowing receiver without notice).

<sup>364</sup> *O'Donnell v. First Nat. Bank*, 9 Wyo. 408, 64 Pac. 337. For further instances of appointment *ex parte* in suits to foreclose chattel mortgages, see *H. B. Claffin Co. v. Furtick*, 119 Fed. 429; *Haggard v. Sanglin*, 31 Wash. 165, 71 Pac. 711.

<sup>365</sup> *Gilbreath v. N. B. & T. Co.*, 121 Ala. 204, 25 South. 581; *Moyers v. Coiner*, 22 Fla. 422; where insolvency was not alleged; *Hutchison v. First Nat. Bank*, 133 Ind. 271, 36 Am. St. Rep. 537, 30 N. E. 952; *Haugan v. Netland*, 51 Minn. 552, 53 N. W. 873; see *Pearson v. Kendrix*, 74 Miss. 235, 21 South. 37, which was affected by statute; *Fletcher v. Krupp*, 35 App. Div. 586, 55 N. Y. Supp. 146; *Belknap Sav. Bank v. Lamar Land etc. Co.*, 28 Colo. 326, 64 Pac. 212.

*parte* appointment. If the debtor, who is disposing of his property, is still solvent, there seems no reason for an appointment without notice;<sup>366</sup> or if the one to whom the goods are being fraudulently transferred is able to respond to a legal demand, notice should be given.<sup>367</sup> But where an insolvent debtor had fraudulently conveyed all his property, and it was being wasted, it was held that no notice was necessary.<sup>368</sup> If a debtor fraudulently withdraws himself from the jurisdiction, to evade process, no notice is necessary, but, it is held, the mere fact that he is absent does not give the plaintiff a right to seize his property unless there is danger of immediate loss.<sup>369</sup> The rights of creditors, in such cases, are well

<sup>366</sup> *Moritz v. Miller*, 87 Ala. 331, 6 South. 269 (stating if the insolvency had existed, the appointment would have been made *ex parte*).

<sup>367</sup> *Thompson v. Tower Mfg. Co.*, 87 Ala. 733, 6 South. 928.

<sup>368</sup> *Heard v. Murray*, 93 Ala. 127, 9 South. 514. See, also, *Wernborn (Peter) v. Kahn*, 93 Ala. 201, 9 South. 729 (holding an allegation of deficiency of legal assets sufficient to impart equity to the bill); *Bank of Florence v. United States Sav. & Loan Co.*, 104 Ala. 297, 16 South. 110 (showing that a simple bank creditor cannot, on the insolvency of the bank, obtain a receiver on *ex parte* application and thereby impress the funds with a prior lien); and *Smith-Dimmick Lumber Co. v. Teague*, 119 Ala. 385, 24 South. 4, that the debtor's insolvency and the fact that he is about to remove his property does not deprive him of the right to notice; see *Maxwell v. Peters Shoe Co.*, 109 Ala. 371, 19 South. 412; *State v. Union Nat. Bank*, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585; *Blondheim v. Moore*, 11 Md. 365, one of the leading cases on the subject.

<sup>369</sup> *Sandford v. Sinclair*, 8 Paige, 373; and see, for the effect of a code provision in such cases, *Grace v. Curtiss*, 23 N. Y. Supp. 321, 3 Misc. Rep. 558; *Henry v. Furbish*, 30 Misc. Rep. 822, 62 N. Y. Supp. 247; *O'Conner v. Mechanics' Bank*, 2 N. Y. Supp. 225, 18 N. Y. St. Rep. 88, 54 Hun, 272; *Leggett v. Sloan*, 24 How. Pr. 479 (as to what notice is sufficient); *Barnett v. Moore*, 20 Misc. Rep. 518, 46 N. Y. Supp. 668 (as to waiver of notice on supplementary proceedings); *Corbin v. Berry*, 83 N. C. 27 (where only part of the defendants appeared, and it was held sufficient). See *Ruffner v. Mairs*, 33 W. Va. 655, 11 S. E. 5.



stated in a leading Mississippi case: "Creditors have rights which should be upheld, so have others, which must not be disregarded," and the appointment of a receiver, in such case, is "never without notice to them (the defendants) and an opportunity to be heard, unless there is a satisfactory showing of the necessity of such emergency."<sup>370</sup>

§ 1566. (§ 145.) **In Suits by Stockholders Against Corporation.**—In a suit against a corporation for the appointment of a receiver, in any of those instances where a receiver is proper, the stockholders must conform to the general practice, and give proper notice of the application unless there is some extremely urgent necessity to justify a departure from the rule. Thus upon a suit by a minority stockholder to obtain a receiver on the ground of unwise management of the property by the corporate directors, the appellate court, in reversing the appointing order, said: "Where notice can be given, it should be given, unless there is imminent danger of loss or great damage, or irreparable injury, or the greatest emergency, or when by the giving of notice the very purpose of the appointment of a receiver would be rendered nugatory."<sup>371</sup> The leading case in regard to the necessity of notice of an application for a receiver was a stockholders' suit against a corporation.<sup>372</sup>

§ 1567. (§ 146.) **In Suits by Creditors Against Corporation.**—Even in those instances where a receiver may be properly appointed, in suits against a corporation by its creditors, in order to protect their rights, the courts

<sup>370</sup> Buckley v. Baldwin, 69 Miss. 804, 13 South. 851.

<sup>371</sup> North American L. & T. Co. v. Watkins, 109 Fed. 101, 48 C. C. A. 254. See, also, Fisher v. Superior Court, 110 Cal. 129, 42 Pac. 561; French v. Gifford, 30 Iowa, 148; State v. Second J. D. Ct., 20 Mont. 284, 50 Pac. 852.

<sup>372</sup> Verplank v. Mercantile Ins. Co., 2 Paige, 438.

are extremely averse to making an appointment without notice having been given, and a case of extreme urgency and necessity must be clearly shown in order to obtain an *ex parte* appointment.<sup>373</sup>

In a case where a receiver was appointed without notice, on the ground that the corporation was indebted to various persons, and had equitable interests that could not be reached by execution, and that other creditors had threatened to bring actions, the court, in reversing the order of appointment, said: "The proceeding is drastic. It takes away from the corporation all control of its property, and puts it in the hands of a stranger. . . . Cases can well be imagined where great interests might be sacrificed by a proceeding without notice."<sup>374</sup>

§ 1568. (§ 147.) **Ex Parte Receivers of Railroads.**—The appointment of a receiver to take charge of a railroad and manage it is such an extremely important undertaking, that it will rarely be done without notice having been given to the defendant, and an opportunity of defense offered.<sup>375</sup> The supreme court of Indiana has

<sup>373</sup> *Mestier v. Chevallier Pav. Co.*, 51 La. Ann. 142, 24 South. 799 (stating, "But we are aware of no authority for the appointment of a receiver *ex parte* in a pending suit against a corporation, as appears to have been done in this case). See *Gilbreath v. Trust Co.*, 121 Ala. 204, 25 South. 581; *Winchester E. L. Co. v. Gordon*, 143 Ind. 681, 42 N. E. 914; approving *Sullivan E. L. & P. Co. v. Blue*, 142 Ind. 407, 41 N. E. 805; *Holcomb v. Tierney* (*Andrews v. Holcomb*), 79 Neb. 660, 113 N. W. 204. As to creditors of railroad corporations, *Whitney v. N. G. & A. R. Co.*, 66 How. Pr. 436. As to a municipal corporation, *State ex rel. Brittin v. New Orleans*, 43 La. Ann. 829, 9 South. 643.

<sup>374</sup> *Davelaar v. Blue Mound Inv. Co.*, 110 Wis. 470, 86 N. W. 185 ("it is not enough to say that the facts stated show the plaintiff would be entitled to such appointment upon notice, and that after a review of the situation the court has decided to allow the appointment to stand").

<sup>375</sup> *Oher v. Excelsior Planting Co.*, 44 La. Ann. 570, 10 South. 792 (construing a statute so that notice is necessary before a cor-

said: "In passing upon an application for the appointment of a receiver, it is the duty of a court to scrutinize, not only the rights asserted by the moving party, but the injuries that may be suffered by the adverse party and the public at large. This is particularly the case where a line of railroad forming part of a system operated as a unit is thereby detached from the main road. In such cases not only the parties to the suit are affected, but a large number of employees are disturbed in their relation with their employers; and the general public along the line of the road are liable to be greatly inconvenienced by the disturbance of their shipping facilities. . . . Deprived of possession, the payment of rent on leased lines would cease, and thereby all creditors and stockholders would be affected"; for these reasons the court held that it was error to appoint a receiver *ex parte*, though expressly stating that it ventured no opinion as to the propriety of an appointment, had proper notice been given.<sup>376</sup> After commenting on the gravity of the situation, the supreme court of Florida, in reversing the appointing order, says: "We can hardly imagine a case where it [the appointment] should be done without notice."<sup>377</sup>

poration can be deprived of its property); *Merriam v. St. Louis, C. G. & F. S. R. Co.*, 136 Mo. 145, 36 S. W. 630; *St. Louis, K. & S. R. Co. v. Wear*, 135 Mo. 230, 33 L. R. A. 341, 36 S. W. 357, 658 (vacation appointment providing for appearance three months hence, controlled by writ of prohibition); *Ramsey v. Erie R'y Co.*, 7 Abb. Pr., N. S., 156; *People ex rel. Port Huron & G. R. Co. v. St. Clair Circuit Judge*, 31 Mich. 456 (holding an *ex parte* appointment, in case of a railroad, "more than irregular, and absolutely void"); *Cook v. Detroit etc. R. R. Co.*, 45 Mich. 453, 8 N. W. 74.

<sup>376</sup> *Wabash R. R. Co. v. Dykeman*, 133 Ind. 56, 32 N. E. 823; approved, *Chicago & S. E. R. Co. v. Cason*, 133 Ind. 49, 32 N. E. 827.

<sup>377</sup> *State v. Jacksonville P. & M. R. Co.*, 15 Fla. 201; approved in *Stockton v. Harman*, 32 Fla. 312, 13 South. 833.

§ 1569. (§ 148.) **Selection and Eligibility of Receiver—In General—Not Disturbed on Appeal.**—In the selection of a person to act as receiver the court acts in the exercise of its judicial discretion, aided by the circumstances of the case and the comparative fitness of the parties proposed, choosing such person as it considers will best subserve the rights and interests of all parties to the controversy.<sup>378</sup> The questions to be considered, generally, are well stated, by a federal case,<sup>379</sup> as follows: "It [the court] places the property in the hands of a receiver, whose duty it is to preserve it, prevent deterioration, and so manage it that the rights of its real owner will be prejudiced as little as possible. The person selected for this duty must possess integrity of character, business experience, a knowledge of affairs, a capacity for the examination into and comprehension of accounts, must not be partisan, and must have no pecuniary interest in any one of the classes of creditors whose claims come before the court."

The selection of a receiver, being a matter addressed to the discretion of the court, is not generally disturbed on appeal. It is stated that "convincing circumstances, amounting to an overwhelming objection in point of pro-

<sup>378</sup> *Thomas v. Dawkins*, 1 Ves. 452; *Morison v. Morison*, 4 Mylne & C. 215; *Perry v. Oriental Hotel Co.*, L. R. 5 Ch. 420; *People ex rel. Gore v. Ill. Bldg. & L. Ass'n*, 56 Ill. App. 642; *Robinson v. Dickey*, 143 Ind. 214, 42 N. E. 638; *Borton v. Brines-Chase Co.*, 175 Pa. St. 209, 34 Atl. 597 (refusing to appoint a foreign receiver); *Shannon v. Hanks*, 88 Va. 338, 13 S. E. 437. And thus, where it would "facilitate matters" and be to the "advantage of all parties interested," a foreign receiver was appointed: *Taylor v. Life Ass'n of America*, 3 Fed. 465; also, *Bayne v. Brewer Pottery Co.*, 82 Fed. 391.

<sup>379</sup> *Farmers' L. & T. Co. v. Cape Fear & G. V. R. Co.*, 62 Fed. 675 (and these requisites may be present, though the appointed party is not a citizen of the appointing jurisdiction).



priety of choice, or something fatal in principle, must be shown to secure a reversal by an appellate tribunal.”<sup>380</sup>

§ 1570. (§ 149.) **Appointment of Person Interested in the Suit.**—Accordingly, it is generally stated that a person will not be appointed who is interested in the outcome of the suit, it being considered that such interest will interfere with the proper, impartial management of the intrusted property. Thus, “a receiver should have no personal interest in the controversy, or in the property in his charge, which would prevent the exercise of his duties and powers without favor to either party.”<sup>381</sup> While the soundness of this rule is undoubted, there are certain cases in which the receiver, for various reasons, has been selected from among the interested parties; as where the parties consented to such appointment,<sup>382</sup> or where a receiver is appointed merely as an aid in the settling of an estate, and it is clear that the defendant’s

380 *People ex rel. Gore v. Ill. Bldg. & L. Ass’n*, 56 Ill. App. 642. See, also, *Perry v. Oriental Hotel Co.*, L. R. 5 Ch. 420; *McGilliard v. Donaldsonville etc. Works*, 104 La. Ann. 544, 81 Am. St. Rep. 145, 29 South. 254; *Shannon v. Hanks*, 88 Va. 338, 13 S. E. 437; as to when the question may be raised, see *Rogers v. Rogers* (Tenn. Ch. App.), 42 S. W. 70. The appointment of an interested party is not void: *Reneau v. Lawless*, 79 Kan. 553, 100 Pac. 479; *Roberts Telephone & Electric Co. v. Farmers & Merchants’ Nat. Bank* (Tex. Civ. App.), 155 S. W. 629.

381 *Watson v. Bettman*, 88 Fed. 825 (refusing to appoint a person otherwise well qualified). See, also, *Cooper v. Leather Mfg. Nat. Bank*, 29 Fed. 161; *Bayne v. Brewer Pottery Co.*, 82 Fed. 391; *Atkins v. Wabash, St. L. & P. R. Co.*, 29 Fed. 161; *In re Lloyd*, L. R. 12 Ch. D. 447; *Etowah Min. Co. v. Wills V. M. & M. Co.*, 106 Ala. 492, 17 South. 522 (“a receiver appointed by the court should be capable, honest, impartial, and without personal interest to serve”); approved in *Jordan v. Jordan*, 121 Ala. 419, 25 South. 855; *Lehman v. Trust Co. of America*, 57 Fla. 473, 49 South. 502; *Reneau v. Lawless*, 79 Kan. 553, 100 Pac. 479.

382 *Tait v. Carey*, 3 Ind. Ter. 765, 49 S. W. 50; *Iroquois Furnace Co. v. Kimbark*, 85 Ill. App. 399 (where they had previously agreed

possession can do no harm,<sup>383</sup> or in the case of a temporary appointment.<sup>384</sup> And there are cases in which a receiver has been appointed because of his intimate knowledge of the business to be transacted, regardless of the fact that he was an interested party. It must, indeed, be a strong case to warrant such action, but where a business is extremely complicated, and an experienced manager necessary, from a practical business standpoint, it may be advisable to have it continue in the hands of one acquainted with its management when he can be controlled by the court.<sup>385</sup>

as to who should be appointed); *Hanover Fire Ins. Co. v. Germania Fire Ins. Co.*, 33 Hun, 539. In general, see *Virginia-Carolina Chemical Co. v. Hunter*, 84 S. C. 214, 66 S. E. 177.

<sup>383</sup> *Robinson v. Taylor*, 42 Fed. 803.

<sup>384</sup> *Finance Co. v. Charleston C. & C. R. Co.*, 45 Fed. 436.

<sup>385</sup> *Fowler v. Jarvis-Conklin Mtg. Co.*, 63 Fed. 888, stating, on refusing a motion to discharge a receiver who had been an officer of the corporation: "It was well known to the court where they were appointed, that it was under their management of its affairs that the corporation came to grief, and it would be no surprise to the court to learn that their business judgment had not been sound; that their method of management had not been conservative; that they had been over-sanguine, and improvident in investments. But it was apparent to the court then, and it is equally apparent now, that a business of such character, so complicated and intricate, so widely extended, with millions of dollars on small mortgages scattered through several states, requiring prompt attention for collection of interest, maintaining of insurance, and payment of taxes, would be best attended to by receivers who, presumably, were familiar with all its details and with the machinery already established for looking after its interests in hundreds of small towns and hamlets in different states. As receivers there would be no new investments for them to make, calling for the exercise of a discretion which had in the past proved to be not always wise. . . . The mere fact that they had, while officers of the company, been imprudent in investing its money, was no sufficient ground for selecting strangers entirely unfamiliar with its assets or the machinery for their collection." See, to the same effect, *People ex rel. Gore v. Illinois Bldg. & L. Ass'n*, 56 Ill. App. 642, the court selecting an interested party be-

§ 1571. (§ 150.) **Appointment of Master in Chancery; of Trustee; of Solicitor.**—It is generally true that the court will be slow to appoint one as receiver, whose position will be liable to interfere with the proper exercise of his duties. On these grounds a master in chancery has been held to be improperly appointed, the court saying: “Nor will a man be appointed receiver whose position may cause difficulty in administering justice. A master in chancery, accordingly, was disqualified from being appointed a receiver, because, being an officer whose duty it might be to pass upon the accounts and check the conduct of the receiver, his appointment was open to objection on very obvious grounds.”<sup>386</sup> On these grounds, it is generally held that a trustee shall not be appointed to the office; the court saying that the trustee should be the one to check the accounts of the receiver in favor of the beneficiaries.<sup>387</sup> But, as in other cases, if the trustee is the most acceptable person available, he may, in special cases, be appointed without compensation.<sup>388</sup>

cause of his “fitness for the position by reason of his occupation, experience and character”; *Iroquois Furnace Co. v. Kimbark*, 35 Ill. App. 399; *Balles v. Duff*, 54 Barb. 215, a case where mortgagee of mortgaged premises was appointed. For further instances of interested parties appointed as receivers, see early cases cited in *Taylor v. L. Ins. Co. of Am.*, 3 Fed. 465, and the cases cited *post* in regard to receivers of partnership and corporation property.

<sup>386</sup> *Ex parte Fletcher*, 6 Ves. 427, quoted approvingly in *Kilgore v. Hair*, 19 S. C. 486; approved in *Allen v. Cooley*, 60 S. C. 353, 38 S. E. 622; *Bemeson v. Bill*, 62 Ill. 408. In *In re Lloyd*, L. R. 12 Ch. D. 447, a solicitor was refused on the same grounds. But this objection does not extend to a clerk of the court, who may be a proper person: *Waters v. Melson*, 112 N. C. 89, 16 S. E. 918; *Crawford v. Crawford* (Tex. Civ. App.), 163 S. W. 115. Nor to a sheriff: *Crawford v. Crawford* (Tex. Civ. App.), 163 S. W. 115.

<sup>387</sup> *Thomas v. Hawkins*, 1 Ves. 452, and note 2; *Anon.*, 3 Ves. 515; — *v. Jolland*, 8 Ves. 72; *Sutton v. Jones*, 15 Ves. 584.

<sup>388</sup> *Sykes v. Hastings*, 11 Ves. 363; *Patterson v. Northern Trust Co.*, 230 Ill. 334, 82 N. E. 837.

One of the grounds on which the court refuses to appoint a solicitor of one of the parties to the office of receiver is, that in the service of his client it may become the duty of the solicitor to call the receiver to account,<sup>389</sup> and the two characters, being incompatible, cannot be united, as it would result in the receiver supervising his own acts.<sup>390</sup> The interest that a solicitor has, in favor of the client he represents, has also been urged as a valid reason for his non-appointment, or his removal where he was properly appointed as temporary receiver.<sup>391</sup>

§ 1572. (§ 151.) **Appointment of Partner; of Creditor.**—In the cases where a partnership is placed under the control of the court, one of the partners has, in many instances, been appointed receiver, the fact of his being an interested party not disqualifying him, in the absence of other additional objections. It has been said: “The courts have, therefore, been inclined, where there has been no actual misconduct, to appoint as receiver the managing partner, or the partner most interested.”<sup>392</sup>

<sup>389</sup> *Ex parte Pericke*, 2 Mer. 452; *Stone v. Wishart*, 2 Madd. 67 (where the same principle was applied to the next friend of an infant). Such appointment is prohibited by statute in some jurisdictions: See *Cook v. Martin*, 75 Ark. 40, 5 Ann. Cas. 204, 87 S. W. 625.

<sup>390</sup> *Garland v. Garland*, 2 Ves. Jr. 137; *Merchants' & Mfg. N. Bank of D. v. Kent*, Cir. J., 43 Mich. 292, 5 N. W. 627 (extending the rule to the partner of the solicitor).

<sup>391</sup> *Finance Co. of Penn. v. Charleston C. & C. R. Co.*, 45 Fed. 436; *State Trust Co. of N. Y. v. Nat. L. I. & Mfg. Co.*, 72 Fed. 575, making him ineligible for permanent appointment: *Baker v. Adm'rs of Backus*, 32 Ill. 79. In *Mitchell v. Aulander Realty Co.*, 169 N. C. 516, 86 S. E. 358, it was held that while the appointment of an attorney for one of the parties is not to be commended, it is not necessarily error.

<sup>392</sup> *Todd v. Rich*, 2 Tenn. Ch. 107; *Blakeney v. Dufour*, 15 Beav. 40; *Wilson v. Greenwood*, 1 Swans. 471; *Brien v. Harriman*, 1 Tenn. Ch. 467, stating: “It is an unusual order and can only be sustained



But in such case the partner-receiver is allowed no compensation for his services.<sup>393</sup>

While a creditor is pecuniarily interested in the settlement of the controversy, this fact alone does not appear to affect his eligibility to the position of receiver; it is said: "There is no rule of law that a creditor cannot be appointed receiver."<sup>394</sup>

§ 1573. (§ 152.) **Appointment of Corporation Officer.** In the appointment of a receiver to take charge of the property of a corporation, the general rule is not to appoint those who have been connected with, or responsible for, its unfortunate condition, rendering it necessary for the court to assume its control.<sup>395</sup> The reasons, as generally stated, are two: First, the probable lack of business ability, as explained by a leading federal case in the following language: "But it has been the uniform practice in this circuit to appoint no one receiver of a railroad corporation who has been one of its officers, or who had anything to do with its control prior to its insolvency. It has always been thought that while the insolvency of the company might have been caused by misfortune, and by no default of its direction, nevertheless those who were about to lose their property, or had it

by his acting without compensation"; *Bartelt v. Smith*, 145 Wis. 31, Ann. Cas. 1912A, 1195, 129 N. W. 782 (both parties to the suit should consent).

<sup>393</sup> Cases cited *supra* in note 392.

<sup>394</sup> *Chamberlain v. Greenleaf*, 4 Abb. N. C. 92. See, also, *Barber v. International Co. of Mexico*, 73 Conn. 587, 48 Atl. 758; *Barker v. Wayne Circuit Judge*, 117 Mich. 325, 75 N. W. 886; *Roby v. Title G. & T. Co.*, 166 Ill. 336, 46 N. E. 1110 (where a receiver's becoming a creditor did not disqualify him).

<sup>395</sup> See cases cited in notes 396 and 397. But there seems to be no objection to a corporation, as such, being a receiver: *Roby v. Title G. & T. Co.*, 166 Ill. 336, 46 N. E. 1110; *Barker v. Wayne County Judge*, 117 Mich. 325, 75 N. W. 886; *Barber v. International Co. of Mexico*, 73 Conn. 587, 48 Atl. 758.

placed in jeopardy, were entitled, in all reason and fairness, to a new management, though perhaps not a better one. In the one case, there is some hope; in the other, there can be expected but the former result.”<sup>396</sup> The further reason, that they are frequently interested parties, while applying particularly to stockholders, is at times a pertinent objection to an officer or manager, especially when he happens to occupy both positions; thus it is said: “Receivers should be impartial between the parties in interest, and stockholders and directors of insolvent corporations should not be appointed, unless the case is exceptional and urgent, and then only on the consent of the parties whose interest is to be intrusted to their charge.”<sup>397</sup>

<sup>396</sup> *Finance Co. of Penn. v. Charleston C. & C. R. Co.*, 45 Fed. 436 (refusing both a former counsel and an officer as permanent receiver). See, also, *Buck v. Piedmont etc. Ins. Co.*, 4 Fed. 849, 4 Hughes, 415; *Coy v. Title Guarantee & Trust Co.*, 157 Fed. 794; *People v. Third Avenue Sav. Bank*, 50 How. Pr. 22; *Freeholders of Middlesex v. State Bank*, 28 N. J. Eq. 166, approved in *McCullough v. Merchants' L. & T. Co.*, 29 N. J. Eq. 217.

<sup>397</sup> *Atkins v. Wabash, St. L. & P. R. R. Co.*, 29 Fed. 161, removing a receiver because of his interest; *Olmstead v. Distilling & Cattle Feeding Co. (Ill.)*, 69 Fed. 24, stating, when removing a receiver: “I have never felt that an officer of a corporation, whose misfortunes necessitated a receivership, should be ineligible to employment by the court, but this case convinces me that where a corporation is one that covers a vast diversity of conflicting interests, and especially of speculation, a stockholder’s appointment to a receivership should be preceded by a most careful and thorough scrutiny into his official and personal antecedents and interests.” . . . “Indeed, I will knowingly accept no man as a receiver for any corporation who is, or who has been, a speculator in its stock. The private interest of the man is very apt to color, if not to overcome, the duty of the official. . . . Especially is it the need of the day that officials who only come in contact with these affairs by virtue of their office should keep clean of any personal intermeddling that might, even remotely, tend to affect their official conduct.” See, also, *Etowah Min. Co. v. Manufacturing Co.*, 106 Ala. 492, 17 South. 522 (stockholder); *Mercantile*

§ 1574. (§ 153.) **Same; Officers or Stockholders Appointed from Necessity.**—While the rule as to the non-appointment of officers, directors or stockholders to be receivers over the corporate property is well settled by authority, and founded on practical reasons, the courts are confronted, on the other hand, with the fact that in many cases the business of a large corporation is so complicated, and requires such expert and experienced management for its profitable continuance, that it is absolutely necessary to retain, as receiver and manager, one who is thoroughly familiar with the workings of the business.<sup>398</sup> Thus it was said: “I concede that, when a court assumes control of an insolvent corporation, it is preferable to take it entirely out of the hands of its managing officers. But there is no inflexible rule rendering such officers ineligible to appointment as receivers.” The president of the corporation was, therefore, retained as receiver because of his “good management as president of the company; his knowledge of its requirements,

Trust & D. Co. v. Water Co., 111 Ala. 119, 19 South. 17 (but the appointment of such interested person is not void); People ex rel. Gore v. Illinois Bldg. & L. Ass’n, 56 Ill. App. 642 (but the stockholder may remove the objection by a *bona fide* transfer of his stock before appointment); Wiswell v. Starr, 48 Me. 401 (stockholder); Roberts Telephone & Electric Co. v. Farmers & Merchants’ Nat. Bank (Tex. Civ. App.), 155 S. W. 629.

<sup>398</sup> Fowler v. Jarvis-Conklin M. & F. Co., 63 Fed. 888, 66 Fed. 14 (see, also, for the advisability of appointing one interested, experienced receiver, and one disinterested one); to the same effect, Olmstead v. Distilling etc. Co., 67 Fed. 24; see In re Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800; People ex rel. Gore v. Illinois Bldg. & L. Ass’n, 56 Ill. App. 642 (stockholder selected); Davis v. Duncan, 19 Fed. 477; Houston v. Redwine, 85 Ga. 130, 11 S. E. 662; Moran v. Wayne Circuit Judge, 125 Mich. 6, 83 N. W. 1004; Covert v. Rogers, 38 Mich. 368; Gypsum Plaster & Stucco Co. v. Adsit, 105 Mich. 498, 63 N. W. 518. See, also, Bowling Green Trust Co. v. Virginia Pass. & Power Co., 133 Fed. 186.

gained by practical experience; his well-known character as a capable, honest, and fair-minded man.”<sup>399</sup>

As a receiver is selected with reference to the welfare of the property to be handled, it is not an absolute requisite that he be a resident of the jurisdiction where appointed, if he is a thoroughly desirable person on other grounds.<sup>400</sup>

<sup>399</sup> *Ralston v. Washington & C. R. R’y Co.*, 65 Fed. 557. See *McGilliard v. Donaldsonville etc. Works*, 104 La. Ann. 544, 81 Am. St. Rep. 145, 29 South. 254; stating that, “Ordinarily, the fact that a receiver has an interest is a recommendation that he will safeguard the interests of his fellow stockholders as well as his own. . . . We will not assume, without testimony, that the one appointed is not a proper person, exclusively because he is a stockholder.”

<sup>400</sup> *Bayne v. Brewer Pottery Co.*, 82 Fed. 391 (though the non-residence occasion an additional expense); see *Farmers’ L. & T. Co. v. Cape Fear & G. V. R. Co.*, 62 Fed. 675; *Phinizy v. Augusta & K. R. Co.*, 56 Fed. 273 (for recognition of foreign receiver on the ground of comity); *Borton v. Brines-Chase Co.*, 175 Pa. St. 209, 34 Atl. 597 (but not where it will interfere with the interests of citizens of the state); see *Chamberlain v. Greenleaf*, 4 Abb. N. C. 92, stating that a non-resident should not be appointed.

See, also, *post*, chapter XI, “Foreign and Ancillary Receivers.”



## CHAPTER IV.

## THE RECEIVER'S POSSESSION; AND CONFLICTING APPOINTMENTS.

## ANALYSIS.

- §§ 154–169. The receiver's possession.
- § 154. The receiver's possession is that of the court.
  - § 155. Receiver's possession is subject to existing liens.
  - § 156. Same; instances of prior liens protected.
  - § 157. Same; receiver's right to possession as against prior lienor.
  - § 158. Receiver's title vests from order of appointment.
  - § 159. *Contra*; title dates from qualification, or from the time when he takes actual possession.
  - § 160. Vesting of title in supplementary proceedings.
  - § 161. How the receiver may obtain possession of property withheld.
- §§ 162–169. Interference with receiver's possession.
- § 162. Claimant must apply to the court.
  - § 163. Interference with receiver a contempt of court.
  - § 164. His possession protected by injunction.
  - § 165. Attachment against receiver.
  - § 166. Property in receiver's possession not subject to sale under execution.
  - § 167. Same; illustrations; execution sales under subsequent, and under prior, liens.
  - § 168. Property in receiver's possession cannot be seized for taxes.
  - § 169. Other forms of interference; strikes; arrest; etc.
  - § 170. Conflicting appointments of receivers.

§ 1575. (§ 154.) **Receiver's Possession is That of the Court.**—A receiver is not a mere agent of the complainants, in the suit in which he is appointed. He represents the court for all the parties interested in the

property, and acts, instead of the court, for the benefit of all interested parties. He is the "servant of the court." His possession is the possession of the court; and any attempt to interfere with it, without leave of court, is a contempt.<sup>1</sup> It is said: "The appointment of a receiver does not determine any right or affect the title of either party in any manner whatever. He is the officer of the court, and truly the hand of the court. His holding is the holding of the court from him from whom possession was taken. He is appointed on behalf of all parties and not on behalf of the plaintiff or of one defendant only."<sup>2</sup>

<sup>1</sup> Morrell v. Noyes, 56 Me. 458, 96 Am. Dec. 486. See, also, Chicago Union Nat. Bank v. Bank of K. C., 136 U. S. 223, 34 L. Ed. 341, 10 Sup. Ct. 1013, stating: "A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody, as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession in the property." See, also, Naumburg v. Hyatt, 24 Fed. 898; Southern Granite Co. v. Wadsworth, 115 Ala. 570, 22 South. 157; Sullivan Timber Co. v. Black, 159 Ala. 570, 48 South. 870; Henry v. Epstein, 50 Ind. App. 660, 95 N. E. 275; In re Receivership of New Iberia Cotton Mill Co., 109 La. 875, 33 South. 903 (receiver is agent of court, and property is *in custodia legis*); Day v. Postal Tel. Co., 66 Md. 354, 7 Atl. 608; Mays v. Rose, Freem. Ch. (Miss.) 703; Moore v. Mercer Wire Co. (N. J.), 15 Atl. 305, 737; Keeney v. Home Ins. Co., 71 N. Y. 396, 27 Am. Rep. 60; Skinner v. Maxwell, 68 N. C. 400; Gobble v. Orrell, 163 N. C. 489, 79 S. E. 957; Robinson v. Atlantic & G. W. R'y Co., 66 Pa. St. 160. It follows that property in the custody of a receiver cannot be replevied: Druhe Hardwood Lumber Co. v. Fischbein, 101 Minn. 81, 11 Ann. Cas. 300, 111 N. W. 950. Inasmuch as he is entitled to the possession of all assets, a debtor who pays to the corporation with knowledge of the receivership is liable for payment again to the receiver: Buchanan v. Hicks, 98 Ark. 370, 34 L. R. A. (N. S.) 1200, 136 S. W. 177.

<sup>2</sup> Ellicott v. Warford, 4 Md. 85; quoted approvingly in Howell v. Hough, 46 Kan. 152, 26 Pac. 636. See, also, State ex rel. Godard

It is frequently stated that "the possession of the receiver is the possession of the party ultimately held to be entitled to the property." A federal court, in commenting on the expression, says such words are certainly "not intended to be authority for the proposition that the intervention of the court operates to change the

*v. State Bank of Circleville*, 84 Kan. 366, 114 Pac. 381; *Underhill v. Rutland R. Co.*, 90 Vt. 462, 98 Atl. 1017. In *Bell v. American Protective League*, 163 Mass. 558, 47 Am. St. Rep. 481, 28 L. R. A. 452, 40 N. E. 857, the court states: "A receiver is merely a ministerial officer of the court, or, as he is sometimes called, the hand of the court. The title to the property does not change; and if he is required to take property into his custody, such custody is that of the court." A receiver is not an assignee of the property: *Baker v. Hill*, 100 Md. 130, 59 Atl. 275. See, also, *Oates v. Smith*, 176 Ala. 39, 57 South. 438 (holding that he does not acquire title). But it seems there is such "special property" vested in a receiver that an indictment may be properly laid, designating him as the owner, where property in his charge has been the subject of larceny; the court of Iowa has so held: *State v. Rivers*, 60 Iowa, 381, 13 N. W. 73, 14 N. W. 738. By statute, in Maine, the decree appointing a receiver *ipso facto* vests title to real estate in him: *Cobb v. Camden Sav. Bank*, 106 Me. 178, 20 Ann. Cas. 547, 76 Atl. 667. Successive receivers succeed to all the rights, powers, and duties of their predecessors. So far as right to possession as against third persons is concerned, it can make no difference which receiver is in office: *McKinnon-Young Co. v. Stockton*, 55 Fla. 708, 46 South. 87; *State ex rel. Sullivan v. Reynolds*, 209 Mo. 161, 123 Am. St. Rep. 468, 14 Ann. Cas. 198, 15 L. R. A. (N. S.) 963, 107 S. W. 487.

**Effect of Appointment of Receiver upon Insurance Policies.**—It is generally held that the mere appointment of a receiver does not invalidate an insurance policy conditioned against change of interest, title or possession: *Lancashire Ins. Co. v. Boardman*, 58 Kan. 339, 62 Am. St. Rep. 621, 49 Pac. 92; *Keeney v. Home Ins. Co.*, 71 N. Y. 396, 27 Am. Rep. 60; *Georgia Home Ins. Co. v. Bartlett*, 91 Va. 305, 50 Am. St. Rep. 832, 21 S. E. 476. In *Bronson v. New York Fire Ins. Co.*, 64 W. Va. 494, 16 Ann. Cas. 868, 19 L. R. A. (N. S.) 643, 63 S. E. 283, a distinction is attempted between the mere appointment of a receiver and his taking possession, it being held that in the latter case the policy is voided. This seems *contra* to the cases cited above.

rights of any parties to the suit, whether they were originally parties, or made such by subsequent order of the court. The property is taken by the court, and is put into the hands of its officer to hold for the benefit of 'whom it may concern.' He holds and manages it for the benefit of the party to whom the court may ultimately decide it belongs, but it would be a perversion of the whole theory of *custodia legis* if the mere appointment of a receiver were itself determinative of that 'ultimate decision.' ”<sup>3</sup>

§ 1576. (§ 155.) **Receiver's Possession Subject to Existing Liens.**—It is well established that where a court takes possession of the property of a party, and appoints a receiver, to administer the trust for the benefit of all interested parties, the court receives such property impressed with all existing rights and equities, and the relative rank of claims and the standing of liens remain unaffected by the receivership. Every legal and equitable lien upon the property is preserved with the power of enforcing it.<sup>4</sup> “The receivership does not destroy

<sup>3</sup> Central Trust Co. v. Worcester Cycle Mfg. Co., 93 Fed. 712, 35 C. C. A. 547 (citing the following cases in which the form of words discussed was used: Wiswall v. Sampson, 14 How. 52, 14 L. Ed. 322; Booth v. Clark, 17 How. 322, 15 L. Ed. 164; Chicago Union Bank v. Kansas City Bank, 136 U. S. 223, 34 L. Ed. 341, 10 Sup. Ct. 1013). See, also, Beverley v. Brooke, 4 Gratt. 187, 208. That the appointment of a receiver of real property does not so alter possession of the estate in the person who is ultimately found to have been entitled thereto as to prevent the running of the statute of limitations, see Anonymous, 2 Atk. 15.

<sup>4</sup> American Trust & Sav. Bank v. McGettigan, 152 Ind. 582, 71 Am. St. Rep. 345, 52 N. E. 793. The text is cited to this effect in Withrell v. Murphy, 154 N. C. 82, 69 S. E. 748; and in Garrison v. Vermont Mills, 154 N. C. 1, 31 L. R. A. (N. S.) 450, 69 S. E. 743. In *In re Binghamton General Electric Co.*, 143 N. Y. 263, 38 N. E. 297, the court says: “It is obvious that every lien upon the property of a corporation resting upon valid agreement or process before the appointment of a receiver, the lienor being lawfully in posses-



any liens that may have been acquired before the appointment.”<sup>5</sup> It is said that “it is as much the duty of a receiver, in administering an estate, to protect valid preferences and priorities, as it is to make a just distribution” of the intrusted property.<sup>6</sup>

sion, must be preserved with the right of enforcement, unless courts and legislatures are to override the vested rights of creditors.” See, also, *In re North American Gutta Percha Co.*, 17 How. Pr. 549, 9 Abb. Pr. 79; *Schmidtman v. Atlantic Phosphate & Oil Corp.*, 230 Fed. 769, 145 C. C. A. 79; *Lowenberg v. Jefferies*, 74 Fed. 385 (the proceeds should be paid in the order of priority); *Von Roun v. Superior Court*, 58 Cal. 358; *Knickerbocker Trust Co. v. Green Bay Phosphate Co.*, 62 Fla. 519, 56 South. 699; *Randall v. Wagner Glass Co.*, 47 Ind. App. 439, 94 N. E. 739; *Smith v. Sioux City Nursery etc. Co.*, 109 Iowa, 51, 79 N. W. 457; *State ex rel. Godard v. State Bank of Circleville*, 84 Kan. 366, 114 Pac. 381; *Cobb v. Camden Savings Bank*, 106 Me. 178, 20 Ann. Cas. 547, 76 Atl. 667; *Forest Lake Cemetery v. Baker*, 113 Md. 529, 77 Atl. 853; *In re Farmers & Merchants' Bank*, 194 Mich. 200, 160 N. W. 601; *Battery Park Bank v. Western Carolina Bank*, 127 N. C. 432, 37 S. E. 461; *Ardmore Nat. Bank v. Briggs M. & S. Co.*, 20 Okl. 427, 129 Am. St. Rep. 747, 16 Ann. Cas. 133, 23 L. R. A. (N. S.) 1074, 94 Pac. 533; *Hays v. Lycoming Fire Ins. Co.*, 99 Pa. St. 621; *Philadelphia Trust Co. v. Northumberland County Traction Co.*, 258 Pa. St. 152, 101 Atl. 970; *James Freeman Brown Co. v. Harris*, 88 S. C. 558, 70 S. E. 802; *Albien v. Smith*, 24 S. D. 203, 123 N. W. 675; *City Bank of Wheeling v. Bryan*, 76 W. Va. 481, L. R. A. 1915F, 1219, 86 S. E. 8; *Hulings v. Jones*, 63 W. Va. 696, 60 S. E. 874. Ordinarily, the receiver takes no greater interest than that of the person for whom he acts. Thus, where the person for whose property he is appointed is a mere bailee, the receiver has only the rights of a bailee, except as to the remedy: *Penton v. Hall*, 140 Ga. 576, 79 S. E. 465. See *post*, chapter IX, as to “Preferred Claims.”

<sup>5</sup> Quoted in *Garden City Banking & Trust Co. v. Geilfuss*, 86 Wis. 612, 57 N. W. 349, from *Ellis v. Vernon Ice, Light & Water Co.*, 86 Tex. Supp. 109, 23 S. W. 858. This portion of the text is quoted in the dissenting opinion in *Garrison v. Vermont Mills*, 152 N. C. 643, 68 S. E. 142. See, also, *Page v. Supreme Lodge, Knights & Ladies of Protection*, 161 Mass. 384, 37 N. E. 369.

<sup>6</sup> *American Trust & Sav. Bank v. McGettigan*, 152 Ind. 582, 71 Am. St. Rep. 345, 52 N. E. 793. A receiver cannot claim rents against

§ 1577. (§ 156.) **Same; Instances of Prior Liens Protected.**—The application of the rule is well recognized in the case of liens of creditors of insolvent corporations over which receivers have been appointed.<sup>7</sup> Thus, it is said: “Where the receiver of this court, under authority of statute and under the direction of the court, has assumed the possession of all the personal property of the insolvent corporation, this court is bound to give effect to liens which existed as liens on the property when its receiver took possession.”<sup>8</sup>

an assignee thereof under an assignment to secure payment of claim: *Brownson v. Roy*, 133 Mich. 617, 95 N. W. 710. But where a receiver is appointed for an insolvent corporation, he is not limited by the rights of the debtor corporation, but has the rights of a levying creditor: *Duplex Printing Press Co. v. Clipper Pub. Co.*, 213 Pa. St. 207, 62 Atl. 841.

<sup>7</sup> *McRae v. Bowers Dredging Co.*, 86 Fed. 344, states: “Where a court of equity takes control and custody of the assets of an insolvent corporation, it does not assume to destroy existing liens, or to divest the rights of lien creditors. The court assumes the burden of protecting as far as may be the rights of all parties having interests. Therefore, it will not surrender property in its custody, to be disposed of by process under other courts, but will, when necessary to enable creditors to collect their dues, order a sale of the assets, and distribute the funds according to the rights and priorities of the owners and creditors”: *Risk v. Kansas T. & Bkg. Co.*, 58 Fed. 45; *Talledega Mercantile Co. v. Jenifer Iron Co.*, 102 Ala. 259, 14 South. 743 (holding that the court may grant leave to the creditor to proceed directly against the receiver).

<sup>8</sup> *Duryee v. United States Credit System Co.*, 55 N. J. Eq. 311, 37 Atl. 155; the court cited *Doane v. Millville Ins. Co.*, 45 N. J. Eq. 274, 282, 17 Atl. 625, and continued: “And effect is generally given to such statutory liens, in practice, either by providing for their payment by the receiver as preferred claims, or by allowing the claimant, on application to the court, to enforce his lien in the courts, and by the proceedings in which they would clearly be enforceable had no receiver been appointed, and making the receiver a party to such further proceedings, where this is necessary. . . . And where the property is in the control of the officer of the court, expressly subject to the lien, the fact that the lien cannot be otherwise made

The right of the lienor to protection would seem to be assured from the fact that "the receiver is the hand of the law, and the law conserves and enforces rights—never destroys them."<sup>9</sup> And it is not necessary that the lien be created in any particular manner, so long as there has been a valid right established in favor of the lienor. Thus, the filing of a creditor's bill has been held to create a sufficient lien.<sup>10</sup> In the case of an attachment made before the application for the appointment of a receiver, the court of Massachusetts said: "We are satisfied that under the laws of Massachusetts an attachment is a lien or encumbrance upon the property attached. It fastens itself upon the property, and whoever takes the property takes it *cum onere*, . . . and, though the assets pass into the hands of receivers, they take with all the liens thereon, and an existing attachment is a lien."<sup>11</sup> And where, after the acquirement of

effective than by the action of this court is no sufficient reason, as it seems to me, for holding that it is not valid." He holds subject to the lien of a valid chattel mortgage: *More v. Lane*, 37 N. D. 563, 164 N. W. 292.

<sup>9</sup> *Von Roun v. Superior Court*, 58 Cal. 358.

<sup>10</sup> *King v. Goodwin*, 130 Ill. 102, 17 Am. St. Rep. 277, 22 N. E. 533. But see *Battery Park Bank v. Western Carolina Bank*, 127 N. C. 432, 37 S. E. 461, stating it does not extend to "tangible personal property"; *Davenport v. Kelly*, 42 N. Y. 193.

<sup>11</sup> *Hubbard v. Hamilton Bank*, 7 Met. 340; quoted with approval in *Arnold v. Weimer*, 40 Neb. 216, 58 N. W. 709. See, also, *Kittridge v. Osgood*, 161 Mass. 384, reported *sub nom.* *Page v. Supreme Lodge*, 37 N. E. 369; *Reynolds v. Enterprise Transp. Co.*, 198 Mass. 590, 85 N. E. 110; *Cobb v. Camden Savings Bank*, 106 Me. 178, 20 Ann. Cas. 547, 76 Atl. 667; *Bisbee v. Mt. Battie Mfg. Co.*, 107 Me. 185, 77 Atl. 778; *Lowenberg v. Jefferies*, 74 Fed. 385; *Roseboom v. Whittaker*, 132 Ill. 81, 23 N. E. 339; *Runner v. Scott*, 150 Ind. 441, 50 N. E. 479 (partnership receiver); *Smith v. Sioux City Nursery etc. Co.*, 109 Iowa, 51, 79 N. W. 457; *Minchin v. Second Nat. Bank*, 36 N. J. Eq. 436; *Hays v. Lyeoming F. Ins. Co.*, 99 Pa. St. 621 (garnishment); *Von Roun v. Superior Ct.*, 58 Cal. 358 (a lien on per-

a judgment lien, a receiver was appointed at the suit of creditors, the judgment creditor was allowed to enforce his lien against the receiver, although he might have intervened in the suit in which the receiver was appointed.<sup>12</sup>

It is held that where a sheriff makes a levy under an execution before the appointment of a receiver, the receiver takes the property subject to the lien thus created.<sup>13</sup> It is said: "If the sheriff had made a levy on the property which subsequently came into the hands of the receiver, it is for him to enforce that levy. He is entitled to collect the money and apply it on the execution if the levy was made. It is his duty to do so."<sup>14</sup>

It is well settled that an existing lien of a state or municipality for the payment of taxes is neither lost nor

sonal property, which ordinarily depends on the retention of possession is not destroyed by the receiver's taking possession).

<sup>12</sup> Talladega Mercantile Co. v. Jenifer Iron Co., 102 Ala. 259, 14 South. 743. See, also, Gere v. Dibble, 17 How. Pr. 31; Battery Park Bank v. Western Carolina Bank, 127 N. C. 432, 37 S. E. 461. But see Doane v. Millville, M., M. & F. Ins. Co., 45 N. J. Eq. 274, 17 Atl. 625, stating, "the mere fact that the debt has been put into a judgment will not secure any preference to the creditor." Approved in Van Steenburgh v. Porsie Button Co. (N. J.), 34 Atl. 135, holding that the delivery of an execution to the sheriff did constitute a lien, though he had made no levy.

<sup>13</sup> Van Alstyne v. Cook, 25 N. Y. 489; Becker v. Torrance, 31 N. Y. 631; Davenport v. Kelly, 42 N. Y. 193 (a levy on personalty is not defeated by another creditor's filing a "creditor's bill"); In re Pond, 21 Misc. Rep. 114, 46 N. Y. Supp. 999; Hubbard v. Security Trust Co., 38 Ind. App. 156, 78 N. E. 79.

<sup>14</sup> In re North American Gutta Percha Co., 17 How. Pr. 549, 9 Abb. Pr. 79 ("if the officer of this court has taken possession of the property thus levied on, and sold the same, he is bound to account to the sheriff for the proceeds"); and cases cited, *supra*, in note 13; In re Muehlfeld & Haynes Piano Co., 12 App. Div. 492, 42 N. Y. Supp. 802, 26 Civ. Pr. Rep. 90 (an execution on a judgment where the action was commenced before the appointment of a receiver, is superior to the receiver's right).



impaired by the transfer of the property to the possession of a receiver; "he but takes the property for the benefit of all lienholders and creditors."<sup>15</sup> And while a landlord cannot exercise the right of distraint for rent, because of the manual possession of the goods by the court's appointee, he necessarily has a lien for the payment which attaches to the fund raised by the sale which the court ordered.<sup>16</sup> So a mechanic's lien cannot be impaired by the subsequent appointment of a receiver.<sup>17</sup> As the receiver takes the property subject to all equities good against the one from whom he takes, he is bound by an existing chattel mortgage or conditional sale.<sup>18</sup> It is said a receiver "is trustee for the whole body of general creditors, and takes the property subject, not only to all legal liens, but to all equitable liens as well";<sup>19</sup> he is "affected with all claims, liens and

15 *Union Trust Co. v. Weber*, 96 Ill. 346 ("we are wholly at a loss to see any reason for holding that the lien of the state or municipalities for taxes should be lost or defeated. . . . We apprehend, no one will or can contend that when the state or municipalities have a lien on property for taxes, it is not paramount to all other liens. . . . The receiver is not a purchaser, but he receives the possession and title, when transferred to him, to hold for all parties in interest"). See, also, *Duryee v. United States Credit System Co.*, 55 N. J. Eq. 311, 37 Atl. 155; *Bear River Paper & Bag Co. v. City of Petoskey*, 241 Fed. 53, 154 C. C. A. 53.

16 *Lane v. Washington Hotel Co.*, 190 Pa. St. 230, 42 Atl. 697. See *Woodward v. Winchill*, 14 Wash. 394, 44 Pac. 860, holding that *notice to quit*, served on a tenant, is binding on a subsequently appointed receiver.

17 *Totten & Hogg I. & S. F. Co. v. Muncie Nail Co.*, 148 Ind. 372, 47 N. E. 703; *Baldwin v. Spear Bros.*, 79 Vt. 43, 64 Atl. 235.

18 *Bates v. Wiggins*, 37 Kan. 44, 1 Am. St. Rep. 234, 14 Pac. 442; *Sumner Iron Works v. Wolten*, 61 Wash. 689, 112 Pac. 1109.

19 *Miller v. Savage*, 60 N. J. Eq. 204, 46 Atl. 632; *In re Olzendarm Co.*, 117 Fed. 179 (subject to equitable lien); *Arkansas Cypress Shingle Co. v. Meto Val. R'y Co.*, 97 Ark. 534, 134 S. W. 1195 (subject to equitable mortgage); *In re New Glenwood Canning Co.*, 150 Iowa, 696, 130 N. W. 800; *Hubbell v. Texas Southern R'y Co.*, 59

equities which would affect the debtor if he himself were asserting his interest in the property."<sup>20</sup> And a receiver can therefore obtain no title to property where the original vendor reserved his title by a clause in the bill of sale of the chattels;<sup>21</sup> neither can he supersede a prior valid assignment.<sup>22</sup>

§ 1578. (§ 157.) **Same; Receiver's Right to Possession as Against Prior Lienor.**—The question of the prior lienholder's right to enforce his lien by process is one on which the cases are far from uniform; this question is discussed elsewhere.<sup>23</sup> A number of decisions have been rendered on the analogous subject of the receiver's right to possession, as against the holder of a prior lien, when such lien carries with it the possession of the property. It is held that the receiver cannot replevy goods upon

Tex. Civ. App. 185, 126 S. W. 313 (vendor's lien). See, also, as pertaining to partnership receivers, *Hoffman v. Schoyer*, 143 Ill. 598, 28 N. E. 823; *Chicago Title & Trust Co. v. Smith*, 158 Ill. 417, 425, 41 N. E. 1076. This is subject to the limitation that equity will not enforce an equitable lien against a receiver when rights of creditors have intervened. Thus, in *American Can Co. v. Erie Preserving Co.*, 183 Fed. 96, 105 C. C. A. 388, it was held that where the essential element of possession in a pledgee was wanting when a receiver was appointed for the pledgor, equity would not thereafter supply it to the detriment of general creditors. See, also, *Bell v. New York Safety Steam Power Co.*, 183 Fed. 274.

<sup>20</sup> *Ryder v. Ryder*, 19 R. I. 188, 32 Atl. 919 (subject to mortgagee's equity to have a mortgage reformed).

<sup>21</sup> *Sayles v. Nat. Water Purifying Co.*, 16 N. Y. Supp. 555, 62 Hun, 618. Compare *Lazear v. Ohio Valley Steel Foundry Co.*, 65 W. Va. 105, 63 S. E. 772.

<sup>22</sup> *Garden City Bank etc. Co. v. Geilfuss*, 86 Wis. 612, 57 N. W. 349; *Chicago Title & Trust Co. v. Smith*, 158 Ill. 417, 425, 41 N. E. 1076; *Brownson v. Roy*, 133 Mich. 617, 95 N. W. 710 (assignment of rents); *McGill v. Brown*, 72 Wash. 514, 130 Pac. 1142; *Lawson v. Warren*, 34 Okl. 94, Ann. Cas. 1914C, 139, 42 L. R. A. (N. S.) 183, 124 Pac. 46.

<sup>23</sup> See *post*, §§ 166, 167.

which execution has been levied prior to the appointment, when the defendant's superior right is so clear that the court of chancery would not have ordered the property to be delivered to the receiver;<sup>24</sup> that personal property, possession of which had been taken by the sheriff under attachment from a state court, cannot rightfully be interfered with by a federal receiver while such possession continues, while a prior attachment of real property, not conferring possession, actual or constructive, does not preclude a lawful seizure of such property by a federal receiver;<sup>25</sup> that when personal property is in the custody of a sheriff under a writ of attachment, a court of chancery cannot acquire jurisdiction of the same property, so as to take it from the possession of the sheriff into the custody of its receiver.<sup>26</sup> The subject has received much attention from the supreme court of Washington, which holds that when creditors of a corporation have attached its property, and maintained their lien by the actual possession of the sheriff, a receiver appointed in a suit by a stockholder, to which the attachment creditors were not parties, has no right of possession of the attached property, but the sheriff must keep and dispose of it under his writ.<sup>27</sup> On

<sup>24</sup> *Conley v. Deere*, 11 Lea (Tenn.), 274, 279. In *Brackett v. Middlesex Banking Co.*, 89 Conn. 645, 95 Atl. 12, it was held that where a debtor has deposited securities as collateral with a trustee, the trustee is entitled to retain possession and to enforce the pledge.

<sup>25</sup> *In re Hall & Stilson Co.*, 73 Fed. 527, citing many cases.

<sup>26</sup> *Ford v. Judsonia Mercantile Co.*, 52 Ark. 426, 20 Am. St. Rep. 192, 6 L. R. A. 714, 12 S. W. 876; *Pease v. Smith*, 63 Ill. App. 411.

<sup>27</sup> *State v. Superior Court of Chehalis County*, 8 Wash. 210, 25 L. R. A. 354, 35 Pac. 1087, 38 Cent. L. J. 341 (but see the strong dissenting opinion of Dunbar, C. J.); *State v. Superior Court of Snohomish County*, 7 Wash. 77, 34 Pac. 430; *State v. Graham*, 9 Wash. 528, 36 Pac. 1085; but the doctrine of these cases seems to be materially limited by the later case of *State v. Superior Court of King County*, 11 Wash. 63, 39 Pac. 244.

the other hand, it is held in Wisconsin that proceeds of an execution sale in the hands of the sheriff, though in law the creditor's, may be sequestered, on motion of the other creditors of the debtor corporation, into the hands of a subsequently appointed receiver, on an *ex parte* showing that the confessed judgments on which the executions were issued were intended as a fraudulent and illegal preference.<sup>28</sup>

§ 1579. (§ 158.) **Receiver's Title Vests from Order of Appointment.**—The general rule is well established that the title and right of a receiver relate to the time of the order appointing him. It is said: "The appointment of a receiver is completed at the farthest by the filing and entering of the order appointing him, although before he proceeds to the discharge of his duties he may be directed to execute and file a proper bond. When that is done, he can take actual manual possession of the property, and his title relates back to the time of his appointment."<sup>29</sup> Accordingly, a levy by an officer, after

<sup>28</sup> Ford v. Plankinton Bank, 87 Wis. 363, 58 N. W. 766.

<sup>29</sup> In re Schuyler Steam Towboat Co., 136 N. Y. 169, 20 L. R. A. 391, 32 N. E. 623. See, also, In re Christian Jensen Co., 128 N. Y. 550, 28 N. E. 665 ("the moment he was appointed he became an officer of the court, and from that time the property of the corporation was *in custodia legis*, and the court had the power to preserve and protect it. While the receiver could not interfere with the property of the corporation until he filed his bond, yet after he filed his bond his title related back to the date of his appointment," and the property, therefore, was not subject to replevin); In re Lenox Corporation, 57 App. Div. 515, 68 N. Y. Supp. 103; In re Muehlfeld & Haynes Piano Co., 12 App. Div. 492, 42 N. Y. Supp. 802, 26 Civ. Pr. Rep. 90; Dickey v. Bates, 13 Misc. Rep. 489, 35 N. Y. Supp. 525; Van Alstyne v. Cook, 25 N. Y. 489; Steele v. Sturges, 5 Abb. Pr. 442; Rutter v. Tallis, 5 Sand. 610; Mosher v. Supreme Sitting of O. T. H., 88 Hun, 394, 34 N. Y. Supp. 816; Maynard v. Bond, 67 Mo. 315; Pope v. Ames, 20 Or. 199, 25 Pac. 393; Fogg v. Providence Lumber Co., 15 R. I. 15, 23 Atl. 31; Clinkscale v. Pendleton Mfg. Co., 9 S. C. 318; Regenstein v. Pearlstein, 30 S. C. 192, 8 S. E. 850;



appointment and before the receiver has filed his bond, will create no lien,<sup>30</sup> and may be enjoined;<sup>31</sup> and a valid judgment, obtained under these circumstances, affords no ground for seizing the property on execution, or creating a lien.<sup>32</sup> A federal court has said: "If the jurisdiction of the court over the property did not attach contemporaneously with the order appointing a receiver, the purpose of the court in appointing a receiver might be defeated by the failure of the person appointed receiver to accept the position, or his inability to give the bond required, or, in the interim between the order

Battery Park Bank v. Western Carolina Bank, 127 N. C. 432, 37 S. E. 461; Saginaw County Sav. Bank v. Duffield, 157 Mich. 522, 133 Am. St. Rep. 354, 122 N. W. 186; Squire v. Princeton Lighting Co., 72 N. J. Eq. 883, 15 L. R. A. (N. S.) 657, 68 Atl. 176; John Mulstein Co. v. City of New York, 213 N. Y. 308, 107 N. E. 651; Roberts v. Bowen Mfg. Co., 169 N. C. 27, 85 S. E. 45; Baldwin v. Spear Bros., 79 Vt. 43, 64 Atl. 235; Brown v. Massachusetts Hide Corp., 218 Fed. 769, 134 C. C. A. 447; Horn v. Pere Marquette R. Co., 151 Fed. 626. The text is cited in John Agnew Co. v. Board of Education, 83 N. J. Eq. 49, 89 Atl. 1046. In Exchange National Bank v. Northern Idaho Pine Lumber Co., 24 Idaho, 671, 135 Pac. 747, it is held that the order takes effect when signed by the judge, not when entered by the clerk. In Ardmore Nat. Bank v. Briggs, M. & S. Co., 20 Okl. 427, 129 Am. St. Rep. 747, 16 Ann. Cas. 133, 23 L. R. A. (N. S.) 1074, 94 Pac. 533, it is held that title vests from the time of the original order of appointment, although not perfected until later. In Strain v. Palmer, 159 Fed. 628, 86 C. C. A. 618, it is held that as to a party having notice of the suit, title vests as of the date of application for appointment.

<sup>30</sup> Ex parte Evans, L. R. 13 Ch. D. 252; In re Lenox Corporation, 57 App. Div. 515, 68 N. Y. Supp. 103; Atlas Bank v. Nahant Bank, 23 Pick. 480 (the title relates to the filing of the bill "or at least to the injunction," issued to prevent the transfer of property).

<sup>31</sup> In re Schuyler Steam Towboat Co., 136 N. Y. 169, 20 L. R. A. 391, 32 N. E. 623.

<sup>32</sup> Connecticut River Banking Co. v. Rockbridge Co., 73 Fed. 709; Temple v. Glasgow, 80 Fed. 441, 42 U. S. App. 417, 25 C. C. A. 540. See, also, Battery Park Bank v. Western Carolina Bank, 127 N. C. 432, 37 S. E. 461.

appointing a receiver and his giving the required bond, a creditor might obtain an advantage by securing a confession of judgment, and in innumerable other ways.”<sup>33</sup>

It is sometimes stated that the title, upon proper bond being given, relates to the date of the filing of the bill; that “the filing of the bill and service of process is an equitable levy on the property, and pending the proceedings such property may properly be held to be *in gremio legis*. . . . In such cases the commencement of the suit is sufficient to give the court whose jurisdiction is invoked the exclusive right to control the property.”<sup>34</sup> In ordinary cases, however, the rule is as stated above.<sup>35</sup> The

33 *Connecticut River Banking Co. v. Rockbridge Co.*, 73 Fed. 709; affirmed in *Temple v. Glasgow*, 80 Fed. 441, 42 U. S. App. 417, 25 C. C. A. 540, stating: “Generally the better rule would seem to be that, when the court has jurisdiction, the order appointing a general receiver for the purpose of liquidation is an adjudication which operates as a sequestration of the property of the corporation, . . . and in such cases to hold that the rights of parties are affected by the accident of whether the receiver is able on the instant to proffer his bond for approval is illogical.”

34 *Illinois Steel Co. v. Putnam*, 68 Fed. 515, 15 C. C. A. 556, citing *Adams v. Trust Co.*, 66 Fed. 617, 15 C. C. A. 1, and supporting, as not within the principle stated, a transfer of stock made pending a motion for the appointment of a receiver: *Merrill v. Commonwealth Mut. Fire Ins. Co.*, 166 Mass. 238, 44 N. E. 144. In Texas the rule appears to be that the title, as against attachments, relates back to the time when the appointing court took jurisdiction of the application, “by acting upon it in such a manner as to indicate that he had determined to investigate the matter and might at some future date appoint a receiver”: *Worden v. Pruter* (Tex. Civ. App.), 88 S. W. 434; *Rissner v. Railway Co.*, 89 Tex. 656, 59 Am. St. Rep. 84, 33 L. R. A. 171, 36 S. W. 53; *Cobb v. Camden Sav. Bank*, 106 Me. 178, 20 Ann. Cas. 547, 76 Atl. 667.

35 *In re Muehlfeld & Haynes Piano Co.*, 12 App. Div. 492, 42 N. Y. Supp. 802, 26 Civ. Pr. Rep. 90; and cases cited above. In *Smith v. Sioux City Nursery & Seed Co.*, 109 Iowa, 51, 79 N. W. 457, the court says: “The fact that the proceedings were begun for the appointment of a receiver did not suspend the right of creditors to

supreme court of Iowa has said: "It is very plain that the commencement of the proceedings for the appointment of the receiver did not subject the property of the gas company to the custody of the law and bring it under the authority of the receiver."<sup>36</sup>

§ 1580. (§ 159.) **Contra; Title Dates from Qualification, or from the Time When He Takes Actual Possession.**—The general rule has been expressly departed from in California in the case of a receiver of mortgaged realty;<sup>37</sup> and in Maryland, actual possession by the receiver is demanded before the property is considered under the control of the court. It is said: "Their mere appointment did not, as we think, place the property, as against a stranger to the proceedings, in possession, and claiming the right to retain and sell it, *in custodia legis*. Actual possession was necessary to accomplish this.

attach, nor that of the company to assign its accounts as security for the payment of its debts, if in doing so it acted in good faith. While there is some conflict in the authorities as to whether property of the debtor passes *in custodia legis* at the time the receiver is appointed, or when he assumes possession, all agree that the *jus disponendi* is not affected by the application, and continues, at least, till the making of the order or appointment." See, also, *Cook v. Cole*, 55 Iowa, 72, 7 N. W. 419; *Van Alstyne v. Cook*, 25 N. Y. 489; *American Clay Machinery Co. v. New England Brick Co.*, 87 Conn. 369, 87 Atl. 731.

<sup>36</sup> *Cook v. Cole*, 55 Iowa, 72, 7 N. W. 419.

<sup>37</sup> *Bank of Woodland v. Heron*, 120 Cal. 614, 52 Pac. 1006 (the court states: "There are, no doubt, authorities—and perhaps a weight of authorities, although there are cases the other way—to the point that the appointment of a receiver operates as a sequestration of the property mentioned in the order of appointment. Still it will be found that the cases in which that principle was declared are mainly cases in which complainants at whose instance the receivers were appointed had some estate in or some right to or lien upon the property involved prior to and independent of the appointment of the receiver"). The text is cited in *John Agnew Co. v. Board of Education*, 83 N. J. Eq. 49, 89 Atl. 1046.

The authorities speak of the appointment *and possession* by the receivers as necessary in order to place the property in the custody of the court."<sup>38</sup> This is true even though the receiver has given his bond.<sup>39</sup> In New York, it has been held that as the vesting of title by relation is only a legal fiction, such fiction will not be indulged in to permit a wrong against the creditor, when the debtor has, by "frivolous pleading," prevented the creditor from obtaining a prior lien.<sup>40</sup> In Virginia an execution levied after the appointment, and before the giving of the bond, is held to create a valid lien.<sup>41</sup> The court, in the case mentioned, relied principally upon the English case of *Edwards v. Edwards*,<sup>42</sup> which may be taken to represent the English rule, which is contrary to the general rule in the United States.<sup>43</sup> A later Virginia

<sup>38</sup> *Everett v. Neff*, 28 Md. 176.

<sup>39</sup> *Farmers' Bank v. Beaston*, 7 Gill & J. 421, 28 Am. Dec. 226. See, also, *Prentiss Tool & Supply Co. v. Whitman & Barnes Mfg. Co.*, 88 Md. 240, 41 Atl. 49, where the time of vesting is regulated by statute.

<sup>40</sup> *In re Lewis & Fowler Mfg. Co.*, 89 Hun, 208, 34 N. Y. Supp. 983. See, also, *Chamberlain v. Rochester S. P. V. Co.*, 7 Hun, 557, where the title of a receiver in the case of voluntary dissolution of a corporation vests on the filing of his bond only. To the same effect, see *Travis v. McBride*, 166 Mich. 126, 131 N. W. 520.

<sup>41</sup> *Frayser v. Richmond & A. R. Co.*, 81 Va. 388.

<sup>42</sup> L. R. 2 Ch. D. 291; the court was not unanimous in their reasoning, James, L. J., stating: "It would be very serious to hold that he can take possession before giving security," and Mellish, L. J., maintaining that "if the receiver had really taken possession before the goods were seized, *although he had not been completely appointed receiver*," the case would have been different.

<sup>43</sup> The English cases, apparently inconsistent with *Edwards v. Edwards*, cannot be said to impair its weight as authority on the point decided; thus, in *Ex parte Evans*, L. R. 13 Ch. D. 252, the court said: "*Edwards v. Edwards* only decided it was no contempt for creditors to seize property before the bond was given and the case related to chattels, not land." In regard to land, the court had the following to say: "A judgment creditor, not being able to obtain relief at law under the old system, because his debtor had nothing but an equitable



case held that a payment made to a receiver, who had not given bond, was at the peril of the payor, and where the receiver failed to account, the purchaser was bound to pay again, as the receiver's authority dated only from his giving bond.<sup>44</sup>

§ 1581. (§ 160.) **Vesting of Title in Supplementary Proceedings.**—The statutes in regard to the appointment of receivers in supplemental proceedings and the time when the title to the property, in such cases, vests in the receiver, are not harmonious. In New Jersey, the title relates to the issuing of the execution, as against an assignee with notice of the proceedings.<sup>45</sup> In New York, the code provides that the title is vested in the receiver

interest in the land, came into a court of equity to obtain that relief which he could not obtain at law, and the moment he established the difficulty in his way at law, and the court made the order giving the right to the possession of the lands to the receiver appointed on his behalf, that order giving the right to possession to the creditor through the receiver was as much a delivery in execution of land in which the debtor had only an equitable interest, as was the sheriff's return to the writ of *elegit* at law, that he had extended the land, a delivery in execution of the land in which the debtor had a legal interest." The case of *In re Bird*, L. R. 22 Ch. D. 604, approving *Wickens v. Townshend*, 1 Russ. & M. 361, refused to allow a solicitor to retain, on a debt due him, money paid before the receiver's bond was given; but the express ground on which the case was put was the inequitable position of the solicitor who occupied a confidential relation to the case, and it cannot be said that it is opposed to *Edwards v. Edwards*. See, also, the recent case, *Ridout v. Fowler*, [1904] 1 Ch. 658 (receiver has no "title" to personalty until he has given bond).

<sup>44</sup> *Woods v. Ellis*, 85 Va. 471, 7 S. E. 852 (the case seems open to some question, for apparently the receiver afterwards qualified by giving the required bond). The mere appointment of a receiver does not of itself vest in him the title to a patent sufficient to enable him to bring a suit for its infringement: *Ball v. Coker*, 168 Fed. 304.

<sup>45</sup> *Coleman v. Roff*, 16 Vroom, 17, 45 N. J. L. 7; approved in *Seyfert v. Edison*, 47 N. J. L. 428, 1 Atl. 502.

from the time he files a certified copy of the order of his appointment in the county where the debtor resides;<sup>46</sup> but that, as respects personal property and things in action, it may relate back, for the benefit of the judgment creditor in whose behalf the proceedings were instituted, to the service of the order for the debtor's examination.<sup>47</sup>

§ 1582. (§ 161.) **How the Receiver may Obtain Possession of Property Withheld.**—Where possession is withheld from the receiver by persons who are parties to the suit, or by others claiming under such parties, as agents, lessees, and the like, with notice of the appointment of the receiver, the court has authority to enforce its order for the surrender of the property in a summary way by attachment or by a writ of possession.<sup>48</sup> Thus,

<sup>46</sup> *Nicoll v. Spowers*, 105 N. Y. 1, 11 N. E. 138; *McCorkle v. Herrman*, 117 N. Y. 297, 22 N. E. 948; *Webb v. Osborne*, 15 Daly, 406, 7 N. Y. Supp. 762 (an order extending the receivership is governed by the same rule).

<sup>47</sup> *McCorkle v. Herrman*, 117 N. Y. 297, 22 N. E. 948; *Youngs v. Klunder*, 27 N. Y. St. Rep. 32, 7 N. Y. Supp. 498. But in such case the debtor must have been served with notice to attend the examination: *In re Sistare's Estate*, 27 Abb. N. C. 34, 15 N. Y. Supp. 709.

See, also, *Rose v. Baker*, 99 N. C. 323, 5 S. E. 919, where the code provides that the title shall vest upon an order restraining the debtor from disposing of his nonexempt property.

<sup>48</sup> *Thornton v. Washington Savings Bank*, 76 Va. 432 (writ of possession against lessee taking a lease from a party, with knowledge of the appointment of a receiver); *Ex parte Cohen*, 5 Cal. 494; *Brandt v. Allen*, 76 Iowa, 50, 1 L. R. A. 653, 40 N. W. 82; *Ryan v. Kingsbery*, 88 Ga. 361, 14 S. E. 596; *Delozier v. Bird*, 123 N. C. 689, 31 S. E. 834, 125 N. C. 493, 34 S. E. 643; *Tolleson v. Green*, 83 Ga. 499, 10 S. E. 120; and see *Fischer v. Superior Court*, 98 Cal. 67, 32 Pac. 875; *Miles v. New South Bldg. & L. Ass'n*, 95 Fed. 419; and cases cited in the next note. See, also, *Horn v. Pere Marquette R. Co.*, 151 Fed. 626. That the receiver may sometimes attack a fraudulent transfer to a third person, by petition in the cause, see *United States v. Late Corporation of Church etc.*, 5 Utah, 538, 18 Pac. 35.

it has been held that the agents or officers of a corporation or firm, a receiver of which has been appointed, may be ordered to deliver up property belonging to their principal, although they themselves are not parties to the suit.<sup>49</sup>

<sup>49</sup> *Brandt v. Allen*, 76 Iowa, 50, 1 L. R. A. 653, 40 N. W. 82; *Ex parte Cohen*, 5 Cal. 494; *Severns v. English*, 19 Okl. 567, 101 Pac. 750.

In *Tolleson v. People's Savings Bank*, 85 Ga. 171, 11 S. E. 599, the receiver appointed by the court applied for an order requiring the president of the insolvent corporation to show cause why he should not be attached for contempt, in not delivering the assets of the corporation to such receiver in obedience to a previous order of the court directed to the corporation. The president appeared as an individual, and responded under oath, and took part in the proceedings. It was held that the court had such jurisdiction of him as would authorize it to deal with him for contempt in not turning over to the receiver the assets of the corporation in his possession. In *Ex parte Hollis*, 59 Cal. 405, on the other hand, it was held that the president of a corporation against which insolvency proceedings were instituted did not become a party by verifying the pleadings; and that the court could not, by a mere order to show cause why he should not be punished for contempt for not surrendering to the receiver property of the corporation, make him a party and adjudge his adverse claim to the property; and see to the same effect *State v. Ball*, 5 Wash. 387, 34 Am. St. Rep. 866, 31 Pac. 975.

Refusal of a party to the action to obey an order directing him to deliver certain property of the corporation to the receiver constitutes a contempt, although he claims a lien thereon: *Ex parte Tinsley*, 37 Tex. Cr. App. 517, 66 Am. St. Rep. 818, 40 S. W. 306; affirmed, 171 U. S. 101, 43 L. Ed. 91, 18 Sup. Ct. 805. Such order must be obeyed, however erroneous it may be, if the court had jurisdiction: *Tolman v. Jones*, 114 Ill. 148, 28 N. E. 464. And the officers need not be expressly required by the order appointing the receiver to deliver the assets to him, if the receiver is invested "with the usual rights and powers of receivers" and specially with power "to receive into his possession all the effects and choses in action" of the dissolved corporation; and a sale of the assets by the officers in such case may be punished as a contempt: *Young v. Rollins*, 90 N. C. 125, 131. See, further, *American C. Co. v. Jacksonville, T. & K. W. R. Co.*, 52 Fed. 937.

But the court will not interfere in a summary way as against the possession of a stranger to the action claiming by a paramount title, but will leave the question of title to be tried by a proper action brought by the receiver for that purpose; or the complainant may make such third person a party to the suit, and apply to have the receivership extended to the property in his hands.<sup>50</sup> "The party in possession, who asserts in good faith color and claim of right, is entitled, under the guaranty of due process of law, to his day in court, and a trial according to the customary forms of law."<sup>51</sup> If in such case the receiver attempts by violence to obtain possession of property claimed by third persons, the court will not pro-

In *Cassilear v. Simons*, 8 Paige (N. Y.), 273, the following rule was laid down by Chancellor Walworth: "Where it is referred to a master to appoint a receiver, and the defendant is directed to assign and deliver over his property on oath, under the direction of the master, it is the duty of the party who wishes to have an actual delivery of the property, in addition to the legal assignment thereof, to call upon the master to decide the question as to what property is under the defendant's power and control, and to obtain from the master an order directing the defendant to deliver over the property thus designated by the master, before the complainant can bring such defendant into contempt for disobeying the order of the court." See, also, *Parker v. Browning*, 8 Paige, 388, 35 Am. Dec. 717.

<sup>50</sup> *Parker v. Browning*, 8 Paige, 388, 35 Am. Dec. 717; *Cassilear v. Simons*, 8 Paige, 273; *Wheaton v. Daily Tel. Co.*, 124 Fed. 61, 59 C. C. A. 427; *Musgrove v. Gray*, 123 Ala. 376, 82 Am. St. Rep. 124, 26 South. 643; *Havemeyer v. Superior Court*, 84 Cal. 327, 387, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; *Stuparich Mfg. Co. v. Superior Court*, 123 Cal. 290, 55 Pac. 985; *McCombs v. Merryhew*, 40 Mich. 721; *Elwell v. Goodnow*, 71 Minn. 383, 73 N. W. 1092, 1095; *In re Muchfeld*, 16 App. Div. 401, 45 N. Y. Supp. 16 (defendant corporation's prior assignee for the benefit of creditors, who is not a party, cannot be compelled on motion to surrender to the receiver); *Thornton v. Washington Savings Bank*, 76 Va. 432; *Andrews v. Paschen*, 67 Wis. 413, 30 N. W. 712. But see *United States v. Late Corporation of Church etc.*, 5 Utah, 538, 18 Pac. 35.

<sup>51</sup> *Musgrove v. Gray*, 123 Ala. 376, 82 Am. St. Rep. 124, 26 South. 643.



tect him any further than the law will protect him, but will permit him to be sued as a trespasser by the party aggrieved.<sup>52</sup>

§ 1583. (§ 162.) **Interference With Receiver's Possession; Claimant must Apply to the Court.**—Courts of equity are exceedingly averse to any interference with the possession of their receivers, which is deemed the possession of the court. They jealously and vigilantly guard and maintain against obstruction, under process of another court, their exclusive authority and right to adjudicate upon and distribute the fund in their custody among those entitled.<sup>53</sup> “The court never allows any person to interfere, either with money or property in the hands of its receiver, without its leave; whether it is done by the consent or submission of the receiver, or by compulsory process against him. The court is obliged to keep a strict hand over property in the hands of a receiver, or which, by virtue of the order of the court, may come into his hands, in order to preserve entire jurisdiction over the whole matter, and to do that which is just in the cause between the parties.”<sup>54</sup> “When a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment [or other action], or to permit him to be examined *pro interesse suo*, which may, perhaps, often be the

<sup>52</sup> Parker v. Browning, 8 Paige, 388, 35 Am. Dec. 717.

<sup>53</sup> Ex parte Tillman, 93 Ala. 101, 9 South. 527; Angel v. Smith, 9 Ves. 335; Brooks v. Greathed, 1 Jacob & W. 178; Evelyn v. Lewis, 3 Hare, 472; Russell v. East Anglian R'y, 3 Maen. & G. 104; Ex parte Cochrane, L. R. 20 Eq. 282; Wiswall v. Sampson, 14 How. 52, 65, 14 L. Ed. 322; In re Swan, 150 U. S. 637, 37 L. Ed. 1207, 14 Sup. Ct. 225; Moore v. Mercer Wire Co. (N. J. Eq.), 15 Atl. 737; Spinning v. Ohio L. I. & T. Co., 2 Disn. (Ohio) 336; Vermont & C. R. Co. v. Vermont Central R. Co., 46 Vt. 792.

<sup>54</sup> De Winton v. Mayor of Brecon, 28 Beav. 200, per Lord Romilly, M. R.

most convenient mode."<sup>55</sup> Where property or funds are in the hands of a receiver, and claimed by persons not parties to the action in which he was appointed, a petition or motion may be presented to the court for an order on the receiver to deliver over the fund or property to the claimant.<sup>56</sup>

§ 1584. (§ 163.) **Interference With Receiver a Contempt of Court.**—It is well settled that a disturbance of the receiver's possession by any person, whether by force, or by legal proceedings against him, or in any other manner, without the permission of the court by whom the receiver was appointed, constitutes a contempt of that court, since the possession of the receiver is in

<sup>55</sup> *Brooks v. Greathed*, 1 Jacob & W. 176. See, also, *Ex parte Cochrane*, L. R. 20 Eq. 282; *Skinner v. Maxwell*, 68 N. C. 400. By the appointment of a receiver, the court acquires jurisdiction to adjust all rights, interests, claims, or demands relating to the property. It may authorize the commencement of an independent suit or it may require the claimant to litigate the matter in the receivership proceeding. It may permit a jury trial, but it is not required to do so: *State ex rel. Godard v. State Bank of Circleville*, 84 Kan. 366, 114 Pac. 381. See, also, in general, *Sumner Iron Works v. Wolten*, 61 Wash. 689, 112 Pac. 1109; *Cobb v. Camden Sav. Bank*, 106 Me. 178, 20 Ann. Cas. 547, 76 Atl. 667; *Baker v. Hill*, 100 Md. 130, 59 Atl. 275; *Strain v. Palmer*, 159 Fed. 628, 86 C. C. A. 618. The court may permit a mortgagee to proceed against the property or to sell it under a power of sale contained in the mortgage. Ordinarily, a sale without permission is void; but where the mortgagee sells without an order of court and reports the sale to the court that appointed the receiver, and that court confirms it, the sale is valid: *Forest Lake Cemetery v. Baker*, 113 Md. 529, 77 Atl. 853.

<sup>56</sup> *Wheeler v. Walton & Wharn Co.*, 64 Fed. 664, 667, affirmed *Winchester v. Davis Pyrites Co.*, 67 Fed. 45, 14 C. C. A. 300; *Kimball v. Gafford*, 78 Iowa, 65, 4 L. R. A. 398, 42 N. W. 583; *Morrill v. Noyes*, 56 Me. 458, 96 Am. Dec. 486; *Jacobson v. Landolt*, 73 Wis. 142, 9 Am. St. Rep. 767, 40 N. W. 636. A seller under a contract of conditional sale, by filing his demand with the receiver, does not waive his right to apply to the court for permission to sue: *Sumner Iron Works v. Wolten*, 61 Wash. 689, 112 Pac. 1109.

law the possession of the court itself.<sup>57</sup> And such person may be chargeable with contempt if he has actual knowledge of the granting of the order appointing a receiver, although the order has not been legally served

<sup>57</sup> *Skip v. Harwood*, 3 Atk. 564; *Russell v. East Anglian R'y*, 3 Maen. & G. 104; *Helmore v. Smith*, 35 Ch. D. 449; *In re Swan*, 150 U. S. 637, 37 L. Ed. 1207, 14 Sup. Ct. 225; *Tinsley v. Anderson*, 171 U. S. 101, 43 L. Ed. 91, 18 Sup. Ct. 805; *In re Doolittle*, 23 Fed. 544, and note; *United States v. Kane*, 23 Fed. 748; *In re Wabash R. Co.*, 24 Fed. 217; *In re Higgins*, 27 Fed. 443; *Beers v. Wabash H. L. & P. R. Co.*, 34 Fed. 244; *United States v. Murphy*, 44 Fed. 39; *American C. Co. v. Jacksonville, T. & K. W. R. Co.*, 52 Fed. 937; *Thomas v. Cincinnati, N. O. & T. P. R'y Co.*, 62 Fed. 803; *United States v. Jose*, 63 Fed. 951; *Strain v. Superior Court of Los Angeles County*, 168 Cal. 216, **Ann. Cas.** 1915D, 702, 142 Pac. 62; *McKinnon-Young Co. v. Stockton*, 53 Fla. 734, 44 South. 237; *In re Acker*, 66 Fed. 290; *Ex parte Hollis*, 59 Cal. 405; *In re Dialogue*, 215 Fed. 462; *Tollison v. Green*, 83 Ga. 499, 10 S. E. 120; *Tolleson v. People's Sav. Bank*, 85 Ga. 171, 11 S. E. 599; *Ryan v. Kingsberry*, 88 Ga. 361, 14 S. E. 596; *Drakeford v. Adams*, 98 Ga. 722, 25 S. E. 833; *Richards v. People*, 81 Ill. 551; *Tolman v. Jones*, 114 Ill. 148, 28 N. E. 464; *Sercomb v. Catlin*, 128 Ill. 556, 15 **Am. St. Rep.** 147, 21 N. E. 606; *In re Lewis*, 52 Kan. 660, 35 Pac. 287; *Smith v. Hosmer*, 84 Mich. 564, 47 N. W. 1092; *Moore v. Mercer Wire Co. (N. J. Eq.)*, 15 Atl. 305; *Noe v. Gibson*, 7 Paige, 513; *Cassilear v. Simons*, 8 Paige, 273; *Hull v. Thomas*, 3 Edw. Ch. 236; *Delozier v. Bird*, 123 N. C. 689, 31 S. E. 834; on rehearing, 125 N. C. 493, 34 S. E. 643; *Spinning v. Ohio etc. Tr. Co.*, 2 Disn. (Ohio) 336; *Chafee v. Quidnick Co.*, 13 R. I. 442; *Edrington v. Pridham*, 65 Tex. 612; *Ex parte Tinsley*, 37 Tex. Cr. App. 517, 66 **Am. St. Rep.** 818, 40 S. W. 306; *Vermont etc. R. Co. v. Vermont Cent. R. Co.*, 46 Vt. 792; *Camden v. Virginia Safe Deposit & Trust Corp.*, 115 Va. 20, 78 S. E. 596; *State v. Ball*, 5 Wash. 387, 34 **Am. St. Rep.** 866, 31 Pac. 975. As to the degree of proof requisite for punishment for contempt, see *United States v. Jose*, 63 Fed. 951. That advice of counsel constitutes no defense, see *Delozier v. Bird*, 123 N. C. 689, 31 S. E. 834; *Edrington v. Pridham*, 65 Tex. 617. As to punishment for contempt, in the case of rival appointments, of the receivers whose rights are inferior, see *People v. Central City Bank*, 35 How. Pr. (N. Y.), 428, 53 Barb. 412; *Spinning v. Ohio etc. Tr. Co.*, 2 Disn. 336. That it is not proper, in contempt proceedings, to render a judgment in favor of the re-

upon him, or even formally drawn up.<sup>58</sup> Further, it is not competent for anyone to interfere with the possession of a receiver on the ground that the appointment was improvident;<sup>59</sup> the order of appointment cannot be assailed as erroneous in contempt proceedings, if the court had jurisdiction of the subject-matter and of the parties in the suit in which the receiver was appointed.<sup>60</sup>

Imprisonment of the defendant by virtue of attachment proceedings, for disobedience in not delivering up a specific sum of money found and adjudged to have been in his hands or under his control at the time demand was made upon him by the receiver, is not impris-

tioner to be collected by execution, see *Edrington v. Pridham*, 65 Tex. 612. A party who prosecutes a suit to judgment after the commencement of a suit for a receiver but before his appointment is not guilty of contempt: *Rickman v. Rickman*, 180 Mich. 224, **Ann. Cas.** 1915C, 1237, 146 N. W. 609. Nor is a party who pursues what he believes to be a proper remedy when the law has not been interpreted and is uncertain: *Bisbee v. Mt. Battie Mfg. Co.*, 107 Me. 185, 77 Atl. 778.

<sup>58</sup> *Skip v. Harwood*, 3 Atk. 564; *Hull v. Thomas*, 3 Edw. Ch. 236; *Drakeford v. Adams*, 98 Ga. 722, 25 S. E. 833; *In re Wilk*, 155 Fed. 943.

<sup>59</sup> *Russell v. East Anglian R'y*, 3 Macn. & G. 104, per Lord Truro: "The result appears to be this: that it is an established rule of this court that it is not open to any party to question the orders of this court, or any process issued under the authority of this court, by disobedience. I know of no act which this court may do which may not be questioned in a proper form and on a proper application; but I am of opinion that it is not competent for anyone to interfere with the possession of a receiver, or to disobey an injunction, or any other order of the court, on the ground that such orders were improvidently made. . . . I do not see how the court can expect its officers to do their duty, if they do it under the peril of resistance, and of that resistance being justified on grounds tending to the impeachment of the order under which they are acting."

<sup>60</sup> *Richards v. People*, 81 Ill. 551; *Tolleson v. Green*, 83 Ga. 499, 10 S. E. 120; *Tolman v. Jones*, 114 Ill. 148, 28 N. E. 464; *In re Lewis*, 52 Kan. 660, 35 Pac. 287.



onment for debt, within the meaning of the constitutional prohibition.<sup>61</sup>

A person within the jurisdiction of the appointing court may be held guilty of contempt for acts of interference committed by him against the receiver in a foreign state, as by attaching property of the receivership there situated.<sup>62</sup>

§ 1585. (§ 164.) **Possession Protected by Injunction.** It is frequently necessary for a receiver to pray for an injunction to restrain any unauthorized interference with the property in his possession, and the granting of such an injunction in such cases is a necessary incident to the power of appointing receivers.<sup>63</sup> Thus, on the appoint-

<sup>61</sup> See the able and exhaustive opinion of Lumpkin, J., in *Ryan v. Kingsberry*, 88 Ga. 361, 14 S. E. 596, reviewing many cases.

<sup>62</sup> *Chafee v. Quidnick Co.*, 13 R. I. 442; *Sercomb v. Catlin*, 128 Ill. 556, 15 Am. St. Rep. 147, 21 N. E. 606; *Smith v. Hosmer*, 84 Mich. 564, 47 N. W. 1092.

<sup>63</sup> *Evelyn v. Lewis*, 3 Hare, 472; *Dixon v. Dixon*, [1904] 1 Ch. 161; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *In re Tyler*, 149 U. S. 164, 37 L. Ed. 689, 13 Sup. Ct. 785; *Fidelity T. & S. V. Co. v. Mobile S. R. Co.*, 53 Fed. 687; *Arthur v. Oakes*, 63 Fed. 310, 25 L. R. A. 414, 11 C. C. A. 209; *Metropolitan Trust Co. v. Columbia, S. & H. R'y Co.*, 95 Fed. 18; *Lake Shore & M. S. R'y Co. v. Felton*, 103 Fed. 227, 43 C. C. A. 189; *Bibber-White Co. v. White River Valley Electric R'y Co.*, 107 Fed. 176; *In re Kleinhouse*, 113 Fed. 107 (receiver in bankruptcy proceedings); *Lang v. Choctaw, O. & G. R. Co.*, 160 Fed. 355, 87 C. C. A. 307; *Gay v. Hudson River Electric Power Co.*, 182 Fed. 279; *Trust Co. of America v. Norfolk & S. R'y Co.*, 183 Fed. 803; *Brady v. South Shore Traction Co.*, 197 Fed. 669; *City of Shelbyville v. Glover*, 184 Fed. 234, 106 C. C. A. 376; *Jackson v. Parkersburg & O. V. Electric R'y Co.*, 233 Fed. 784; *Equitable Trust Co. v. Western Pac. R'y Co.*, 231 Fed. 478; *McKinnon-Young Co. v. Stockton*, 53 Fla. 734, 44 South. 237; *Marshall v. Lockett*, 76 Ga. 289; *Woodburn v. Smith*, 96 Ga. 241, 22 S. E. 964; *Morgan v. New York & A. R. Co.*, 10 Paige, 290, 40 Am. Dec. 244; *In re Christian Jensen Co.*, 128 N. Y. 550, 28 N. E. 665; *Woerishoffer v. North River Construction Co.*, 99 N. Y. 398, 2 N. E. 47. It should be borne in mind that the federal courts are prohibited from granting injunc-

ment of a receiver of all the property and effects of a corporation, for the purpose of closing up its affairs, it is proper that the court should make it a part of the order that the directors and officers of the corporation be restrained from collecting any debts or demands due the company, and from paying out, assigning, or delivering any of the property, moneys or effects of the corporation to any other person, and from incumbering the same.<sup>64</sup> The aid of an injunction is frequently invoked in connection with railway receiverships: for instance,

tions to stay proceedings in any court of a state, except as may be authorized by the bankruptcy laws: U. S. Rev. Stats., § 720; *Baker v. Ault*, 78 Fed. 394; *Kansas City, M. & O. R'y Co. v. Latham* (Tex. Civ.), 182 S. W. 717. In *Davis v. Butters Lumber Co.*, 132 N. C. 233, 43 S. E. 650, a receiver was allowed an injunction to restrain a resident creditor from suing in another state, it appearing that such action would interfere with the collection of assets. In *Parr v. Blue Ridge Coal Co.*, 72 W. Va. 174, 77 S. E. 894, it was held that the court may enjoin the forfeiture of a lease under which a receiver is acting, for nonpayment of rent, and compel the lessee to wait and collect its rents and royalties out of the proceeds of a sale of the assets.

<sup>64</sup> *Morgan v. New York & A. R. Co.*, 10 Paige, 290, 40 Am. Dec. 244, per Walworth, C. See, also, *In re Christian Jensen Co.*, 128 N. Y. 550, 28 N. E. 665; *Phoenix F. & M. Co. v. North River Construction Co.*, 33 Hun, 156; *Woerishoffer v. North River Construction Co.*, 99 N. Y. 398, 2 N. E. 47, per Finch, J.: "Both parties concede that the possession of the court must not be invaded; that its officers cannot be sued without its permission; and that he cannot be dispossessed except at the peril of a contempt. What then must needs be the effect of the order in this case? It commands nothing which was not already commanded; it forbids nothing which otherwise was permissible; it takes away no right or remedy which the appointment of the receiver had not already taken away. Its sole practical effect was to give notice of that appointment and the right secured by it, and charge the specific creditor with a conscious and willful contempt if he assailed the possession of the court." Although a mortgagee might, under the terms of his mortgage, collect rents as against the mortgagor, after the appointment of a receiver he has no such right: *Baker v. Hill*, 100 Md. 130, 59 Atl. 275.

in restraint of striking workmen;<sup>65</sup> to protect the right of way from an unwarranted use by another company;<sup>66</sup> to protect the company's right to a joint user of the track of another company;<sup>67</sup> to restrain state officers from disposing of a land grant, under a claim of forfeiture to the state.<sup>68</sup> The parties to a suit concerning real property may be enjoined by the receiver from distraining for rent.<sup>69</sup> And a receiver may apply, pending confirmation of his sale of property, to protect the possession of his vendee.<sup>70</sup>

Relief for such interference with property belonging to the receiver, by strangers to the suit, may be had either by bill or by petition in the suit, at the discretion of the court.<sup>71</sup>

§ 1586. (§ 165.) **Attachment Against Receiver.**— Since the possession of the receiver is the possession of the court appointing him, “the property in his hands as such is not subject to attachment,<sup>72</sup> nor is he subject to

<sup>65</sup> *Arthur v. Oakes*, 63 Fed. 310, 25 L. R. A. 414, 11 C. C. A. 209; see *post*, § 169.

<sup>66</sup> *Fidelity T. & S. V. Co. v. Mobile S. R. Co.*, 53 Fed. 687.

<sup>67</sup> *Metropolitan Trust Co. v. Columbus, S. & H. R'y Co.*, 95 Fed. 18.

<sup>68</sup> *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 417.

<sup>69</sup> *Marshall v. Lockett*, 76 Ga. 289.

<sup>70</sup> *Woodburn v. Smith*, 96 Ga. 241, 22 S. E. 964.

<sup>71</sup> *In re Tyler*, 149 U. S. 164, 37 L. Ed. 689, 13 Sup. Ct. 785; *Lake Shore & M. S. R. Co. v. Felton*, 103 Fed. 227, 43 C. C. A. 189; *Bibber-White Co. v. White R. V. E. R. Co.*, 107 Fed. 176; *Vermont & C. R. Co. v. Vermont Cent. R. Co.*, 46 Vt. 792.

<sup>72</sup> *In re John L. Nelson & Bros. Co.*, 149 Fed. 590; *Ex parte Tillman*, 93 Ala. 101, 9 South. 527 (refusing to allow a party to obtain possession of attached goods); *Atlas Bank v. Nahant Bank*, 23 Pick. 480 (attachment after filing of the bill creates no lien on the property); *Columbian Book Co. v. De Golyer*, 115 Mass. 67; *Walker v. George Taylor C. Co.*, 56 Ark. 1, 18 S. W. 1056, 19 S. W. 601; *Wadsworth v. Laurie*, 164 Ill. 42, 49, 45 N. E. 435; *State v. Ellis*, 45 La. Ann. 1418, 14 South. 308 (“being [the property] already in the hands of an officer of the court for distribution among creditors, the

garnishment on account of it,<sup>73</sup> or funds in his hands or

object to be accomplished by a seizure is attained"); *White v. Frankel*, 12 Misc. Rep. 271, 33 N. Y. Supp. 1; *Mosher v. Supreme Sitting of O. of I. H.*, 88 Hun, 394, 34 N. Y. Supp. 816; *Texas Trunk R. R. Co. v. Lewis*, 81 Tex. 1, 26 **Am. St. Rep.** 776, 16 S. W. 647; *Merrill v. Commonwealth Mut. Fire Ins. Co.*, 166 Mass. 238, 44 N. E. 144 (attachment after proceedings commenced for winding up company is void); *Hagedon v. Bank of Wisconsin*, 1 Pinn. 61, 39 **Am. Dec.** 275; *Regenstein v. Pearlstein*, 30 S. C. 192, 8 S. E. 850 (attachment after appointment, and before bond is given, is ineffectual); but see *Naumburg v. Hyatt*, 24 Fed. 898, stating: "The fact that a receiver had been appointed with special and limited power to execute the judgment in this case before the levy of the attachment of petitioners does not necessarily avoid the levy and prevent the court from waiving the apparent contempt and recognizing as valid such irregular proceedings. . . . The possession of the property was in no way disturbed, and there was no hasty interference with the proceedings in the pending cause": *Halpern v. Clarendon H. L. Co.*, 64 Ark. 132, 40 S. W. 784 (vendor's right to lien may be defeated, if not perfected before the appointment).

<sup>73</sup> *Blum v. Van Vechten*, 92 Wis. 378, 66 N. W. 507; *Campau v. Detroit Driving Club*, 135 Mich. 575, 98 N. W. 267; *Vieth v. Ress*, 60 Neb. 52, 82 N. W. 116 ("and he cannot be sued or summoned, as garnishee in respect to property in his possession by virtue of his trust"); *Richards v. People*, 81 Ill. 551 ("the garnishee proceedings were a direct interference with the right of the receiver since they attempted to deprive him of what was his under the order of his appointment"); *Missouri Pac. R'y Co. v. Love*, 61 Kan. 433, 59 Pac. 1072; *Commonwealth v. Hide & Leather Ins. Co.*, 119 Mass. 155, gives the following reason: "The property of the corporation is intrusted to the receivers by the authority of the law, for the purpose of distribution among the creditors of the corporation, not among the creditors of those creditors. To undertake to determine, as incidental to the administration of the estate of the corporation, the validity and equity of the claims of every creditor of a creditor of the corporation, would unreasonably embarrass and delay the distribution of the estate and the settlement of the accounts of the receivers": *Holbrook v. Ford*, 153 Ill. 633, 46 **Am. St. Rep.** 917, 27 **L. R. A.** 324, 39 N. E. 1091, distinguishing *Sercomb v. Catlin*, 128 Ill. 556, 15 **Am. St. Rep.** 147, 21 N. E. 606; *McGowan v. Myers*, 66 Iowa, 99, 23 N. W. 282; *Field v. Jones*, 11 Ga. 413; *Taylor v. Gillean*, 23 Tex. 508; *Kreislee v. Campbell*, 89 Tex. 104, 33 S. W. 853; *Blum v. Van Vech-*



subject to his control in that capacity.”<sup>74</sup> But in such cases the court “may with propriety permit proceedings in garnishment to be brought,”<sup>75</sup> where, in the discretion of the court, justice requires it.<sup>76</sup> And it has been stated that “where the case in which their appointment has been made has been settled, or where they have a fund in their hands over and above the amount necessary to satisfy the judgment,” an attachment or garnishment is not an improper interference with the court’s possession.<sup>77</sup>

ten, 92 Wis. 378, 66 N. W. 507; but see *Central Trust Co. v. Chattanooga R. & C. R. Co.*, 68 Fed. 685. Where property of a non-resident corporation is brought into the state by the receiver for a special purpose, it is not subject to garnishment by a creditor within the state: *Somerset Coal Co. v. Diamond State Steel Co.*, 224 Pa. St. 217, 132 Am. St. Rep. 775, 73 Atl. 442.

<sup>74</sup> *Blum v. Van Vechten*, *supra*. See, also, *Ex parte Tillman*, 93 Ala. 101, 9 South. 527; *People’s Bank of Bell v. Calhoun*, 102 U. S. 256, 26 L. Ed. 101 (“it was for the court having possession to determine how far it would permit any other court to interfere with that possession, and what effect it would give to the attempt of another court to seize the property so under its control”).

<sup>75</sup> *Cohnen v. Sweeney*, 105 Mich. 643, 63 N. W. 641 (the assets were shown to be in excess of the debt which the receiver was to satisfy); approved in *Citizens’ Com. & Sav. Bank v. Bay Circuit Judge*, 110 Mich. 633, 68 N. W. 649 (if there is no abuse of discretion in granting the order, it will not be set aside on appeal); *Van Bianchi v. Wayne*, 124 Mich. 462, 83 N. W. 26 (see for the effect of statute); *Yeiser v. Cathers*, 5 Neb. (Unof.) 204, 97 N. W. 840. When nothing remains to be done but pay the money upon final decree, a creditor of the person entitled may garnishee the receiver: *Robertson v. Detroit Pattern Works*, 152 Mich. 612, 15 Ann. Cas. 131, 116 N. W. 196; *People v. Wipfler*, 167 Mich. 13, 132 N. W. 444.

<sup>76</sup> *Ex parte Tillman*, 93 Ala. 102, 9 South. 527 (“unquestionably the chancery court had authority to permit the levies of the attachments, and, had they been levied by leave of the court first obtained, the levies would have been legal and valid”). See, also, *Wallace v. Wallace*, 21 App. Div. 542, 48 N. Y. Supp. 592.

<sup>77</sup> *Russell v. Millett*, 20 Wash. 212, 55 Pac. 44; see, also, *Smith v. People*, 93 Ill. App. 135. But this is expressly denied by *Campbell, J.*, in *People v. Brooks*, 40 Mich. 333, 29 Am. Rep. 534.

§ 1587. (§ 166.) **Property in Receiver's Possession not Subject to Sale Under Execution.**—It is a general rule that property in the hands of a receiver is not subject to execution sale without leave of the court.<sup>78</sup> The reason for the rule is thus given: "When a court of equity has undertaken to adjudicate upon and distribute a fund among the parties entitled to it, it would be inconvenient if a court of law (or any other court) could by its process interrupt the adjudication and create new rights in the property itself."<sup>79</sup> The argument that a sale on execution of land in the possession of a receiver

<sup>78</sup> *Russell v. East Anglian R'y*, 3 Maen. & G. 104; *Wiswall v. Sampson*, 14 How. 52, 65, 14 L. Ed. 322; *State of Georgia v. Jesup*, 106 U. S. 458, 464, 27 L. Ed. 216, 1 Sup. Ct. 363; *Wheeler v. Walton ete. Co.*, 65 Fed. 720; *In re Hall & Stilson Co.*, 73 Fed. 527; *Dugger v. Collins*, 69 Ala. 324; *Premier Steel Co. v. McElwaine-Richards Co.*, 144 Ind. 614, 43 N. E. 876; *Chalmers v. Littlefield*, 103 Me. 271, 69 Atl. 100; *In re Abbott*, 187 Mich. 229, 153 N. W. 795; *Gardner v. Caldwell*, 16 Mont. 221, 40 Pac. 590, and numerous authorities reviewed; *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400, 15 N. E. 65; *Skinner v. Maxwell*, 68 N. C. 400; *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 Am. St. Rep. 837, 31 S. E. 855; *Grosscup v. German Sav. & Loan Soc. (C. C. Or.)*, 162 Fed. 947; *Robinson v. Atlantic & G. W. R. Co.*, 66 Pa. St. 160; *Thompson v. McCleary*, 159 Pa. St. 189, 28 Atl. 254; *Edwards v. Norton*, 55 Tex. 405; *Russell v. Texas & P. R. Co.*, 68 Tex. 646, 5 S. W. 686; *Ellis v. Vernon ete. Co.*, 86 Tex. 109, 23 S. W. 858; *Hammond v. Tarver*, 11 Tex. Civ. App. 48, 31 S. W. 841. For limitations on the rule, see *Hickox v. Holladay*, 29 Fed. 226, 233 (following *Wiswall v. Sampson*, but with reluctance); *Petaluma Sav. Bk. v. Superior Court*, 111 Cal. 488, 44 Pac. 177; *Chautauqua Co. Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347; *In re Loos*, 50 Hun, 67, 3 N. Y. Supp. 383; *Wilkinson v. Pad-dock*, 57 Hun, 191, 11 N. Y. Supp. 442, affirmed on appeal, 125 N. Y. 748, 27 N. E. 407; *St. Louis ete. R. Co. v. Whitaker*, 68 Tex. 630, 5 S. W. 448; *Cherry v. Western Washington I. E. Co.*, 11 Wash. 586, 40 Pac. 136; *Cass v. Sutherland*, 98 Wis. 551, 74 N. W. 337. It has been held proper for the court to allow an attachment to issue to reach particular property claimed by the creditor: *State ex rel. Newell v. District Court*, 37 Utah, 418, 108 Pac. 1121.

<sup>79</sup> *Skinner v. Maxwell*, 68 N. C. 404.

occasions no interference with the possession of the receiver, and hence no contempt of the authority of the court, does not meet the objection.<sup>80</sup> "The end sought by the rule is not only the avoidance of conflict in the jurisdiction of the courts, but the preservation of the interests of creditors and debtor. These interests have been intrusted to the court of equity, which affords a more comprehensive and perfect system of justice than the court of law, in order that all may be guarded and protected, each with reference to every other." Further, sales on execution of property in a receiver's hands would usually be sales at a sacrifice, and redemption from such sales attended with embarrassment.<sup>81</sup>

<sup>80</sup> *Wiswall v. Sampson*, 14 How. 52, 66, 14 L. Ed. 322. "The property is a fund in court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And, in order to effect this, the court must administer it independently of any rights acquired by third persons, pending the litigation. Otherwise, the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless." See, also, *Dugger v. Collins*, 69 Ala. 324.

<sup>81</sup> *Premier Steel Co. v. McElwaine-Richards Co.*, 144 Ind. 614, 43 N. E. 876, per Hackney, C. J., who continues: "If the right of the lower court was to direct the sale by its own officer, and upon execution, as in other instances, that right would be in utter disregard of the condition of the estate as to the ability of the receiver to realize by certificates, rentals, or other means, permitted by the court in possession, sums sufficient to pay the appellee's claim and extinguish the lien. Any possible right of the receiver to redeem would be embarrassed by additional costs and ultimate losses to the general creditors, and a redemption by any creditor would not only meet the same embarrassment, but it would result either in giving such redeeming creditor an advantage over other creditors, or of redeeming to his own inconvenience, that all creditors might be protected. If the whole subject were within the control of the court appointing the receiver, the lienholder's interests could be protected by his right

The rule is not to be understood as absolutely preventing the acquisition of new rights to the fund in controversy after the commencement of the proceedings. Any person claiming to have acquired such an interest, while he cannot interfere under the process of another court, may, under the old equity practice, apply to the court which has jurisdiction of the fund, *pro interesse suo*, and his claim will be heard.<sup>82</sup> The same result can now be accomplished by a petition and motion in the cause;<sup>83</sup> and in administering the fund, the court will take care that the rights of prior liens or encumbrances shall not be destroyed; and will adopt proper measures, by reference to the master or otherwise, to ascertain them, and bring them before it.<sup>84</sup> In some cases, where the property in dispute is ample, and the litigation protracted, it may be fit and proper for the court to permit the execution to issue; but such proceedings should be under the

of priority to the proceeds of any sale; the opportunity for competition in selling at private sale would be afforded; the wisdom of the chancellor would be taken upon the prudence and fairness of the sale and the adequacy of the consideration; costs would be spared, and redemption complications avoided." See, also, *Gardner v. Caldwell*, 16 Mont. 221, 40 Pac. 590. In *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 *Am. St. Rep.* 837, 31 S. E. 855, Douglas, J., says of the doctrine permitting the sale of real estate, provided it does not interfere with the actual possession of the receiver: "Its practical effect would be either to permit outside parties to stop all further proceedings of a court of equity by disposing of the subject-matter in controversy, or else to put that court in the position of holding simply the naked possession of property and gravely proceeding to determine who would have been entitled to the property if it had not been sold!"

<sup>82</sup> *Skinner v. Maxwell*, 68 N. C. 400, 404; *Wiswall v. Sampson*, 14 How. 52, 65, 14 *L. Ed.* 322; *Dugger v. Collins*, 69 Ala. 324.

<sup>83</sup> *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 *Am. St. Rep.* 837, 31 S. E. 855; and other cases *supra*, in note 78.

<sup>84</sup> *Wiswall v. Sampson*, 14 How. 52, 66, 67, 14 *L. Ed.* 322; *In re Hall & Stillson Co.*, 73 Fed. 527, 536.



control of the discretion of the court, as the condition of the title to the property may frequently be so complicated and embarrassed, that unless the sale is withheld until the title is cleared up by the judgment of the court, great sacrifice must necessarily ensue to the parties interested;<sup>85</sup> and authority to issue an execution on a prior judgment should be withheld, in absence of a satisfactory showing that there is any urgent necessity for a speedy sale, or that the petitioner will be prejudiced by allowing the receiver to administer the estate and to distribute the fund with due regard to priority of claims.<sup>86</sup>

Giving consent to making the receiver a party defendant to an action in another court to establish a lien against the property does not authorize such other court to order a sale of the property on execution.<sup>87</sup>

It is held that the doctrine of non-interference does not extend so far as to prevent a sale, without leave, of property to which the receiver was not entitled under the order of appointment;<sup>88</sup> and it appears to be held in California that the appointment of a receiver of the separate real estate of the husband in an action for divorce, in order to enforce a decree for alimony awarded

<sup>85</sup> *Wiswall v. Sampson*, 14 How. 52, 68, 14 L. Ed. 322; *In re Hall & Stillson Co.*, 73 Fed. 527, 536 (refusing leave to issue execution, where property not ample to meet all claims, and title embarrassed). Leave was granted in *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 Am. St. Rep. 837, 31 S. E. 855; *In re Thompson*, 10 App. Div. 40, 41 N. Y. Supp. 740; *Case v. Sutherland*, 98 Wis. 551, 74 N. W. 337; and *Cohen v. Gold Creek etc. Co.*, 95 Fed. 580 (receiver showing no diligence in executing the trust).

<sup>86</sup> *Wheeler v. Walton etc. Co.*, 65 Fed. 720. That the petition should not be determined without notice to the parties in the original suit, see *In re Hall & Stillson Co.*, 69 Fed. 425.

<sup>87</sup> *Premier Steel Co. v. McElwaine-Richards Co.*, 144 Ind. 614, 43 N. E. 876.

<sup>88</sup> *St. Louis etc. R. Co. v. Whitaker*, 68 Tex. 630, 5 S. W. 448.

to the wife, does not prevent the enforcement of a judgment lien upon such real estate by a judgment creditor of the husband, whether such lien be prior or subsequent to the lien of the decree for alimony, and it is not necessary that there should be an application by such judgment creditor to the court appointing the receiver before proceeding to sell such real estate under execution.<sup>89</sup>

§ 1588. (§ 167.) **Same; Illustrations; Execution Sales Under Subsequent, and Under Prior, Liens.**—When, on a creditor's bill, the judgment debtor has made an assignment of all his property to the receiver, under an order of court, a subsequent judgment against the receiver does not bind the land, since the debtor has no title or interest left to which the judgment could attach; and, therefore, a sale on execution levied under such subsequent judgment is void as against a sale by the receiver.<sup>90</sup> But such an assignment or conveyance to the receiver is not necessary in order to invalidate execution sales upon judgments recovered during the receivership. Thus, the purchaser at an execution sale of property in the possession of a receiver for the purpose of collecting the rents, on a judgment recovered subsequent to the appoint-

<sup>89</sup> *Petaluma Savings Bank v. Superior Court*, 111 Cal. 488, 44 Pac. 177. It is difficult to determine from the opinion of Beatty, C. J., whether this rule is limited to receivership in this particular class of actions. If intended to be of general application, it is, of course, contrary to the whole current of authority. *Wiswall v. Sampson* is distinguished (pp. 500, 501) on the ground that there the fund sought to be reached on execution was "the creation of the court appointing the receiver, and was necessarily subject to its disposition." In considering the weight to be attached to this decision it is well to remember that the supreme court of California has, in several cases, taken an extremely narrow view of the receiver's title, in apparent indifference to the consensus of opinion elsewhere.

<sup>90</sup> *Chautauqua County Bank v. White*, 6 N. Y. 236, 57 Am. Dec. 442.

ment, takes no title;<sup>91</sup> and the same is true when the judgment was recovered before the appointment, but no lien was acquired by levy upon the land until after the receiver had taken possession.<sup>92</sup> Such levy and sale is not only ineffectual to pass title, but may be restrained on the receiver's petition as an interference with his control; thus, a levy, subsequent to the appointment of a receiver of all the mortgaged property of a company, upon land which was covered by the mortgage, was set aside, and further proceedings under the execution restrained, although the judgment upon which the execution was issued was recovered before the appointment of the receiver;<sup>93</sup> and a receiver having in custody property of a corporation may restrain execution against such property on a subsequent judgment.<sup>94</sup>

Where, on the other hand, the property in the hands of the receiver is subject to a prior lien, the question of the right and power of the holder of such lien to enforce it without the consent of the court which has appointed the receiver is one of much difficulty, and has given rise to some conflict of decision. The weight of authority, notwithstanding some vigorous dissent, appears to support the negative of this question. The facts in the leading

<sup>91</sup> *Edwards v. Norton*, 55 Tex. 405; see, also, *Russell v. Texas P. R. R. Co.*, 68 Tex. 646, 5 S. W. 686.

<sup>92</sup> *Dugger v. Collins*, 69 Ala. 324.

<sup>93</sup> *Robinson v. Atlantic & G. W. R. Co.*, 66 Pa. St. 160. The court says: "If the property might be taken piecemeal from the custody of the receiver, the remedy of the creditors under the mortgage would become worthless, or at least greatly imperiled. . . . If a creditor believes that the property was not legally mortgaged, or for any good reason should not pass into the hands of the receiver, his duty is to apply to the court having appointed the receiver to ask its discharge out of custody in order that he may proceed against it."

<sup>94</sup> *Gardner v. Caldwell*, 16 Mont. 221, 40 Pac. 590, and cases cited; *Thompson v. McCleary*, 159 Pa. St. 189, 28 Atl. 254 (decree without prejudice to the defendants' right to apply to the proper court).

case<sup>95</sup> have been thus stated (the action was ejectment): "The demanded premises in that action had belonged to Ticknor, who had conveyed them in fraud of creditors to Day prior to December, 1840. At that date plaintiff's lessors recovered a money judgment against Ticknor, execution upon which was returned *nulla bona*. In 1842 another creditor recovered judgment against Ticknor and thereafter commenced a suit in equity to set aside the conveyance to Day. He succeeded in his action, and after the conveyance was set aside a receiver of the property was appointed. While the receiver was in possession plaintiff's lessors, without leave asked or granted, sold it under an *alias* execution issued upon his judgment of 1840. The defendant in the ejectment suit claimed under the receiver, and it was held in his favor that the execution sale passed no title." A few years later the court of appeals of New York reached an opposite conclusion in a case presenting facts very similar.<sup>96</sup> "The opinion in that case lays down the broad doctrine that, if a judgment creditor have a lien upon real estate by virtue of his judgment at the time of the appointment of a receiver, he may be guilty of contempt by the attempt to enforce the collection of his judgment by a sale under execution, but that, if the sale be made, it is neither illegal nor void. The facts of the case were that a judgment creditor, where execution had been returned unsatisfied, sued his debtor to set aside a fraudulent assign-

<sup>95</sup> *Wiswall v. Sampson*, 14 How. 52, 14 L. Ed. 322 (December term, 1852), opinion by Justice Nelson. The cases holding the affirmative of the question usually attempt to distinguish this case, and limit it to its particular facts. The summary of the facts is taken from the opinion of Beatty, C. J., in *Petaluma Sav. Bank v. Superior Court*, 111 Cal. 488, 500, 44 Pac. 177.

<sup>96</sup> *Chautauqua County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347. The summary of this case is taken from the opinion of Gaines, J., in *Ellis v. Vernon Ice, Light and Water Co.*, 86 Tex. 109, 23 S. W. 658.



ment of real estate, and had a receiver appointed. He prevailed in his suit, and, by order of the court, the receiver sold the property. A few days after the same property was sold under an execution issued upon a judgment against the same debtor, which was rendered before the appointment of a receiver, and which was a lien upon the property. The court held that the purchaser at the sheriff's sale took a good title. The judgment which was sought to be collected by the suit in which the receiver was appointed was older than the judgment under which the property was sold by the sheriff, and was also a lien upon the property. But the court was of opinion that the defendant, who claimed through the receiver, took only such title as was conveyed to the receiver by the deed of the party over whose property he was appointed, and that this conveyance passed the property subject to the lien of the judgment under which it was sold by the constable, and that, therefore, the purchaser at execution sale took the superior title. It appears that the laws of New York required a conveyance to the receiver, in order to perfect his control over real estate, but that in case of personal property no such conveyance was necessary. Subsequently, in *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400, 15 N. E. 65, the same court held that where the sheriff had a levy upon personal property, and a receiver was subsequently appointed, a sale by the sheriff after the appointment, without leave of the court, was wholly illegal and void. If these decisions can be reconciled, it must be upon the ground that under the laws of that state the receiver derives his title to real estate only through the conveyance of the defendant in the action, and that, because such conveyance is not necessary as to personal property, a different rule applies. In *re Loos*, 50 Hun, 67, 3 N. Y. Supp. 383.<sup>97</sup>

<sup>97</sup> The doctrine of *Walling v. Miller* appears to be limited by a later case, in which it was claimed by a receiver that a sale of the

It would seem, however, that in *Walling v. Miller* the court intended to overrule the case of *Bank v. Risley*, although they do not expressly say so. In the later case they rely upon *Wiswall v. Sampson*," the authority of which was expressly denied in *Chatauqua Bank v. Risley*. The case from the opinion in which the above extract is taken,<sup>98</sup> was one of an execution of sale of land belonging to a corporation, subsequent to the appointment, under a levy made prior to the appointment of a receiver of the corporation. The court, holding such sale ineffective to pass title, says, with much force: "To permit the control of a receiver to be interfered with by virtue of process from another court would be a practice fraught with injustice, and productive of confusion; and that remark applies with especial force to the receivers of insolvent corporations. After all the assets of a corporation have been taken from its managers, and placed under the control of a receiver, is it just to allow its property to be sold under execution? The court, having deprived the corporation of the power of paying the debt and of avoiding the sale, should, in the interest of all concerned, pro-

property of the corporation under an execution after his appointment was absolutely void, but the court held that, as the sheriff had seized the property, and had it in his possession at the time of the appointment of the receiver, the sale was not void, but, at most, should be held simply voidable: *Varnum v. Hart*, 119 N. Y. 101, 23 N. E. 183, as explained in *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271. See, also, *Smith v. Davis*, 63 Hun, 100, 17 N. Y. Supp. 614 (receiver not in possession of the property on which execution was levied, and claimed no right or interest in it).

It was held in an early New York case that the levy and sale by the sheriff of real estate in the receiver's possession, upon a prior judgment which was a lien on the land, did not disturb the receiver's possession, and was not a contempt of court: *Albany City Bank v. Schermerhorn*, 9 Paige, 372, 38 Am. Dec. 551; 10 Paige, 263; see criticism of this case in *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 Am. St. Rep. 837, 31 S. E. 855.

<sup>98</sup> *Ellis v. Vernon Ice, L. & W. Co.*, 86 Tex. 109, 23 S. W. 858.

teet its property from the sacrifice." Further cases to the same effect are cited in the note.<sup>99</sup>

The affirmative of the question under consideration has, however, received vigorous support. Thus, it is held that where the property of an insolvent foreign corporation has been seized by the sheriff under a warrant of attachment issued by a state court in an action which was afterwards prosecuted to judgment, and execution issued and levy made upon the property seized, a receiver appointed subsequent to the attachment by the United States circuit court of the district in which such property is situated cannot obtain a summary order to the sheriff to surrender the seized property.<sup>100</sup> In a series of cases in Washington it is held that where a creditor has attached property, the court has no authority to direct a receiver appointed in an action other than the attachment suit to take possession of the attached property, as the attachment creditor has not only the right to have his debt paid out of the proceeds of such property, but to have the sheriff retain it intact in the meantime, under ordinary circumstances;<sup>101</sup> and that

<sup>99</sup> *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 Am. St. Rep. 837, 31 S. E. 855 (holding that land belonging to an insolvent corporation cannot, as a matter of right and without leave of the court, be sold, after the appointment of a receiver, upon a valid judgment obtained before such appointment); *State of Georgia v. Jesup*, 106 U. S. 458, 27 L. Ed. 216, 1 Sup. Ct. 363, as explained in *In re Hall & Stillson Co.*, 73 Fed. 527, 535; *Wheeler v. Walton etc. Co.*, 65 Fed. 720 (execution sale not permitted without urgent reasons); *Earle v. Commonwealth*, 178 U. S. 449, 44 L. Ed. 1146, 20 Sup. Ct. 915.

<sup>100</sup> *Cole v. Oil-Well Supply Co.*, 57 Fed. 534. See, also, *In re Hall & Stillson Co.*, 73 Fed. 527.

<sup>101</sup> *State v. Superior Court of Snohomish County*, 7 Wash. 77, 34 Pac. 430; *State v. Superior Court of Chehalis County*, 8 Wash. 210, 25 L. R. A. 354, 35 Pac. 1087. In the latter case, *Wiswall v. Sampson* is distinguished on the ground that the receiver there was in actual possession. See further as to this case, the later case of *State*

where a judgment was recovered and execution levied on land prior to the appointment of the receiver of a corporation, the judgment creditor may lawfully proceed to a sale, and the purchaser thereunder is entitled to a deed from the sheriff.<sup>102</sup> A similar view is held in California, at least in relation to the receivership of the estate of the husband in an action for divorce.<sup>103</sup>

On the whole, it may be said that the doctrine of *Wiswall v. Sampson*, in the fifty years of the history of that case, has been generally accepted in the full breadth and scope with which it was laid down. Reasons of convenience are in its favor; and its proper application can never result in "the hardship on judgment creditors" which would ensue "if they could be restrained from enforcing collection of a judgment and lien given by the court indefinitely."<sup>104</sup>

*v. Superior Court of King County*, 11 Wash. 63, 39 Pac. 244, holding that he may be allowed, under some circumstances, to take possession of the property affected by the prior lien.

<sup>102</sup> *Cherry v. Western Washington I. E. Co.*, 11 Wash. 586, 40 Pac. 136.

<sup>103</sup> *Petaluma Savings Bank v. Superior Court*, 111 Cal. 488, 44 Pac. 177. Mr. High, in the third edition of his work on Receivers (§ 141, note), gives the weight of his opinion in support of the right of the prior lienholder: "The cases of *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400, 15 N. E. 65, and *Ellis v. Vernon I. L. & W. Co.*, 86 Tex. 109, 23 S. W. 858, may be regarded as extending the doctrine of non-interference with the receiver's possession to its extreme limits, since the lien of the judgment creditor having been perfected by levying his execution before the appointment of the receiver, it would seem, upon principle, to be the better doctrine that the rights thus acquired are paramount to the receivership, and that the judgment creditor should be permitted to proceed with his levy and sale, without being required to seek relief in the cause in which the receiver is appointed." But, it may be asked, has not the learned author, in thus speaking of these cases as a new departure, overlooked the leading case on the whole subject, *Wiswall v. Sampson*?

<sup>104</sup> *Clark, J.*, concurring in result in *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 Am. St. Rep. 837, 31 S. E. 855.



§ 1589. (§ 168.) **Property in Receiver's Possession cannot be Seized for Taxes.**—The principle that the receiver's possession is exclusive, and will be protected from interference without leave of the court whose hand he is, is strikingly illustrated by the rule, firmly established in the federal courts, that property in the receiver's possession is exempt from levy and sale by state officers in collection of taxes.<sup>105</sup> Such levy and sale may

<sup>105</sup> In *In re Tyler*, 149 U. S. 164, 13 L. Ed. 689, 13 Sup. Ct. 785, the court states: "The general doctrine that property in the possession of a receiver appointed by a court is *in custodia legis*, and that unauthorized interference with such possession is punishable as a contempt, is conceded, but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly, property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever except judicial costs, where the property is rightfully in the custody of the law; but this does not justify a physical invasion of such custody, and a wanton disregard of the orders of the court in respect of it. The maintenance of the system of checks and balances characteristic of republican institutions requires the co-ordinate departments of government, whether federal or state, to refrain from any interference with the independence of each other; and the possession of property by the judicial department cannot be arbitrarily encroached upon, save in violation of this fundamental principle.

"The levy of a tax warrant, like the levy of an ordinary *fiery facias*, sequesters the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and, while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done, and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty—an assumption carrying a contempt upon its face." See *King v. Wooten*, 2 U. S. App. 651, 54 Fed. 612, 4 C. C. A. 519; *Ex parte Chamberlain*, 55 Fed. 706; *Oakes v. Myers*, 68 Fed. 807; *contra*, *Central Trust Co. v. Wabash etc. Co.*, 26 Fed. 11. In *Coy v. Title Guarantee & Trust Co.*, 212 Fed. 520, it was held that assessment

be enjoined,<sup>106</sup> and the officer making the same may be punished for contempt;<sup>107</sup> and it is held that such sale is void and confers no title upon the purchaser,<sup>108</sup> and that a judgment for the amount of the taxes may be removed as a cloud upon title.<sup>109</sup> This conclusion, says Chief Justice Fuller, "does not involve interruption in the payment of taxes, or the displacement or impairment of the lien therefor; but, on the contrary, it makes it the imperative duty of the court to recognize as paramount, and enforce with promptness and vigor, the just claims of the authorities for the prescribed contributions to state and municipal revenue."<sup>110</sup> The usual and proper

proceedings could be conducted without an order of court. For state courts following the same rule, see *Blakistone v. State*, 117 Md. 237, 83 Atl. 151; *Cleveland v. McCravy*, 46 S. C. 252, 24 S. E. 175; *Weaver v. Duncan* (Tenn. Ch. App.), 56 S. W. 39.

<sup>106</sup> In *re Tyler*, *supra*; *Ex parte Chamberlain*, 55 Fed. 706; *Oakes v. Myers*, 68 Fed. 807; *Burleigh v. Chehalis County*, 75 Fed. 873, 34 L. R. A. 393; *Clark v. McGhee*, 87 Fed. 789, 31 C. C. A. 321; *Virginia, T. & C. Co. v. Bristol Land Co.*, 88 Fed. 134 (the receiver may apply for the injunction by petition in the original suit).

<sup>107</sup> In *re Tyler*, *supra*.

<sup>108</sup> *Virginia, T. & C. Co. v. Bristol Land Co.*, 88 Fed. 134.

<sup>109</sup> *Burleigh v. Chehalis County*, 75 Fed. 873, 34 L. R. A. 393.

<sup>110</sup> In *re Tyler*, *supra*. See *Ex parte Chamberlain*, 55 Fed. 704-706, stating: "There can be no doubt that property in the hands of a receiver of any court, either of a state or of the United States, is as much bound for the payment of taxes, state, county and municipal, as any other property. Persons cannot, by coming into this court, and, for the promotion of their interests, applying for and obtaining the appointment of receivers, obtain exemption from the paramount duty of a citizen. For this reason, receivers in this district pay all just and lawful taxes without asking or needing the sanction of the court, and in their accounts such payments are passed without question. But, on the other hand, receivers are not bound to pay a tax in their judgment unlawful, without the order of the court; and when they consider the legality of the tax questionable it is their right—their manifest duty—to apply to the court either for instruction or protection. Especially is this the case when the question arises between the receiver and persons in the state, county, and

course pursued by the tax officer is by intervention in the receivership suit.<sup>111</sup>

§ 1590. (§ 169.) **Other Forms of Interference; Strikes; Arrest; etc.**—Conspiracies by striking workmen to interfere with the operation of railroads in the hands of receivers have been the subject of much adjudication within recent years. While this subject may more appropriately be taken up in another connection, the rule should here be noted that any willful attempt by anyone, with knowledge that the road is in the hands of the court, to prevent or impede the receiver from complying with the order of the court in running the road, when the attempt is unlawful, and as between private individuals would give a right of action for damages, is a contempt of the order of the court.<sup>112</sup>

Immunity from arrest is extended to the receiver for acts done in discharge of the duties imposed upon him by the court, though not for acts done in violation of the ordinary criminal statutes of a state.<sup>113</sup> Distraining

municipal government as to the proper construction to be given to the law, upon which individuals may well differ, and it is his right and manifest duty to go to the court, whose creature he is, for instruction. He [the receiver] therefore pursued the proper course when he came in by this petition." See, also, to the same effect, *Lamkin v. Baldwin ete. Co.*, 72 Conn. 59, 44 L. R. A. 786, 43 Atl. 593; *Greeley v. Provident Sav. Bank*, 98 Mo. 458, 11 S. W. 980.

<sup>111</sup> *In re Tyler*, *supra*; *Spalding v. Commonwealth*, 88 Ky. 135, 10 S. W. 420 (the court may grant leave to sue the receiver in such case); *Weaver v. Duncan* (Tenn. Ch. App.), 56 S. W. 39 (same).

<sup>112</sup> *Thomas v. Cincinnati, N. O. & T. P. R'y Co.*, 62 Fed. 803, per Taft, Cir. J.; *Secor v. Railroad Co.*, 7 Biss. 513, Fed. Cas. No. 12,605; *In re Doolittle*, 23 Fed. 544; *United States v. Kane*, 23 Fed. 748; *In re Wabash R. Co.*, 24 Fed. 217; *In re Higgins*, 27 Fed. 443; *Beers v. Wabash, St. L. & P. R. Co.*, 34 Fed. 244; *In re Acker*, 66 Fed. 290. On the general subject of injunctions in strike cases, see *post*, chapter XXVIII.

<sup>113</sup> *United States v. Murphy*, 44 Fed. 39, holding arrest a contempt.

for rent upon property in the receiver's possession, without leave;<sup>114</sup> searching premises in his possession without a warrant, and seizing goods therein;<sup>115</sup> and removing a building from the premises<sup>116</sup>—clearly constitute acts of contempt. It is held, in England, that a libel on the business conducted by a receiver and manager amounts to a contempt, in a case where a former clerk of the firm sent around a circular to the customers of the firm, containing an unfair statement of the effect of the order appointing the receiver, and soliciting their custom for his own business.<sup>117</sup>

It has been held, following the analogy of the cases concerning execution sales of lands and other property in the receiver's hands, that the sale of such lands under a power in a trust deed which is a first lien thereon is void, even though it was error for the court not to permit such sale.<sup>118</sup> But those cases do not apply to prevent a sale of property of which the receiver had no possession or right of possession, as where a corporation contracted to purchase certain personal property, and afterwards refused to take and pay for it according to the contract, and the vendor, after the subsequent appointment of a receiver of the corporation, and upon notice to him, elected to sell the property and hold him for the balance.<sup>119</sup>

<sup>114</sup> *Noe v. Gibson*, 7 Paige, 513.

<sup>115</sup> *In re Swan*, 150 U. S. 637, 37 L. Ed. 1207, 14 Sup. Ct. 225.

<sup>116</sup> *Delozier v. Bird*, 123 N. C. 689, 31 S. E. 834.

<sup>117</sup> *Helmores v. Smith*, 35 Ch. D. 449. Also, tampering with the receiver's employees and inducing them to join a rival business was restrained by injunction in *Dixon v. Dixon*, [1904] 1 Ch. 161.

<sup>118</sup> *Scott v. Crawford*, 16 Tex. Civ. App. 477, 41 S. W. 697.

<sup>119</sup> The receiver "had only the right to receive the property purchased by the corporation upon paying the agreed price. No fund or property that had passed into the hands of the receiver was attempted to be disposed of or sold": *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271.



§ 1591. (§ 170.) **Conflicting Appointments of Receivers.**—It often happens that proceedings looking toward the appointment of receivers are instituted in courts having the same territorial jurisdiction, existing side by side. Examples of courts having concurrent territorial jurisdiction are the courts of the state and the courts of the United States within the district; or the courts of different counties or judicial districts in the state whose territorial jurisdiction extends throughout the state. In such cases considerable confusion and diversity of opinion have existed among different courts as to the principles which should control. The following results are probably sustained by the better reasoning and authority: 1. Where, in the first proceeding, the court has actually got possession through its receiver or other process *in rem* of the thing before the second proceedings are begun, that possession will not be disturbed by the second court.<sup>120</sup> 2. Where the first proceeding

<sup>120</sup> *Baltimore & O. R. R. v. Wabash R. R. Co.*, 119 Fed. 678; *Merritt v. American Steel Barge Co.*, 79 Fed. 228, 24 C. C. A. 530; *Knott v. Evening Post Co.*, 124 Fed. 342; *Gaylord v. Fort Wayne etc. R. R. Co.*, 6 Biss. 286, Fed. Cas. No. 5284; *Shields v. Coleman*, 157 U. S. 168, 39 L. Ed. 660, 15 Sup. Ct. 570; *Moran v. Sturgis*, 154 U. S. 256, 38 L. Ed. 981, 14 Sup. Ct. 1019, citing many authorities; *Byers v. McAuley*, 149 U. S. 608, 37 L. Ed. 367, 13 Sup. Ct. 906; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028, a leading case; *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257; *Interstate R'y Co. v. Philadelphia, B. & T. St. R'y Co.*, 164 Fed. 770; *Sullivan v. Algrem*, 160 Fed. 366, 87 C. C. A. 318; *Lively v. Picton*, 218 Fed. 401, 134 C. C. A. 189; *Cochran v. Pittsburg, S. & N. R. Co.*, 158 Fed. 549; *Robinson v. Mutual Reserve Life Ins. Co.*, 162 Fed. 794; *Stirling v. Seattle, R. & S. R. Co.*, 198 Fed. 913; *Dodds v. Palmer Mountain Tunnel Co.*, 188 Fed. 447; *United States Fidelity & Guaranty Co. v. First National Bank*, 239 Fed. 227, 152 C. C. A. 215; *South Penn. Oil Co. v. Miller*, 175 Fed. 729, 99 C. C. A. 305; *State ex rel. Sullivan v. Reynolds*, 209 Mo. 161, 123 Am. St. Rep. 468, 14 Ann. Cas. 198, 15 L. R. A. (N. S.) 963, 107 S. W. 487; *Jones v. Lincoln Sav. & Trust Co.*, 222 Pa. St. 325, 71 Atl. 209; *Waters-Pierce Oil Co. v. State*, 47 Tex. Civ. App. 162, 103 S. W. 836; *Kittrell v. First National Bank*

is an *in rem* proceeding or is in the nature of a proceeding *in rem*, though that court has not yet actually seized the property, the first court will retain exclusive jurisdiction.<sup>121</sup> In this connection, however, difficult ques-

of Morgan, 56 Tex. Civ. App. 395, 120 S. W. 1104. Compare Wabash R. R. Co. v. Adelbert College, 208 U. S. 38, 52 L. Ed. 379, 28 Sup. Ct. 182. In Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294, 305, 28 L. Ed. 729, 5 Sup. Ct. 135, the court says: "Where the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it for the purposes of its jurisdiction." See, also, Pulliam v. Osborne, 17 How. 471, 15 L. Ed. 154. The acts of a receiver appointed in the second suit are not void, but only voidable: Crawford v. Gordon, 88 Wash. 553, L. R. A. 1916C, 516, 153 Pac. 363. In Kansas City Pipe-Line Co. v. Fidelity Title & Trust Co., 217 Fed. 187, 133 C. C. A. 181, a suit had been started in a state court. Then suit was started in a federal court and a receiver was appointed. Then a receiver was appointed in the first suit. It was held that while the federal court had jurisdiction, it would order its receiver to turn over the property to the other receiver, reserving a lien for expenses.

**Effect of Appointment of Bankruptcy Receiver.**—Where at the time a corporation is adjudged bankrupt its property is in the hands of a receiver appointed by a state court, and a receiver is appointed by the bankruptcy court, the proper procedure is for the federal receiver to apply to the state court to make an order directing that the property in the hands of its receiver be delivered to the bankruptcy receiver. In delivering the property the state court may retain the costs and compensation for its officers: McGahee v. Cruickshank, 133 Ga. 649, 66 S. E. 776. In general, see First Nat. Bank of Quincy v. Zangwill, 61 Fla. 596, 54 South. 375. See *contra*, to the effect that the receiver appointed by the state court will retain possession: Southwell v. Church, 51 Tex. Civ. App. 547, 111 S. W. 969.

<sup>121</sup> Farmers' Loan & Trust Co. v. Lake Street Elevated R. R. Co., 177 U. S. 51, 44 L. Ed. 667, 20 Sup. Ct. 564; Guaranty T. Co. v. North Chicago St. R. Co., 130 Fed. 801; Knott v. Evening Post Co., 124 Fed. 342; State of Texas v. Palmer, 158 Fed. 705, 22 L. R. A. (N. S.) 316, 85 C. C. A. 603; McKinney v. Kansas Natural Gas Co., 206 Fed. 772; Palmer v. Texas, 212 U. S. 118, 53 L. Ed. 435, 29 Sup.

tions arise as to when the proceeding is or becomes in the nature of an *in rem* proceeding. Thus, take the ordinary case of a foreclosure proceeding, say, of a railroad, where the bill asks the final relief of sale and the intermediate relief of a receiver *pendente lite*. Of course such a proceeding is not strictly an *in rem* proceeding, because the element of notice to all the world is absent, yet it is plain that the ultimate purpose of the suit is a change in title and that as soon at least as possession is rightfully taken, the proceeding begins to assume many of the characteristics of an *in rem* proceeding. At what particular point shall we say the proceeding partakes of this character? Some courts say (a) that the *in rem* character attaches to the proceeding from the time of filing the bill;<sup>122</sup> (b) others, from the time of any order in the proceeding indicating that the court has taken jurisdiction of the case, especially if such order affects possession, as *e. g.*, where the subpoena contains a re-

Ct. 230; In *re* Schuyler's Steam Tow-Boat Co., 136 N. Y. 169, 20 L. R. A. 391, and note, 32 N. E. 623; In *re* Christian Jensen Co., 128 N. Y. 550, 28 N. E. 665; *Rogers & Baldwin Co. v. Cleveland Building Co.*, 132 Mo. 442, 53 Am. St. Rep. 494, 31 L. R. A. 335, 34 S. W. 57; *Kurtz v. Phila. etc. R. R. Co.*, 187 Pa. St. 59, 40 Atl. 988. See, also, *Harding v. Corn Products Refining Co.*, 168 Fed. 658, 94 C. C. A. 144; *Lanyon v. Braden*, 48 Okl. 689, 150 Pac. 677; *Tenth Nat. Bank v. Smith C. Co.*, 227 Pa. 354, 136 Am. St. Rep. 884, 76 Atl. 67. In Washington, the court in which the first suit for a corporation dissolution and receivership is filed has exclusive jurisdiction: *State v. Superior Court of Clallam County*, 87 Wash. 498, 151 Pac. 1094. See, also, *O'Neil v. Welch*, 245 Fed. 261, 157 C. C. A. 453. But see *Empire Trust Co. v. Brooks*, 232 Fed. 641, 146 C. C. A. 567 (court which actually acquires possession of the property first is prior in right). The court which appoints a receiver has exclusive control over his proceedings: *State ex rel. Pope v. Germania Bank*, 103 Minn. 129, 114 N. W. 651. See, also, *City Bank of Wheeling v. Bryan*, 76 W. Va. 481, L. R. A. 1915F, 1219, 86 S. E. 8.

<sup>122</sup> *Gaylord v. Fort Wayne M. & C. R. Co.*, 6 Biss. 286, Fed. Cas. No. 5284.

straining order;<sup>123</sup> (c) other cases consider that jurisdiction of the *res* attaches at the date of service of subpoena, from which time, under the chancery practice, subsequent purchasers are affected with notice;<sup>124</sup> (d) other cases hold that the court making the first appointment of a receiver shall have exclusive jurisdiction of the *res*;<sup>125</sup> (e) while still another view insists on the test of actual seizure in all cases.<sup>126</sup> A final view holds, (f) as between the immediate parties, that the exclusive jurisdiction attaches from the time of filing the bill.<sup>127</sup> It

123 *Appleton Water Co. v. Central T. Co.*, 93 Fed. 286, 35 C. C. A. 302: "The entry of an order upon filing of the bill for any purpose involved in the action, and especially one tending to the possession by the court of the *res*."

124 *Wilmer v. Atlanta etc. R. Co.*, 2 Wood, 409, Fed. Cas. No. 17,775 (opinion of Woods, C. J.); *Adams v. Mercantile Trust Co.*, 66 Fed. 621, 15 C. C. A. 1; *Illinois Steel Co. v. Putnam*, 68 Fed. 515, 15 C. C. A. 556; *Farmers' Loan & Trust Co. v. Lake Street Elev. R. R. Co.*, 177 U. S. 51, 61, 44 L. Ed. 667, 20 Sup. Ct. 564; *Haughwout v. Murphy*, 22 N. J. Eq. 536, 545; *Gluck & Becker on Receivers*, 2d ed., 99; *Bell v. Ohio L. & T. Co.*, 1 Biss. 260, Fed. Cas. No. 1260.

125 *In re Schuyler's Steam Tow-Boat Co.*, 136 N. Y. 169, 20 L. R. A. 391, 32 N. E. 623; *In re Christian Jensen Co.*, 128 N. Y. 550, 28 N. E. 665.

126 *Bradley, C. J.*, in *Wilmer v. Atlanta etc. Co.*, 2 Wood, 410, Fed. Cas. No. 17,775; *Thompson on Corporations*, § 6855; *East Tenn. etc. R. Co. v. Atlanta etc. R. Co.*, 49 Fed. 608, 15 L. R. A. 109; *Knott v. Evening Post Co.*, 124 Fed. 342.

127 *Farmers' Loan & Trust Co. v. Lake Street Elev. R. R. Co.*, 177 U. S. 48, 60, 44 L. Ed. 667, 20 Sup. Ct. 564. In this case the bill was filed first in the federal court praying foreclosure, but before service, a summons was served in an action in the state court begun by defendant to restrain plaintiff from proceeding to foreclose, alleging conspiracy, etc. The court said "*As between the immediate parties in a proceeding in rem*, jurisdiction must be regarded as attaching when the bill is filed and process has been issued." Cf. *United States v. Supervisors of Johnson Co.*, 6 Wall. 196, 18 L. Ed. 768. It will be noted that in many of the cases, priority is determined by a small fraction of a day: *East Tennessee etc. R. Co. v. Atlanta etc. R. Co.*, 49 Fed. 608, 15 L. R. A. 109; *North v. Piedmont Bank of Mor-*



would seem, in the absence of authority, that the question should be governed by the principles regarding notice,<sup>128</sup> in which event only those dealing with the property after service of subpoena would have constructive notice of the bill, and this is probably the prevailing rule. 3. Where the first proceeding is not *in rem* in its nature, and the effect of the proceeding will not be to disturb the title of the *res*, a receiver may be appointed of the entire property, notwithstanding the pendency of the prior proceeding. For example, a receiver is sought to manage the affairs of an insolvent corporation until such time as the corporation itself can pay its debts and resume the management of its property; there is no reason why a receiver should not be appointed in proceedings which, though subsequently begun, have as their object the final disposition of the property.<sup>129</sup> This

ganton, 121 N. C. 343, 28 S. E. 488. In *New York Security & T. Co. v. Saratoga G. & E. L. Co.*, 159 N. Y. 137, 45 L. R. A. 132, 53 N. E. 758, a receiver in sequestration proceedings and a receiver in foreclosure proceedings were appointed "at the same instant of time." The question involved was which receiver was entitled to certain income of the company, the foreclosure receiver claiming under a clause in the mortgage making such income subject to the lien thereof. The court holds that the lien of the mortgage, so far as concerns future earnings, is consummated only by taking possession, and there can be no retroactive operation given to his possession so as to defeat the title which the receiver in the sequestration proceedings obtained by the order of appointment.

<sup>128</sup> *Conner v. Long*, 104 U. S. 229, 26 L. Ed. 723; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749.

<sup>129</sup> In *Shields v. Coleman*, 157 U. S. 168, 4 L. Ed. 660, 15 Sup. Ct. 570, Brown, J., says: "The mere fact that, in the progress of an attachment or other like action, an exigency may arise, which calls for the appointment of a receiver, does not make the jurisdiction of the court in that respect relate back to the commencement of the action." See, also, *Guaranty T. Co. v. North Chicago St. R. Co.*, 130 Fed. 801, 65 C. C. A. 65; *Illinois Steel Co. v. Putnam*, 68 Fed. 515, 15 C. C. A. 556, holding that the filing of a bill for the appointment

important distinction between proceedings in the nature of proceedings *in rem* and other proceedings has often been overlooked, and the determination of the important question arising from different appointments by courts of concurrent jurisdiction has erroneously been made to depend on the test: which court has first obtained jurisdiction of the controversy<sup>130</sup>—and not on the true test: which court has first obtained jurisdiction of the *res*. Many of the courts have founded their decisions, properly yielding jurisdiction to the courts which had first obtained jurisdiction, upon the ground of comity, when in fact they had better have been rested upon the basis that the second court had no jurisdiction of the *res* because some other tribunal already had it.<sup>131</sup> One of the earlier cases in the United States supreme court shows the true extent of the principle, holding a sale made under an execution at law void, where the property was

of a receiver of an insolvent corporation to take charge of the assets until the corporation shall pay its debts or resume control is not such taking *in gremio legis* as to preclude another court from appointing a receiver. See, also, *De la Vergne v. Palmetto Brewing Co.*, 72 Fed. 579; *Pacific Coast Pipe Co. v. Conrad City Water Co.*, 245 Fed. 846, 158 C. C. A. 186. An instructive discussion of the nature of an *in rem* seizure will be found in *First National Bank of Oswego v. Dunn*, 97 N. Y. 149, where it is held that property held by the sheriff under a writ of replevin is *in custodia legis*, while property held on execution is not. After a receiver is discharged, another court may appoint a receiver although the first action is still pending: *Kansas City, M. & O. R'y v. Latham* (Tex. Civ.) 182 S. W. 717.

<sup>130</sup> The test is, for example, incorrectly stated in 23 Am. & Eng. Ency. of Law, 2d ed., p. 1112.

<sup>131</sup> That the rule is not a mere rule of comity but a question of jurisdiction, see *Dillon v. O. S. L. etc. R'y Co.*, 66 Fed. 622; *Baltimore & O. R. R. Co. v. Wabash R. R. Co.*, 119 Fed. 678, 57 C. C. A. 322; *Merritt v. American Steel Barge Co.*, 79 Fed. 226, 24 C. C. A. 530; *Covell v. Heyman*, 111 U. S. 176, 28 L. Ed. 390, 4 Sup. Ct. 355. Some authorities say the rule is one of comity: *Gaylord v. Fort*

in the custody of a receiver appointed by the state court in a suit in chancery.<sup>132</sup>

Wayne etc. R. Co., 6 Biss. 286, Fed. Cas. No. 5284; *De la Vergne v. Palmetto Brewing Co.*, 72 Fed. 579.

<sup>132</sup> *Wiswall v. Sampson*, 14 How. 52, 14 L. Ed. 322. See *ante*, §§ 166, 167.

## CHAPTER V.

## ACTIONS AGAINST THE RECEIVER.

## ANALYSIS.

§§ 171-179. Actions against the receiver.

- § 171. General rule; leave must be obtained from the appointing court.
- § 172. Whether leave to sue is a "jurisdictional fact."
- § 173. Suits against federal receivers; rule now modified by act of Congress.
- § 174. Same; such suits are "subject to the general equity jurisdiction" of the court of the appointment.
- § 175. Leave of court not necessary where receiver is a trespasser.
- § 176. Leave to sue receiver, when granted.
- § 177. Practice; whether by petition or independent action.
- § 178. Receiver's right to appeal.
- § 179. Judgment against receiver, how enforced; as against successor in office; in case of his discharge.

**§ 1592. (§ 171.) Actions Against Receiver—General Rule; Leave must be Obtained from Appointing Court.—**

It is a well-established rule that before suit is brought against a receiver in his official capacity, leave should be obtained from the court by which he was appointed,<sup>1</sup> in

<sup>1</sup> See the following, among a multitude of cases: *Searle v. Choate*, 25 Ch. D. 723 (suit to restrain receiver from preventing payment of rents by tenants); *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 673; affirming S. C., 3 McAr. 212, 36 Am. Rep. 104; *Porter v. Sabin*, 149 U. S. 473, 37 L. Ed. 815, 13 Sup. Ct. 1008; *People's Bank v. Calhoun*, 102 U. S. 256, 26 L. Ed. 101; *Thompson v. Scott*, 4 Dill. 508, Fed. Cas. No. 13,975; *Werner v. Murphy*, 60 Fed. 769; *Foreman v. Central Trust Co.*, 71 Fed. 776, 18 C. C. A. 321; *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296, 22 C. C. A. 334; *Stateler v. California Nat. Bank*, 77 Fed. 43; *Jones v. Schlapback*, 81 Fed. 274; *Ross v. Heckman*, 84 Fed. 6; *Ridge v. Manker* (C. C. A.), 132 Fed. 599; *Minot v. Mastin*, 95 Fed. 734, 37 C. C. A. 234; *Odell v. H. Batterman*



the absence of statutes authorizing suits without such leave. It is generally agreed that the rule applies not only to suits the object of which is to take from his possession property which he is holding by order of the court, but also to suits brought against him to recover a

Co., 223 Fed. 292, 138 C. C. A. 534; *Slade v. Massachusetts Coal & Power Co.*, 188 Fed. 369; *Talladega Mercantile Co. v. Jenifer Iron Co.*, 102 Ala. 259, 14 South. 743; *Southern Granite Co. v. Wadsworth*, 115 Ala. 570, 22 South. 157; *Montgomery v. Enslen*, 126 Ala. 654, 28 South. 626; *Links v. Connecticut River Bkg. Co.*, 66 Conn. 277, 33 Atl. 1003; *De Graffenried v. Brunswick etc. R. R. Co.*, 57 Ga. 22; *Harrell v. Atkinson*, 9 Ga. App. 150, 70 S. E. 954; *Harmon v. Best*, 174 Ind. 323, 91 N. E. 19; *Randall v. Wagner Glass Co.*, 47 Ind. App. 439, 94 N. E. 739; *Fort Wayne, M. & C. R. Co. v. Mellett*, 92 Ind. 535 (ejectment); *Keen v. Breckenridge*, 96 Ind. 69; *Wayne Pike Co. v. State*, 134 Ind. 672, 34 N. E. 440; *Meredith Village Sav. Bank v. Simpson*, 22 Kan. 414; *People ex rel. Tremper v. Brooks*, 40 Mich. 333, 29 *Am. Rep.* 534; *Burk v. Muskegon Mach. & F. Co.*, 98 Mich. 614, 57 N. W. 804; *Citizens' Com. & Sav. Bank v. Bay Circuit Judge*, 110 Mich. 633, 68 N. W. 649; *Prather Engineering Co. v. Detroit F. & S. R'y*, 152 Mich. 582, 116 N. W. 376; *Wade v. Ringo*, 62 Mo. App. 414 (leave of court obtained in vacation); *In re Commercial Bank*, 35 App. Div. 224, 54 N. Y. Supp. 722 (from what court leave must be obtained, under the New York Code); *Payne v. Baxter*, 2 Tenn. Ch. 517; *Melendy v. Barbour*, 78 Va. 544; *Jones v. Browse*, 32 W. Va. 444, 9 S. E. 873; and other cases in the notes to this and the following sections. See, also, on the general subject, monographic note, *Malott v. Shimer*, 74 *Am. St. Rep.* 285-300.

A receiver appointed by a state court cannot be sued in a federal court without the permission of the state court: *Isom v. Rex Crude Oil Co.*, 147 Cal. 663, 82 Pac. 319. But an action may be maintained in the federal court, without permission of the state court, where property in his possession is involved, but his right thereto is not: *Isom v. Rex Crude Oil Co.*, 147 Cal. 663, 82 Pac. 319.

It is held not to be essential to the validity of an order granting leave to bring an action against a receiver, that notice of the application for the order should be given to the parties in the case in which the receiver was appointed. Notice of such application to the receiver is sufficient: *Potter v. Bunnell*, 20 Ohio St. 150.

The general principle of the text is held not to apply to a suit in a federal court by the owner of a patent to restrain its infringe-

money demand or damages.<sup>2</sup> The reasons for the rule have been thus stated: "One court having custody of property through its receiver cannot admit that another court, in defiance of its orders, has power to define what are his duties with reference to such property. To admit this is substantially to say that one co-ordinate court can sue another. . . . Every consideration of economy, of

ment by a receiver of a state court, since the federal courts have exclusive jurisdiction to determine questions as to the validity and infringement of patents: *Hupfeld v. Automaton Piano Co.*, 66 Fed. 788.

In *Ratcliff v. Adler*, 71 Ark. 269, 72 S. W. 896, it was held that an appellate court will not reverse a judgment because consent was not obtained, when rendered by the same court and the same judge that has charge of the receivership proceedings.

By Texas statute, where a receiver is appointed at the suit of a junior mortgagee, other creditors may sue him to satisfy their claims without leave of court: *Houston Ice & Brewing Co. v. Clint* (Tex. Civ. App.), 159 S. W. 409.

Where statute requires suit on the bond of a public contractor to be brought in the district where the work was performed, the suit may be brought without leave of the court which appointed a receiver for the contractor: *United States v. Illinois Surety Co.*, 238 Fed. 840.

**Intervention.**—By the Indiana statute, creditors desiring to intervene in the receivership proceedings must obtain leave of court: *Pottlitzer v. Citizens' Trust Co.*, 60 Ind. App. 45, 108 N. E. 36.

It is not necessary to obtain permission of the court to sue sureties on the bond of a corporation in the hands of a receiver: *Forte v. Chamberlin*, 93 Ark. 112, 124 S. W. 234.

<sup>2</sup> For example, to suits against railroad receivers to recover damages for injuries received at the hands of the receiver's servants, or on other liabilities incurred by the receiver, see *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 673, affirming 3 McAr. 212, 36 Am. Rep. 104; *Thompson v. Scott*, 4 Dill. 508, Fed. Cas. No. 13,975 (an instructive opinion); *Jones v. Schlapbaek*, 81 Fed. 274; *De Graffenried v. Brunswick etc. R. R.*, 57 Ga. 22; *Payne v. Baxter*, 2 Tenn. Ch. 517; *Melendy v. Barbour*, 78 Va. 544. The objections to the doctrine, as applied to suits upon liabilities incurred by railroad receivers, are stated with great force in the dissenting opinion of Miller, J., in *Barton v. Barbour*, *supra*.

the prevention of vexatious litigation and conflicts of jurisdiction, would indicate the importance of protecting the exclusive possession of the receiver by an inflexible rule of law.”<sup>3</sup> It is argued that if judgments in such suits be invalid, no purpose can be effected thereby save the embarrassment of the receiver by expensive and useless litigation; that the judgments, even if repudiated, would cast a cloud upon the title to the property in the receiver’s possession and prejudice its sale; while if their validity be recognized, the court of appointment would sit merely to register and pay the judgments and decrees of other courts.<sup>4</sup> In the leading case upon the

<sup>3</sup> Meredith Village Sav. Bank v. Simpson, 22 Kan. 414, per Horton, C. J.

<sup>4</sup> Thompson v. Scott, 4 Dill. 508, Fed. Cas. No. 13,975, per Love, D. J. The opinion is so vigorous a presentation of what has come to be the generally accepted rule, that I venture to quote from it at some length: “Such judgment against the receiver would be either valid or invalid. If invalid, it follows that suits against the receiver, resulting in such judgments, would be perfectly futile and useless, and for that reason they ought to be stopped by the receiver’s court; for certainly such suits would harass and embarrass the receiver, and expose him to the heavy costs of litigation; and, if they resulted in no benefit to the parties prosecuting them, it would be simply idle, if not absurd, to allow such actions to proceed against the receiver. But, doubtless, if the doctrine of the Iowa court [Allen v. Central R. Co., 42 Iowa, 683] be sound, judgments against the receiver would be valid to all intents and purposes, and they must be so treated by all courts in which they should be pleaded. This being the case, what follows? Why, that the court of equity, having control of the fund, would have no alternative but to recognize and pay the judgments and decrees rendered elsewhere against its receiver, and if the fund consisted, in whole or in part, of real estate, the judgments against the receiver would become liens against the property, thus encumbering and casting a cloud upon the title. Under such conditions the sale of the property, under the decree of the court of equity, to satisfy its judgments, would be hopeless and ineffectual. Thus would the whole purpose of the litigation in equity and of the taking possession of property through the receiver, be utterly defeated. The absurdity of such a result requires no ex-

subject it is said: "If he [the plaintiff in a suit against the receiver] has the right, in a distinct suit, to prosecute his demand to judgment without leave of the court appointing the receiver, he would have the right to enforce satisfaction of it without leave. By virtue of his judgment he could, unless restrained by injunction, seize upon the property of the trust or attach its credits. If his judgment were recovered outside the territorial jurisdiction of the court by which the receiver was appointed, he could do this, and the court which appointed the receiver and was administering the trust assets would be impotent to restrain him. The effect upon the property of the trust of any attempt to enforce satisfaction of his judgment would be precisely the same as if his suit had been brought for the purpose of taking property from the possession of the receiver. A suit, therefore, brought without leave to recover judgment against a receiver for a money demand, is virtually a suit, the purpose of which is, and the effect of which may be, to take the property of the trust from the receiver's hands and apply it to the payment of the plaintiff's claim, without regard to the rights of other creditors, or the order of the court which is administering the trust property. We think, therefore, that it is immaterial whether the suit is

planation. . . . Again, if any and every body may sue our receiver without our consent, along the line of the road, innumerable suits may be prosecuted against him, and he may be thus exposed to the costs and expenses of ruinous litigation. Now, he is our officer, and suits would be prosecuted against him as such, and not against him as an individual. We have placed him in the breach and exposed him to a deadly fire. Shall we leave him naked to his enemies? Shall the court abandon him to his fate and compel him to pay the costs and charges of a ruinous litigation out of his own pocket? Or, if the court should authorize him to employ counsel and pay the costs of numberless suits out of the trust fund, what then? Why, it would follow that the fund in our hands might be wasted and squandered in useless and fruitless litigation," etc.



brought against the receiver to recover specific property or to obtain judgment for a money demand. In either case leave should be first obtained.”<sup>5</sup> The objection that, by leaving all questions relating to the liability of receivers in the hands of the court appointing them, persons having claims against the insolvent corporation or against the receiver will be deprived of their constitutional right to a trial by jury, is thus met, in the same case: “Those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity.”<sup>6</sup>

The consequences resulting from the prosecution of a suit against the receiver in his official capacity are, that the plaintiff in such suit may be attached as for a contempt,<sup>7</sup> or restrained by an injunction.<sup>8</sup>

§ 1593. (§ 172.) **Whether Leave to Sue is a “Jurisdictional Fact.”**—It is the rule of the federal courts, unless changed by statute, and of the courts of many of the states, that leave to prosecute a suit against a receiver, in his official capacity, without the consent of the court of appointment, is a jurisdictional fact; in other words, that want of leave not only subjects the plaintiff to liability to be attached for contempt, or to be enjoined from

<sup>5</sup> *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 673, per Woods, J.

<sup>6</sup> *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 673, per Woods, J. The text is cited to this effect in *Shedd v. Seefeld*, 230 Ill. 118, 120 Am. St. Rep. 269, 13 L. R. A. (N. S.) 709, 82 N. E. 580.

<sup>7</sup> *Lane v. Capsey*, [1891] 3 Ch. 411; *Thompson v. Scott*, 4 Dill. 508, Fed. Cas. No. 13,975.

<sup>8</sup> *Evolyn v. Lewis*, 3 Hare, 472; *Stateler v. California Nat. Bank*, 77 Fed. 43; *Jones v. Schlappack*, 81 Fed. 274; *Montgomery v. Enslen*, 126 Ala. 654, 28 South. 626.

the prosecution of his suit, but takes away the jurisdiction of the court in which the suit was brought to hear and determine it. Such leave must, therefore, be averred in the complaint.<sup>9</sup> In other courts this rule has received most earnest disapproval, both on the grounds of policy and convenience, and on the ground that it ignores and sets aside well-established principles governing the relations of courts of law to courts of equity. Says Mr. Justice Miller, in his dissenting opinion in the leading case,<sup>10</sup> already cited: "I know of no principle nor of any precedent whereby a court of law, having before it a plaintiff with a cause of action of which that court has jurisdiction, and a defendant charged in regard to his own act also within the jurisdiction, is bound or is even

<sup>9</sup> *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 673, affirming 3 McAr. 212, 36 Am. Rep. 104; *Swope v. Villard*, 61 Fed. 417; *De Graffenried v. Brunswick etc. R. R.*, 57 Ga. 22; *Martin v. Atchison*, 2 Idaho, 624, 33 Pac. 47; *Keen v. Breckenridge*, 96 Ind. 69; *Wayne Pike Co. v. State*, 134 Ind. 672, 34 N. E. 440; *Peirce v. Chism*, 23 Ind. App. 505, 77 Am. St. Rep. 441, 55 N. E. 795; *Peirce v. Jones*, 24 Ind. App. 286, 56 N. E. 683; *Manker v. Phoenix Loan Ass'n (Iowa)*, 96 N. W. 982; *Steel Brick Siding Co. v. Muskegon etc. Co.*, 98 Mich. 616, 57 N. W. 817; *Schmidt v. Gayner*, 59 Minn. 303, 61 N. W. 333, 62 N. W. 265; *Smith v. St. Louis & S. F. R'y Co.*, 151 Mo. 391, 48 L. R. A. 368, 52 S. W. 378; *Jones v. Moore*, 106 Tenn. 188, 61 S. W. 81. In *Brown v. Rauch*, 1 Wash. 497, 20 Pac. 785, a decision by a territorial court, it was held that the question of want of leave may be raised for the first time even upon appeal from a judgment against the receiver; but see *Elkhart Car Works v. Ellis*, 113 Ind. 215, 15 N. E. 249 (objection not heard upon motion in arrest of judgment). It has been held in a recent federal case that a decree against a receiver will not be held void, in a collateral proceeding, for failure affirmatively to recite that leave to sue was obtained, when the receiver appeared, defended upon the merits, and asked affirmative relief: *Ridge v. Manker (C. C. A.)*, 132 Fed. 599.

<sup>10</sup> *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 673. The reasoning of the learned justice who rendered the opinion of the court in this case is also severely criticised in *Lyman v. Central Vermont R. Co.*, 59 Vt. 167, 10 Atl. 346.

at liberty to deny the party his lawful right to a trial of his cause because the defendant is receiver of some other court, and to leave the suitor to that court for remedy, when it is known that some of the most important guaranties of the trial to which he is entitled and which are appropriate to the nature of his case will be denied him. Whatever courts of equity may have done to protect their receivers, and may do to protect the fund in their hands, it is no part of the duty of courts of law to deny to suitors properly before them the trial of their rights which justice requires and which the constitution and the law guarantee." By many courts, therefore, the rule is laid down "that the question always is, not one of jurisdiction, but of contempt; that the ordinary jurisdiction of other courts is in no manner taken away or affected by the appointment of a receiver; that while the court making the appointment may draw to itself all controversies to which the receiver is a party, it does so by acting directly upon the parties, and not by challenging the jurisdiction of the other tribunals; that while it may so draw to itself all such controversies, it is not compelled to do so, and that not doing so in any particular case, the mere fact of the appointment constitutes no plea to the jurisdiction."<sup>11</sup> The rule as thus defined, however,

<sup>11</sup> *St. Joseph & D. C. R. R. Co. v. Smith*, 19 Kan. 225, 231, per Brewer, J. (now Mr. Justice Brewer of the United States supreme court); *Muleahey v. Strauss*, 151 Ill. 70, 37 N. E. 702; *Flenthams v. Stewart*, 45 Neb. 640, 63 N. W. 924; *Hirshfeld v. Kalisher*, 81 Hun, 606, 30 N. Y. Supp. 1027; *Le Fevre v. Matthews*, 39 App. Div. 232, 57 N. Y. Supp. 128; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 350; *Lyman v. Central Vt. R. Co.*, 59 Vt. 167, 10 Atl. 346; *Town of Roxbury v. Central Vt. R. Co.*, 60 Vt. 121, 14 Atl. 92; *Kinnéy v. Crocker*, 18 Wis. 74; *Colorado Fuel etc. Co. v. Rio Grande S. R'y Co.*, 8 Colo. App. 493, 46 Pac. 845; *Payson v. Jacobs*, 38 Wash. 203, 80 Pac. 429. Where a suit is brought without leave, the error is cured where the court gives leave to continue the suit: *Brooke v. Kettler*, 166 Ala. 76, 51 South. 940; *Washington Trust Co. v. Local*

appears to be limited to cases where there is no attempt to interfere with the actual possession of the property held by the receiver; ejectment or garnishment suits against the receiver without leave will not be entertained.<sup>12</sup> It follows from the rule that leave to sue the receiver is not jurisdictional, that the receiver may waive the defense of being sued without leave by a voluntary appearance in the action against him.<sup>13</sup>

§ 1594. (§ 173.) **Suits Against Federal Receivers; Rule Now Modified by Act of Congress.**—The general rule laid down in the preceding paragraphs was productive of great hardship in those cases where parties were forced to sue receivers whose residence was in a jurisdiction different from that where the cause of action arose. A distinguished and able federal judge has said: “Where property is in the hands of a receiver simply as a custodian, or for sale or distribution, it is proper that all persons having claims against it, or upon the fund arising from its sale, should be required to assert them in the court appointing the receiver. But a very different question is presented where the court assumes the operation of a railroad hundreds of miles in length, and advertises itself to the world as a common carrier. This

& Long Distance Telephone Co., 73 Wash. 627, 132 Pac. 398. The fact that a suit is brought in a state court against a federal receiver, without leave, gives no right to the receiver to have the case removed to the federal court: *People v. Bleecker St. & F. F. R. Co.*, 178 Fed. 156.

<sup>12</sup> *St. Louis, A. & S. R. Co. v. Hamilton*, 158 Ill. 366, 41 N. E. 777 (ejectment); *Blum v. Van Vechten*, 92 Wis. 378, 66 N. W. 507 (garnishment).

<sup>13</sup> *Mulcahey v. Strauss*, 151 Ill. 70, 37 N. E. 702; *Flentham v. Stewart*, 45 Neb. 640, 63 N. W. 924; *Hubbell v. Dana*, 9 How. Pr. (N. Y.) 424; *Jay's Case*, 6 Abb. Pr. (N. Y.) 293; and see *Elkhart Car Works Co. v. Ellis*, 113 Ind. 215, 15 N. E. 249; *Goodale Phonograph Co. v. Valentine*, 69 Wash. 263, 124 Pac. 691; *American Steel & Wire Co. v. Bearse*, 194 Mass. 596, 80 N. E. 623.



brings it into constant and extensive business relations with the public. . . . All the liabilities incident to the operation of a railroad are incurred by a court where it engages in that business; and, when they are incurred, why should the citizen be denied the right to establish the justice and amount of his demand, by the verdict of a jury in a court of the county where the cause of action arose and the witnesses reside? If the road was operated by its owners or its creditors, the citizen would have this right, and when it is operated for their benefit by a receiver, why should the right be denied?"<sup>14</sup> To remedy this condition, and save expense to those suing receivers,<sup>15</sup> section 3 of the act of Congress approved March 3, 1887 (c. 373; 1 U. S. Comp. Stats., p. 582), provides: "That every receiver or manager of any property

14 *Dowe v. Memphis & L. R. R. Co.*, 20 Fed. 260, at 268, by Caldwell, J., who continued: "If the denial of the right to sue can be rested on the ground that it saves money for the corporation and its creditors, why not carry the doctrine one degree further, and declare the receiver shall not be liable to the citizen at all for breaches of contract, or any act of malfeasance or misfeasance in his office as receiver? This would be a great saving to the estate. The difference is one of degree and not of principle. When a court, through its receiver, becomes a common carrier, and enters the lists to compete with other common carriers for the carrying trade of the country, it ought not to claim or exercise any special privilege denied to its competitors, and oppressive on the citizen. The court appointing a receiver of a railroad and those interested in the property, should be content with the same measure of justice that is meted out to all persons and corporations conducting the like business. The court appointing a receiver cannot, of course, permit any other jurisdiction to interfere with its possession of the property, or control its administration of the fund; but, in the case of long lines of railroad, the question of the legal liability of its receiver to the demands of the citizen, growing out of the operation of the road, should be remitted to the tribunals that would have jurisdiction if the controversy had arisen between the citizen and the railroad company; giving to the citizen the option of seeking redress in such tribunals, or in the court appointing the receiver."

15 *Gilmore v. Herrick*, 93 Fed. 525.

appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."<sup>16</sup> The statute has been applied in a number of cases,<sup>17</sup> and it is held that the suit may be brought in any court of competent jurisdiction;<sup>18</sup> but the suit must be in regard to

<sup>16</sup> The act was revised by an act approved August 13, 1888, but was not materially altered.

<sup>17</sup> See the following cases as well as those cited in the succeeding notes: *Texas & Pac. R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829, 12 Sup. Ct. 905; *Erb v. Morasch*, 177 U. S. 584, 44 L. Ed. 897, 20 Sup. Ct. 819; *The St. Nicholas*, 49 Fed. 671; *Wheeler v. Smith*, 81 Fed. 319 (the statute extends to territorial appointments, for the court in making such appointment acts as a federal court); *Dale v. Smith*, 182 Fed. 360 (action for personal injuries); *Trumbull v. McKuser*, 9 Colo. App. 350, 48 Pac. 825; *Louisville Southern R'y Co. v. Tucker's Adm'r*, 105 Ky. 492, 49 S. W. 314; *Massey v. Camden & T. R'y Co.*, 75 N. J. Eq. 1, 71 Atl. 241 (citing the text); *Southern Pac. R. R. v. Maddox*, 75 Tex. 300, 12 S. W. 815; *Houston & T. C. R'y Co. v. State* (Tex. Civ. App.), 39 S. W. 390 (a suit, at the direction of the governor, to determine the title to land in possession of a federal receiver was upheld without leave of court having been obtained, without an express reliance on the statute); *Stolze v. Milwaukee & L. W. R. Co.*, 104 Wis. 47, 80 N. W. 68. A receiver appointed by a federal court may be sued, without permission, for a penalty imposed by state statute on railroads for failure to adjust claims promptly: *Huguelet v. Warfield*, 84 S. C. 87, 65 S. E. 985. And for building a track over plaintiff's private right of way: *Atkinson v. Kreis*, 140 Ga. 52, 78 S. E. 465. See, also, *Railroad Commission v. Alabama Great Southern R. Co.*, 185 Ala. 354, L. R. A. 1915D, 98, 64 South. 13.

<sup>18</sup> *McNulta v. Lochridge*, 141 U. S. 327, 35 L. Ed. 796, 12 Sup. Ct. 11; *Central Trust Co. of N. Y. v. East Tenn. V. & G. R'y Co.*, 59 Fed. 523.

some "act or transaction" in connection with the operation of the property, and unless this is strictly true, leave of court should be obtained.<sup>19</sup> Under guise of the statute, a party cannot put in issue the right of the receiver to the possession of the property, or his right to control and manage it under the receivership.<sup>20</sup> It is said that "suits in which it is sought to deal with the property in the custody of the receivers, to subject it to sale or other remedy, can still be brought only by intervening petition, or by independent bill filed by leave of

<sup>19</sup> *Central Trust Co. of N. Y. v. East Tenn., V. & G. R'y Co.*, 59 Fed. 523; *Glover v. Thayer*, 101 Ga. 824, 29 S. E. 36. Thus, proceedings to condemn property for a grade crossing can be maintained only by leave of court where receivership is pending: *Coster v. Parkersburg Branch R. Co.*, 131 Fed. 115; *Buckhannon & N. R. Co. v. Davis (C. C. A.)*, 135 Fed. 707. The statute does not apply to a suit to quiet title and recover land: *Morse v. Tackaberry*, 63 Tex. Civ. App. 487, 134 S. W. 273. Nor to a suit to foreclose a lien on property in the receiver's possession and to recover damages for its detention by him: *Love v. Louisville & E. R. Co.*, 178 Fed. 507. Nor to a suit to recover wages, where the receiver has been garnished and has paid to the creditor by order of court: *Harmon v. Best*, 174 Ind. 323, 91 N. E. 19. A suit to recover for injuries received before the appointment is not within the statute: *Farmers' Loan & Tr. Co. v. Chicago & N. P. R. Co.*, 118 Fed. 204; *Harmon v. Perkins (Ind. App.)*, 88 N. E. 961. But see *In re Seaboard Air Line R'y*, 166 Fed. 376. A suit on a contract made by the receiver relating to the care and preservation of the property is not within the statute: *In re Kalb & Berger Mfg. Co.*, 165 Fed. 895, 91 C. C. A. 573.

<sup>20</sup> *Swope v. Villard*, 61 Fed. 417 (a refusal of the receiver to sue for a cause of action in favor of the corporation, is not an "act or transaction in carrying on the business"); *Dickinson v. Willis*, 239 Fed. 171; *Bennett v. Northern Pac. R. Co.*, 17 Wash. 534, 50 Pac. 496 (the receiver's wrongful claim to an interest in land is not such act as comes within the statute); *Hallifield v. Wrightsville & T. R. Co.*, 99 Ga. 365, 27 S. E. 715; *Glover v. Thayer*, 101 Ga. 824, 29 S. E. 36; *J. I. Case Plow Works v. Finks*, 81 Fed. 529, 26 C. C. A. 46; *Dillingham v. Anthony*, 73 Tex. 47, 15 Am. St. Rep. 753, 3 L. R. A. 634, 11 S. W. 139 (the statute does not apply to a case where it is sought to establish title to personalty, as against the receiver).

the court.”<sup>21</sup> A garnishment proceeding is said not to be a “suit against the receiver, for any act or transaction of his, and such claims must be prosecuted in the manner heretofore settled. . . . A proceeding for garnishment purposes is an equitable seizure of the funds and property within the custody of the court.”<sup>22</sup> But the supreme court of Minnesota has held that money due from a receiver for indebtedness incurred in operating the road, may be garnished in the state court; they say: “But in this case it will be noticed that what is sought to be reached by garnishment is the property, not of the railway company, but of the defendant, viz., a debt due him from the receivers. Moreover, while garnishment of a debt is often called a mode of attachment, yet it does not effect a specific lien on any property of the garnishee, such as is acquired by the actual seizure of property. The effect of the judgment is merely to determine the existence and amount of the debt, and to substitute the plaintiff for the defendant as the person to whom it is payable. The judgment against the receivers would not be against them personally, but against them officially. No executory process could be issued on it, for that would interfere with the control of the property in the custody of the federal court.”<sup>23</sup> In applying the statute

<sup>21</sup> *Gilmore v. Herrick*, 93 Fed. 525.

<sup>22</sup> *Central Trust Co. v. East Tenn. V. & G. R’y Co.*, 59 Fed. 523; *Central Trust Co. v. Wheeling & L. E. R. Co.*, 189 Fed. 82; *Reisner v. Gulf etc. R. R. Co.*, 89 Tex. 656, 59 *Am. St. Rep.* 84, 33 *L. R. A.* 171, 36 *S. W.* 53 (the case did not discuss the statute).

<sup>23</sup> *Irvine v. McKechnie*, 58 *Minn.* 145, 49 *Am. St. Rep.* 495, 26 *L. R. A.* 218, 59 *N. W.* 987. The court continued: “Under the ‘removal act’ [the act of March 3, 1887, quoted above] the defendant himself could have sued the receivers, and recovered judgment, and we are unable to see why the plaintiff may not, through garnishee proceedings, recover judgment against them for the same claim, or why a judgment in his favor interferes with property in the custody of the federal court any more than would a judgment in favor of the defendant for the same claim.”



the federal courts have said: "The third section of the judiciary act of March 3, 1887, authorizing suits to be brought against receivers of railroads, without special leave of the court by which they are appointed, was intended, as we think, to place receivers upon the same plane with railway companies, both as respects their liability to be sued for acts done while operating a railroad and as respects the mode of obtaining service."<sup>24</sup> And it is, therefore, generally held that a federal receiver is subject to an action in a state court, without leave of the federal court, for any damage due by reason of the management of the property, when the injury to property or person has resulted from the negligence of the receiver, his agents, or employees.<sup>25</sup>

§ 1595. (§ 174.) **Same; Such Suits are "Subject to the General Equity Jurisdiction" of the Court of the Appointment.**—But while the act of Congress grants leave to sue in such cases, it expressly provides that "such suits shall be subject to the general equity jurisdic-

<sup>24</sup> *Eddy v. Lafayette*, 49 Fed. 807, 1 C. C. A. 441; S. C., 163 U. S. 456, 41 L. Ed. 225, 16 Sup. Ct. 1082 (recognizing the receiver's liability for damages for burning hay by fire set by locomotives); *Central Trust Co. v. St. Louis, A. & T. R. Co.*, 40 Fed. 426 (service on an agent of the receiver is binding, though the receiver is not within the jurisdiction).

<sup>25</sup> *Gableman v. Peoria, D. & E. R. R. Co.*, 179 U. S. 335, 45 L. Ed. 220, 21 Sup. Ct. 171; *Texas & Pac. R. R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829, 12 Sup. Ct. 905; *McNulta v. Lockridge*, 137 Ill. 270, 31 Am. St. Rep. 362, 27 N. E. 452, 141 U. S. 327, 35 L. Ed. 796, 12 Sup. Ct. 11; *St. Louis S. W. R'y Co. v. Holbrook*, 73 Fed. 112, 19 C. C. A. 385; *Ball v. Mabry*, 91 Ga. 781, 18 S. E. 64; *Malott v. Shiner*, 153 Ind. 35, 74 Am. St. Rep. 278, 54 N. E. 101; *Fullerton v. Fordyce*, 121 Mo. 1, 42 Am. St. Rep. 516, 25 S. W. 587; *Robinson v. Mills*, 25 Mont. 114, 65 Pac. 114; *Meyer v. Harris*, 61 N. J. L. 83, 38 Atl. 690; *Baer v. McCullough*, 176 N. Y. 97, 68 N. E. 129. But the statute does not permit suit for personal injuries which were sustained prior to the receivership: *Allen v. St. Louis & S. F. R. Co.*, 184 Mo. App. 492, 170 S. W. 455.

tion of the court in which such receiver was appointed so far as the same shall be necessary to the ends of justice." This is construed as "applying only to suits which seek to interfere with the receiver's possession of property, and to process the execution of which would have that effect; any process, whether for the recovery of such property or for the enforcement and collection of a judgment out of it. These shall be subject to the control of the court appointing the receiver, so far as the ends of justice may require. The time when, and the manner in which, a judgment against the receiver shall be paid; the adjustment of equities between all persons having claims against the property in his hands; the just distribution of the funds according to the rights of the several parties interested in it—all must necessarily be under the control of the court having custody of the property by its receiver, and shall be subject to its general equity jurisdiction."<sup>26</sup> But where the state court has

<sup>26</sup> *Dillingham v. Hawk*, 60 Fed. 494, 23 L. R. A. 517, 9 C. C. A. 101. See, also, *Investment Registry v. Chicago & M. Electric R. Co.*, 204 Fed. 500; *Dillingham v. Anthony*, 73 Tex. 47, 15 Am. St. Rep. 753, 3 L. R. A. 634, 11 S. W. 139. In *Missouri Pac. R'y Co. v. Tex. Pac. R'y Co.*, 41 Fed. 311, the court states: "The better opinion of the effect of said section is that it merely dispenses with leave of the court appointing the receiver, as a prerequisite to instituting a suit against him in another court, and that a suit brought thereunder has the same *status*, and a judgment rendered therein has the same effect, as if permission to sue had been regularly granted by the court appointing the receiver. However this may be, it is clear that when a judgment is so obtained, and is brought to the court of original jurisdiction to be ranked as a lien upon the trust funds, such judgment is subject to the general equity jurisdiction, and the duty of determining the rightfulness of the judgment, including whether the amount is just, is still imposed upon this court, as it would be if it had ordered an issue tried at law; for this court must still, in the language of the statute, exercise a 'general equity jurisdiction, so far as the same shall be necessary to the ends of justice.'" The court had held that the district court rendering the judgment did not have jurisdiction of the suit against the receiver

jurisdiction of the parties and the subject-matter, its judgment against the federal receiver is as final and conclusive as it is against any other suitor. It is said that the right to sue the receiver would be of little utility if its judgment could be annulled or modified at the discretion of the federal court.<sup>27</sup> Since a federal receiver may now be sued in a state court without leave of the appointing court, a receiver cannot have such case removed to the federal court on the ground that it is ancillary to the original suit, unless he shows such additional cause as makes the removal a necessary means of

under the act of 1887, and the value of the decision would seem to be weakened by that fact. See, also, *Reinhart v. Sutton*, 58 Kan. 726, 51 Pac. 221; *Burke v. Ellis*, 105 Tenn. 702, 58 S. W. 855. See particularly, *Irwin v. McKechnie*, 58 Minn. 145, 49 Am. St. Rep. 495, 26 L. R. A. 218, 59 N. W. 987; *Rogers v. Chippewa Circuit Judge*, 135 Mich. 79, 97 N. W. 154 (no injunction against enforcing higher telephone rates than city ordinance authorizes).

Where, instead of suing at law, the claimant intervenes in the receivership proceedings, equitable principles and rules govern: *Nashville R'y & Light Co. v. Bunn*, 168 Fed. 862, 94 C. C. A. 274.

A federal court is not obliged to wait until all suits in state courts are determined before distributing the fund. It may limit the time within which claims may be filed: *Smith v. Jones Lumber & Mercantile Co.*, 200 Fed. 647.

A statutory lien claimant may have his right enforced in the federal court without perfecting his lien in the manner prescribed by statute, when the right to a complete lien does not accrue until after the appointment of a receiver: *Commonwealth Roofing Co. v. North American Trust Co.*, 135 Fed. 984, 68 C. C. A. 418.

<sup>27</sup> *Central Trust Co. v. St. Louis A. & T. R. Co.*, 41 Fed. 551; and to the same effect, see the cases in note 26. The statute does not require the discontinuance of an action against a federal receiver after his discharge on the ground that the decree of the federal court provided a method for establishing claims against the funds in the hands of the receiver: *Baer v. McCullough*, 176 N. Y. 97, 68 N. E. 129. It has been held that a judgment against a receiver who is carrying on business is conclusive not only against the receiver but against those ultimately entitled to the assets: *Manhattan Trust Co. v. Chicago E. T. Co.*, 188 Fed. 1006.

obtaining justice.<sup>28</sup> But the opposite has been held, and it is stated that an action for damages, growing out of the transactions of the receiver or his employees is ancillary to the suit in which the receiver was appointed, and is within the jurisdiction of that court, regardless of the citizenship of the parties, the nature of the controversy, or the amount involved.<sup>29</sup>

When a receiver is sued without leave of the appointing court, the complaint should contain an allegation that he is a federal receiver, as only such are liable to be sued without leave, and it will not be presumed that he has been appointed by a United States court.<sup>30</sup>

§ 1596. (§ 175.) **Leave of Court not Necessary When Receiver is a Trespasser.**—"The principle is well settled that the court will not protect a receiver for any acts committed by him outside of the performance of the

<sup>28</sup> *Gableman v. Peoria, D. & E. R. R. Co.*, 179 U. S. 335, 45 L. Ed. 220, 21 Sup. Ct. 171, and cases cited; *Ray v. Peirce*, 81 Fed. 881; *Pitkin v. Cowen*, 91 Fed. 599; *Gilmore v. Herrick*, 93 Fed. 525, stating: "It is said, however, that a suit against a receiver is ancillary to the suit in which the receiver is appointed, and therefore that, if it is brought in a state court, it may be removed to the federal court in which the principal suit is pending. The power of one court to stop proceedings in a suit lawfully begun and pending in another, and to take such suits within its own jurisdiction for further hearing and final definition, is the exercise of an unusual and high prerogative, and must be based on clear statutory authority. Such a power is not to be presumed or implied. There is no language in any removal statute which justifies removal of a cause from a state court to a federal court on the ground that it is ancillary to a suit in a federal court."

<sup>29</sup> *Carpenter v. Northern Pac. R. R. Co.*, 75 Fed. 850, followed in *Sullivan v. Barnard*, 81 Fed. 886; *Betts v. Bisher*, 213 Fed. 581, 130 C. C. A. 161. The first two of these cases are expressly departed from in *Gilmore v. Herrick*, quoted *supra*, note 28.

<sup>30</sup> *Peirce v. Chism*, 23 Ind. App. 505, 77 Am. St. Rep. 441, 55 N. E. 795; approved in *Peirce v. Jones*, 24 Ind. App. 286, 56 N. E. 683.



proper and legitimate duties of his receivership.”<sup>31</sup> Therefore, it is said, in sustaining a suit in replevin for a locomotive, to which the insolvent corporation had no right: “The decree of a court of chancery appointing a receiver entitles him to its protection only in the possession of property which he is authorized or directed by the decree to take possession of. When he assumes to take or hold possession of property not embraced in the decree appointing him, and to which the debtor never had any title, he is not acting as the officer or representative of the court of chancery, but is a mere trespasser, and the rightful owner of the property may sue him in any appropriate form of action for damages or to recover possession of the property illegally taken or detained.”<sup>32</sup>

<sup>31</sup> *In re Young*, 7 Fed. 855 (refusing to enjoin an action for trespass, brought without leave of court). In *Gutsch v. McIlhargey*, 69 Mich. 377, 37 N. W. 303, Campbell, J., says: “A receiver may frequently, under color of office, get possession of property which does not belong to him, and his official character ought not to be a defense to his tortious action, or deprive parties of their rights.” An action of replevin for a small frame house, of which the receiver had improperly obtained possession, was accordingly sustained, though the plaintiff had not obtained leave to sue. If a receiver takes possession of property which the court has not authorized him to take, or does something outside his duties as receiver, he cannot claim the protection of the court against a suit brought against him on account of the same: *Brooke v. Kettler*, 166 Ala. 76, 51 South. 940.

<sup>32</sup> *Hills v. Parker*, 111 Mass. 508, 15 Am. Rep. 63. See, also, for an instructive case, *Curran v. Craig*, 22 Fed. 101; and to the same effect, *Kenney v. Ranney*, 96 Mich. 617, 55 N. W. 982. See *Fallon v. Egbert's Woolen Mills Co.*, 31 Misc. Rep. 523, 64 N. Y. Supp. 466, 56 App. Div. 585, 67 N. Y. Supp. 347, as to when the right to sue a receiver individually may be lost by proceeding against him officially.

That an order directing the receiver to take possession of property not involved in the litigation is void, and that in acting under such order he becomes liable as a trespasser, see *Bowman v. Hazen*,

§ 1597. (§ 176.) **Leave to Sue Receiver, When Granted.**—The rule is well settled that in ordinary cases the granting or withholding of leave to sue a receiver is within the discretion of the court to which the motion is addressed.<sup>33</sup> The court may, therefore, determine whether it is more desirable to allow the receiver to be sued in some appropriate form of action, or to protect him from the suit entirely.<sup>34</sup> It is said that leave should not be granted to sue a receiver unless the applicant's complaint makes out a *prima facie* case; that "the court

69 Kan. 682, 77 Pac. 589. It has been held that a receiver of a national bank may be enjoined from taking funds belonging to the plaintiff beyond the jurisdiction of the court: *Patek v. Patek*, 166 Mich. 443, 131 N. W. 1103.

<sup>33</sup> *Walker v. Green*, 60 Kan. 20, 55 Pac. 281 (the leave may be given generally, to "all parties"); *McNeal Machinery Co. v. Empire Brick & Gas Co.*, 85 Kan. 277, 116 Pac. 501; *In re Mackwirth*, 15 App. Div. 65, 44 N. Y. Supp. 80 (refusing leave to a creditor where the receiver was not shown to be lax in his duties in caring for the estate); *Shrady v. Van Kirk*, 51 App. Div. 504, 64 N. Y. Supp. 731 (cannot be given where the receiver is only *pendente lite*); *Marshall v. Friend*, 68 N. Y. Supp. 502, 33 Misc. Rep. 443; *Pringle v. Woodworth*, 90 N. Y. 502; *Ludington v. Thompson*, 153 N. Y. 499, 47 N. E. 903; *Holmes & Hibbard Mortg. Co. v. Ardmore National Bank*, 48 Okl. 319, 150 Pac. 105; *Reed v. Axtell*, 84 Va. 231, 4 S. E. 587. The power to grant leave to sue carries with it the power to revoke that authority. Thus, where a claimant has obtained an injunction in another court enjoining the receiver from asking relief in the court of his appointment, the latter may compel the claimant to have such order revoked under penalty of a withdrawal of leave to sue: *Ray v. Trice*, 53 Fla. 864, 42 South. 901. See, also, *McNeal Machinery Co. v. Empire Brick & Gas Co.*, 85 Kan. 277, 116 Pac. 501.

<sup>34</sup> *In re Herbst*, 63 Hun, 247, 17 N. Y. Supp. 760 (*Van Brunt, P. J.*, dissented on the ground that the action was not to take from the receiver any property of which he had possession); *Taylor v. Hill*, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922; *De Forrest v. Coffey*, 154 Cal. 444, 98 Pac. 27; *Mechanics' Nat. Bank v. Landauer*, 68 Wis. 44, 31 N. W. 160 (and the exercise of the discretion will not be disturbed on appeal unless manifestly abused).

should not allow its receiver to be harassed by a suit where, according to his own showing, the plaintiff has no cause of action.”<sup>35</sup> But, on the other hand, it is settled that the consent of the court is not to be arbitrarily refused when the plaintiff presents a meritorious case; it is said: “Parties having claims upon the property have a right to prosecute them by suit, which is said to be liable to be abridged, if leave of court must be had for that purpose. The leave is, however, necessary only for the orderly administration of justice, and is not to be denied arbitrarily, but only for legal unfitness for the purposes when and where sought. The right remains, and leave is to be granted according to the right and the proper adaptation of the proceedings.”<sup>36</sup> A federal court, after referring to the general rule, has stated it as follows: “There are other cases, however, where the right of a third party to intervene in a pending case is so imperative, resting, as it does, on grounds of necessity, and the inability of the party to obtain relief by other means, that the right cannot be said to be dependent upon judicial discretion. For example, a court cannot lawfully refuse to permit an intervening petition to be filed when the petitioner shows a title to, or lien upon, property in the custody of a receiver, and a present right to its possession, which is superior to any right or title that is or may be asserted by the parties to the suit in

<sup>35</sup> *Jordan v. Wells*, 3 Woods, 527, Fed. Cas. No. 7525. It has been said that permission should only be granted for good cause: *Black v. Consolidated R’y & Power Co.*, 158 N. C. 468, 74 S. E. 468.

<sup>36</sup> *American Loan & Trust Co. v. Central Vt. R. Co.*, 84 Fed. 917. To the same effect are the English cases of *Randfield v. Randfield*, 3 De Gex, F. & J. 766; *Lane v. Capey*, [1891] 3 Ch. 411, 414. See, also, *Allan v. Manitoba R’y Co.*, 10 Manitoba, 106; *Cobb v. Sweet*, 46 App. Div. 375, 61 N. Y. Supp. 545; *Citizens’ Sav. Bank v. Person*, 98 Mich. 173, 57 N. W. 121.

which the intervention is filed, and at whose instance the receiver was appointed.”<sup>37</sup>

§ 1598. (§ 177.) **Practice, Whether by Petition or Independent Action.**—While it is, under some circumstances, proper to direct the prosecution of an action at law against the receiver to determine the amount of compensation or damages to be paid, the better and more commonly recognized practice is to apply for relief to the court in which the receiver is acting.<sup>38</sup> The proper course to be pursued is, for the court to proceed to investigate the matter in a summary way, and if it appears that the case is free from difficulty, and the liability of the receiver plain, or that the dispute involves no question which must necessarily be settled at law, the court should proceed to decide the matter; since the court, in giving leave to sue in such a case, would be authorizing an inexcusable waste of the moneys of the trust.<sup>39</sup> And where the party who has a legal cause of action against a receiver comes voluntarily into court and submits him-

<sup>37</sup> *Minot v. Mastin*, 95 Fed. 734, 37 C. C. A. 234 (but the court approved the general rule indicated by the text in the following words: “In cases of the latter sort, it is usually held to be discretionary with the court or chancellor to whom an application to intervene is addressed, to allow or reject the intervention, and leave to intervene should be obtained”).

<sup>38</sup> *Pacific R’y Co. v. Wade*, 91 Cal. 449, 456, 25 Am. St. Rep. 201, 13 L. R. A. 754, 27 Pac. 768 (proceedings to determine compensation for use of tracks of street railway in hands of receiver); *Meredith Village Sav. Bank v. Simpson*, 22 Kan. 414, 432; *Central Trust Co. v. Wabash, St. Louis & P. R. Co.*, 23 Fed. 858; *Citizens’ Sav. Bank v. Ingham*, Circuit Judge, 98 Mich. 173, 57 N. W. 121; *Buffum v. Hale*, 71 Minn. 190, 73 N. W. 856; *Goodnough v. Gatch*, 37 Or. 5, 60 Pac. 383; *Crutchfield v. Hunter*, 138 N. C. 54, 50 S. E. 557. The text is quoted in *De Forrest v. Coffey*, 154 Cal. 444, 98 Pac. 27.

<sup>39</sup> *Lehigh Coal & Navigation Co. v. Central R. R. Co.*, 38 N. J. Eq. 175, 179.



self to the jurisdiction of the court, offering to do what the court deems equitable, the court is competent to deal with his complaint, notwithstanding the receiver's objection.<sup>40</sup> It has been held that if the proceeding is to assert an equitable right in relation to the property in the receiver's hands, it must be by petition in the cause in which the receiver was appointed, and not by independent suit.<sup>41</sup> A court of law is, however, the more appropriate forum to determine a question of damages for personal injuries.<sup>42</sup>

Since the court of the appointment has power to fix the forum in which suit shall be brought against its receiver, it has also the power to revoke the permission to sue when it is sought to be abused. Thus, where permission was granted to sue the receiver in the court of the appointment, and in no other, and the plaintiff in such action filed his petition and bond for a removal of the cause to a federal court, it was not error for the court, of its own motion, to revoke the order granting permission to sue the receiver, and to dismiss the action pending against him.<sup>43</sup>

§ 1599. (§ 178.) **Receiver's Right to Appeal.**—It is held that where a judgment is recovered against a receiver, on account of his management of the property, he may properly appeal from the decision; that the court's directions to him to defend do not extend only to the

<sup>40</sup> *Potter v. Spa Spring Brick Co.*, 47 N. J. Eq. 442, 20 Atl. 852.

<sup>41</sup> *Porter v. Kingman*, 126 Mass. 141 (to cancel mortgage); *Meeker v. Sprague*, 5 Wash. 242, 31 Pac. 628 (refusal to allow independent action to foreclose mortgage proper, and not an abuse of discretion); but see *Talladega Mercantile Co. v. Jenifer Iron Co.*, 102 Ala. 259, 14 South. 743; *Jones v. Stewart* (Tenn. Ch.), 61 S. W. 105.

<sup>42</sup> *Palys v. Jewett*, 32 N. J. Eq. 302; and see *Melendy v. Barbour*, 78 Va. 544.

<sup>43</sup> *Meredith Village Sav. Bank v. Simpson*, 22 Kan. 414, 433.

court that hears the trial.<sup>44</sup> But he may not appeal from an order determining the rights of parties, where a payment under the order would be a protection to him,<sup>45</sup> nor can he appeal from an order relative to his rights and duties, without previous authorization from the court.<sup>46</sup> Mr. Justice Brewer, in a recent case,<sup>47</sup> ably summarizes the rules as follows: "First. A receiver may defend, both in the court appointing him and by appeal, the estate in his possession against all claims which are antagonistic to the rights of both parties to the suit.<sup>48</sup> . . . Second. He may likewise defend the estate against all claims which are antagonistic to the rights of either party to the suit, subject to the limitation that he may not, in such defense, question any order or decree of the court distributing burdens or apportioning rights between the parties to the suit, or any order or decree resting upon the discretion of the court appointing him. . . . Third. Neither can he question any subsequent order or decree of the court distributing

<sup>44</sup> *Thorn v. Pittard*, 62 Fed. 232, 10 C. C. A. 352.

<sup>45</sup> *Dorsey v. Sibert*, 93 Ala. 312, 9 South. 288; *First Nat. Bank v. Bunting & Co.*, 7 Idaho, 27, 59 Pac. 929, 1106; *Sullivan Timber Co. v. Black*, 159 Ala. 570, 48 South. 870; *Knabe v. Johnson*, 107 Md. 616, 69 Atl. 420 (cannot appeal from an order allowing a preference between claims); *State v. State Bank & Trust Co.*, 36 Nev. 524, 137 Pac. 400.

<sup>46</sup> *McKinnon v. Wolfenden*, 78 Wis. 237, 47 N. W. 436 ("a receiver is the mere servant or agent of the court to do its bidding, and he cannot be heard to question by appeal the regularity or propriety of the orders of the court in the action, unless the court first authorizes him to do so").

<sup>47</sup> *Bosworth v. Terminal R. Ass'n*, 174 U. S. 182, 43 L. Ed. 941, 19 Sup. Ct. 625, modifying 80 Fed. 969, 26 C. C. A. 279, 53 U. S. App. 302. See, also, *Kirkpatrick v. Eastern Milling & Export Co.*, 135 Fed. 151.

<sup>48</sup> For instance, he may thus contest a claim for taxes. He may appeal in an action in which he is defending the assets from unlawful claims: *Pickering v. Richardson*, 57 Wash. 117, 106 Pac. 614.

the estate in his hands between the parties to the suit. It is nothing to him whether all of the property is given to the mortgagee or all returned to the mortgagor. He is to stand indifferent between the parties, and may not be heard, either in the court which appointed him or in the appellate court, as to the rightfulness of any order which is a mere order of distribution between the parties.<sup>49</sup> . . . Fourth. He may appeal from an order or decree which affects his personal rights, provided it is not an order resting in the discretion of the court.<sup>50</sup> . . . Fifth. His right to appeal from an allowance of a claim against the estate does not necessarily fail when the receivership is terminated to the extent of surrendering the property in the possession of the receiver. It is a common practice in courts of equity, anxious as they are to be relieved of the care of property, to turn it over to the parties entitled thereto, even before the final settlement of all claims against it, and at the same time to leave to the receiver the further defense of such claims, the party receiving the property giving security to abide by any decree which may finally be entered against the estate.”

§ 1600. (§ 179.) **Judgment Against Receiver, How Enforced; as Against Successor in Office; in Case of His Discharge.**—As a general rule, actions against the receiver are in law actions against the receivership; his liabilities are official, not personal;<sup>51</sup> and judgment

<sup>49</sup> Thus, in a foreclosure suit, a receiver may defend the property from an adverse claim, and may appeal.

<sup>50</sup> He may not appeal from an order discharging or removing him. He may appeal from an order disallowing him commissions or fees.

<sup>51</sup> *McNulta v. Lockridge*, 141 U. S. 327, 12 Sup. Ct. 11; affirming 137 Ill. 210, 31 *Am. St. Rep.* 362, 27 N. E. 452; *Bonner v. Mayfield*, 82 Tex. 234, 18 S. W. 305; *Hanlon v. Smith*, 175 Fed. 192; *Vandalia R'y Co. v. Keys*, 46 Ind. App. 353, 91 N. E. 173.

against him should be so entered as to be enforced only out of the funds properly chargeable to him in the capacity of receiver,<sup>52</sup> leaving the manner of its enforcement to be determined by the court having jurisdiction of the receivership.<sup>53</sup> And an action may be brought against a receiver on a liability incurred by his predecessor in the receivership, since the receivership is continuous and uninterrupted until the court relinquishes its hold upon the property, though its *personnel* may be subject to repeated changes; the position of the receiver in this respect being somewhat analogous to that of a corporation sole.<sup>54</sup> Leave to bring suit against a receiver, therefore, extends to permit suit against his successor in office.<sup>55</sup>

It also follows that no judgment can be rendered against a receiver in his official capacity after he is discharged from the receivership and the property is withdrawn from his custody.<sup>56</sup> The supreme court of Mis-

<sup>52</sup> *McNulta v. Enseh*, 134 Ill. 46, 24 N. E. 631. It has been said that while a receiver may be sued in other courts, when it comes to directing payment of judgments so obtained, the court appointing him will exercise its own discretion: *Investment Registry v. Chicago & M. Electric R'y Co.*, 204 Fed. 500.

<sup>53</sup> *Brown v. Brown*, 71 Tex. 355, 9 S. W. 261. See, also, *Painter v. Painter*, 138 Cal. 231, 94 Am. St. Rep. 47, 71 Pac. 90 (judgment cannot be enforced on execution; practice is to apply to the court for an order). See, also, to the effect that execution will not issue, *Pennsylvania Steel Co. v. New York City R'y Co.*, 165 Fed. 471; *Central Trust Co. v. St. Louis etc. R'y Co.*, 41 Fed. 551; *Houston Ice & Brewing Co. v. Clint* (Tex. Civ. App.), 159 S. W. 409. Where a chattel mortgagee obtains a decree of foreclosure, the court may either direct the receiver to pay, or direct a sale and permit the receiver to bid in the property: *St. Louis Union Trust Co. v. Texas Southern R'y Co.*, 59 Tex. Civ. App. 176, 126 S. W. 306.

<sup>54</sup> *McNulta v. Lockbridge*, *supra*; *State v. Port Royal & A. R. Co.*, 84 Fed. 67.

<sup>55</sup> *Fordyce v. Dixon*, 70 Tex. 694, 8 S. W. 504.

<sup>56</sup> *Farmers' Loan & Trust Co. v. Central R. R. Co. of Iowa*, 7 Fed. 537, 2 McCrary, 181; *Lehman v. McQuown*, 31 Fed. 138; *Western N. Y. & P. R. Co. v. Penn Refining Co. (C. C. A.)*, 137 Fed. 343;



Mississippi says: "The final discharge of the receiver put an end to his official existence, and withdrew from his care and management the road and property of the company. The discharge having terminated the representative character of the receiver, we are at a loss to understand how any judgment could be rendered against him officially that would render liable to its satisfaction any property of the company,—property in his hands when the suit was brought, but now finally withdrawn from him by the extinction of his official character before his plea was filed. . . . It seems plain to us that, with the termination of his representative character, and the withdrawal of the road and its property from his custody by the order discharging him, no judgment could be rendered against him properly, as the representative of the company, whereby to make its property chargeable. His

Smith v. Jones Lumber & Mercantile Co., 200 Fed. 647; Archambeau v. Platt, 173 Mass. 249, 53 N. E. 816; Ansley v. McLoud, 5 Ind. Ter. 563, 82 S. W. 908; Brawn v. McBean, 54 App. Div. 635, 66 N. Y. Supp. 785; New York & W. W. Tel. Co. v. Jewett, 115 N. Y. 166, 21 N. E. 1036; Texas & Pac. R. R. Co. v. Johnston, 76 Tex. 421, 18 Am. St. Rep. 60, 13 S. W. 463; Boggs v. Brown, 82 Tex. 41, 17 S. W. 830; Fordyce v. Du Bose, 87 Tex. 78, 26 S. W. 1050 (see for the effect of a statute allowing judgment against receiver after his discharge, when suit is pending at the time); Texas & Pac. R. R. Co. v. Watson, 13 Tex. Civ. App. 555, 36 S. W. 290 (a judgment rendered after his discharge binds neither the receiver nor the company represented); Hanlon v. Smith, 175 Fed. 192. But the fact that the property has been sold, and has entirely passed from his control is no bar to an action against him if he has not been finally discharged: Erb v. Popritz, 59 Kan. 264, 68 Am. St. Rep. 362, 52 Pac. 871. See, also, Houston City St. R'y Co. v. Storrie (Tex. Civ. App.), 44 S. W. 693; Houston & F. C. R'y Co. v. Stoyeharski (Tex. Civ. App.), 35 S. W. 851, 37 S. W. 415; Howe v. Harper, 127 N. C. 356, 37 S. E. 505. Where by order of the court the receiver returns the property to the railroad company, which assumes all claims, suits for negligence should be brought against the company: Vandalia R'y Co. v. Keys, 46 Ind. App. 353, 91 N. E. 173.

official liability ended with his official existence.”<sup>57</sup> But the fact that a receiver has been discharged is no bar to an action against him, where he has sold the property of another with notice of his claim, and no notice of the motion to discharge him was served on the owner;<sup>58</sup> or where he has collected money under a void appointment.<sup>59</sup> And where judgment has been recovered against him in the lower court, and he is discharged pending an appeal, judgment may properly be entered against him if the judgment of the lower court is affirmed.<sup>60</sup>

<sup>57</sup> *Bond v. State*, 68 Miss. 648, 9 South. 353. See *Davis v. Duncan*, 19 Fed. 477, stating that the court is aware of no rule by which it can “in any way alter, change, modify, suspend or expand the decree discharging the receiver, and again obtain jurisdiction of the property and funds which it had by its decree ordered the receiver to turn over to the corporation and which it is admitted was done.” But that an action against the receiver is not necessarily terminated by the discharge of the receiver and sale of the property under decree of the appointing court, under a section of the New York code allowing a continuance of the action by or against the original party thereto, in case of a transfer of interest or devolution of liability, see *Baer v. McCullough*, 176 N. Y. 97, 68 N. E. 129.

<sup>58</sup> *Muller v. Loeb*, 64 Barb. 454.

<sup>59</sup> *Johnson v. Powers*, 21 Neb. 292, 32 N. W. 62. But if the receiver has in good faith applied the money in improving the property, and the order was valid on its face, he will be protected to that extent: *Edee v. Strunk*, 35 Neb. 307, 53 N. W. 70.

<sup>60</sup> *McCarley v. McGhee*, 108 Fed. 494; *Woodruff v. Jewett*, 115 N. Y. 267, 22 N. E. 156.

## CHAPTER VI.

## SUITS BY THE RECEIVER.

## ANALYSIS.

- § 180. Suits by receivers; leave of court necessary.
- § 181. Suits by receiver, in whose name.
- § 182. Appointment cannot be questioned collaterally.
- § 183. Pleading in suit by receiver; must allege his authority.
- § 184. Same; appointment and authority, how alleged.
- § 185. Proof by receiver of his appointment and powers.
- § 186. Receiver is subject to the same defenses as the one whom he represents.
- §§ 187-189. Set-off against the receiver.
  - § 187. In general.
  - § 188. Set-off by bank depositor.
  - § 189. Set-off against corporation receiver, in suit against stockholders.
- § 190. Statutory receiver of insolvent corporation represents its creditors.
- § 191. Receiver in supplementary proceedings, how far a representative of creditors.

§ 1601. (§ 180.) **Suits by Receivers; Leave of Court Necessary.**—In the absence of statute, it is generally held that a receiver can “neither bring nor defend actions except by permission and the direct authority of the court by which he was appointed.”<sup>1</sup> It is said: “That rule is

<sup>1</sup> Foster v. Townshend, 68 N. Y. 206. See to the same effect, Phoenix Ins. Co. v. Schultz, 80 Fed. 337, 25 C. C. A. 453 (see for what constitutes leave to sue); Kelly v. Dolan, 218 Fed. 966; First Nat. Bank v. C. B. & Co., 7 Idaho, 27, 59 Pac. 929, 1106 (leave to appeal should be obtained); Herron v. Vance, 17 Ind. 595; Coffin v. Ransdell, 110 Ind. 417, 11 N. E. 20; Wayne Pike Co. v. State, 134 Ind. 672, 34 N. E. 440; Hatfield v. Cummings, 142 Ind. 350, 39 N. E. 859; Runner v. Deviggins, 117 Ind. 238, 36 L. R. A. 645, 46 N. E.

a necessary result of the nature of the functions of the

580; *Vigo Real Estate Co. v. Reese*, 21 Ind. App. 20, 51 N. E. 350; *Peirce v. Chism*, 23 Ind. App. 505, 77 Am. St. Rep. 441, 55 N. E. 795; *Troy Sav. Bank v. Morrison*, 27 App. Div. 423, 50 N. Y. Supp. 225; *Battle v. Davis*, 66 N. C. 262; *Davis's Adm'rs v. Snead*, 33 Gratt. 709; *Reynolds's Ex'r v. Pettyjohn*, 79 Va. 327; *McAllister v. Harmon*, 97 Va. 543, 34 S. E. 474 (leave of court to sue will not be implied from general order to collect). The text is cited in *Kretschmar v. Stone*, 90 Miss. 375, 43 South. 177. See the following cases to the effect that the receiver should allege that he has obtained leave of court to sue: *Wheat v. Bank of California*, 119 Cal. 4, 50 Pac. 842, 51 Pac. 47; *Morgan v. Buski*, 61 N. Y. Supp. 929, 30 Misc. Rep. 245; *Swing v. White River Lumber Co.*, 91 Wis. 517, 65 N. W. 174; *Rhodes v. Hilligoss*, 16 Ind. App. 478, 45 N. E. 666; *Gainey v. Gilson*, 149 Ind. 58, 48 N. E. 633. To the effect that he need not allege that leave of court has been obtained, see *Hegewisch v. Silver*, 140 N. Y. 414, 35 N. E. 658; *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138; *Compton v. Schwabacher Bros. & Co.*, 15 Wash. 306, 46 Pac. 338; *Howard v. Stephenson*, 33 W. Va. 116, 10 S. E. 66; *Elliott v. Trahern*, 35 W. Va. 634, 14 S. E. 223; *Minn. etc. St. R'y Co. v. Minn. etc. R. Co.*, 61 Minn. 502, 63 N. W. 1035.

Ordinarily the receiver after his appointment is the only party who can sue to recover the assets of a corporation: *Du Pont v. Standard Arms Co.*, 9 Del. Ch. 324, 82 Atl. 692; *Herf & Frerichs Chemical Co. v. Brewster*, 54 Tex. Civ. App. 217, 117 S. W. 880. See, also, *Marcovich v. O'Brien* (Ind. App.), 114 N. E. 100 (he is the proper party to bring all suits which the corporation could bring, and also to bring suits on behalf of creditors). Although it has been held that particular creditors who have claims against stockholders based upon estoppel must maintain such claims by suits in their own names: *Reel v. Brammer*, 56 Ind. App. 180, 101 N. E. 1043. Compare *Kelly v. Dólan*, 218 Fed. 966. Bondholders cannot ordinarily sue until after the receiver has been requested to sue and has refused: *Finance Co. of Pa. v. New Jersey Short Line R. Co.*, 183 Fed. 830. A few instances of the nature of suits permitted are given:

**Suits Against Stockholders to Enforce Statutory Liability.**—*Converse v. Hamilton*, 224 U. S. 243, Ann. Cas. 1913D, 1292, 56 L. Ed. 749, 32 Sup. Ct. 415; *Irvine v. Elliott*, 203 Fed. 82; *John W. Cooney Co. v. Arlington Hotel Co.* (Del.), 101 Atl. 879; *Walters v. Porter*, 3 Ga. App. 73, 59 S. E. 452; *Hughes v. Hall*, 117 Md. 547, 83 Atl.



receiver. He is a mere custodian of the property for the

1023; *Herf & Frerichs Chemical Co. v. Brewster*, 54 Tex. Civ. App. 217, 117 S. W. 880. Although it is sometimes held that he cannot maintain such a suit in the absence of statutory authority: *Hammond v. Cline*, 170 Ind. 452, 84 N. E. 827.

**Suits Against Directors for Mismanagement.**—*Du Pont v. Standard Arms Co.*, 9 Del. Ch. 324, 82 Atl. 692; *Foutz v. Miller*, 112 Md. 458, 76 Atl. 1111; *Snover v. Boynton*, 173 Mich. 539, 139 N. W. 266 (bill against officers of fraternal lodge alleging that funds were lost or stolen through their negligence); *Metzger v. Joseph*, 111 Miss. 385, 71 South. 645; *Ventress v. Wallace*, 111 Miss. 357, **L. R. A.** 1917A, 971, 71 South. 636; *French v. Armstrong*, 79 N. J. Eq. 283, 82 Atl. 101 (suit against President); *Bowers v. Male*, 186 N. Y. 28, 78 N. E. 577.

**Suits to Collect Assessments and Subscriptions.**—*Graves v. Denny*, 15 Ga. App. 718, 84 S. E. 187; *Haskell v. Gardner* (Ind. App.), 93 N. E. 458; *Carter, Rice & Co. v. Samuel Hano Co.*, 73 N. H. 588, 64 Atl. 201; *Dill v. Ebey*, 27 Okl. 584, 46 **L. R. A. (N. S.)** 440, 112 Pac. 973. It has been held that the liability of the stockholders is several and not joint, and that therefore the receiver cannot maintain a suit against all the stockholders jointly: *Fidelity Trust & S. D. Co. v. Archer*, 179 Fed. 32, 103 C. C. A. 16. See, also, *Greer v. Jackson*, 146 Ga. 376, 91 S. E. 417. But see, *contra*, *Lanham v. Wenatchee Canal Co.*, 48 Wash. 337, 93 Pac. 522; *Dill v. Ebey*, 27 Okl. 584, 46 **L. R. A. (N. S.)** 440, 112 Pac. 973.

**Suit to Recover Dividends Unlawfully Paid.**—*Kretschmar v. Stone*, 90 Miss. 375, 43 South. 177 (citing the text).

**Right of Receiver to Proceed in Equity Against Debtors.**—There is a sharp conflict of authority on the question of the right of the receiver to enforce a purely legal demand against debtors in equity. In *Peck v. Elliott*, 79 Fed. 10, 38 **L. R. A.** 616, 24 C. C. A. 425, *Lurton*, Circuit Judge, said: "For the purpose of collecting in choses in action, the court might direct its receivers to institute independent suits in that or courts of the state, or cause such debtors to be made defendants in the principal cause, and determine for itself any question which might be involved by the defense to the claim. . . . The complete jurisdiction of the court over the *res*, the property and assets of this corporation, involved its right to bring before it persons having possession of any of those assets, or having claims thereon, or who were indebted to it, and either itself hear and determine all controversies, or refer them to a master or to a jury,

court as one of its officers. His acts are the acts of the

as it saw fit. A court of equity is not deprived of jurisdiction simply because a purely legal question becomes collaterally involved. It might, in its discretion, submit such controversy upon issues made to a jury, or dispose of them without doing so. That the liability of appellee was one of legal character did not operate to defeat the jurisdiction, and bring its proceedings against him to a stand. These questions seem conclusively settled by *White v. Ewing*, 159 U. S. 36, 40 L. Ed. 67, 15 Sup. Ct. 1018." See, also, *Cunningham v. Cleveland*, 98 Fed. 657, 39 C. C. A. 211. On the other hand, it has been said that the receiver should sue at law. See *City of Eau Claire v. Payson*, 109 Fed. 676, 48 C. C. A. 608; *Whelan v. Enterprise Transp. Co.*, 164 Fed. 95. In the latter case the court said: "This conclusion avoids the unpleasant consequences which Paige suggested in argument. To-day B owes A a sum of money. B can be sued only at law. To-morrow C is appointed receiver of A and proceeds against B in equity. B's right to a jury trial has disappeared. The receivership suit may have been collusive in order to oust B of his right. B, it seems, cannot raise this objection. Instead of asserting a right, he must apply to the discretion of the chancellor. . . . This court . . . holds that the jurisdiction over the controversy acquired by filing the original bill in equity extends to an action at law brought in the Circuit Court to enforce the receiver's claim. If this be true, both sides admit that *White v. Ewing* is not conclusive in the receiver's favor."

**Power of Receiver to Bind by Stipulation.**—The receiver represents the company and all creditors, and hence his stipulations bind all in the absence of seasonable and proper objection: *Robinson v. Mutual Reserve Life Ins. Co.*, 182 Fed. 850. See, also, *Spencer v. Alki Point Transportation Co.*, 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509.

**Right of Receiver to Sue Himself.**—In *Murphy v. Penniman*, 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282, the receiver was authorized to sue directors, including himself. The court said: "It is not a practice to be commended to have a person in his representative capacity sue himself as an individual. . . . But in this case the court, having jurisdiction of the trust, authorized and directed Messrs. Hughes and Benson to institute and conduct the proceedings in the name of the receivers, and hence, although the receivers are the technical plaintiffs of record, the solicitors in reality have control over the case. Any interference or obstruction placed in the

court when duly sanctioned, and when not so sanctioned they have no greater effect than the acts of other unauthorized officers or agents.”<sup>2</sup> The supreme court of Georgia has stated: “The rule is perhaps an arbitrary one, but it is, nevertheless, well settled, that a receiver has no right to sue without express authority from the chancellor; his general authority to collect and keep the assets is not sufficient to justify him in bringing an action. A receiver is at least only an officer of the court, and the foundation of the rule probably is, that it is always for the court to determine whether it shall be dragged into litigation. At law, the party having the legal right to sue is the proper party, and if one comes suing for the property of another, he must show, as part of his right to recover, the authority he has to come into a court of law asserting another’s right.”<sup>3</sup> In regard to the case of a receiver *pendente lite*, where leave of court was not obtained, the supreme court of California states: “As a rule, however, the receiver cannot sue to recover property which has not come to his possession, or which, being in the possession of the defendant, ought to have been delivered to him. He cannot maintain trover for property of the insolvent converted before the adjudication, nor to recover property transferred by the

way of the solicitors by the receivers, or either of them, could be reported to and corrected by the court having jurisdiction over them, and hence the reason for the rule prohibiting, or at least disapproving of, the same individual being on both sides of the record, does not have the same force as it ordinarily would.”

**Who Entitled to Share Proceeds of Suit.**—The court may limit the right to share in the proceeds of a suit to those creditors who contribute to the cost thereof: *Cornell v. Nichols & Langworthy Machine Co.*, 201 Fed. 320, 119 C. C. A. 558.

<sup>2</sup> *Fincke v. Funke*, 25 Hun, 616; approved in *Ogden v. Arnot*, 29 Hun, 146.

<sup>3</sup> *Screven v. Clark*, 48 Ga. 41.

debtor in fraud of creditors.”<sup>4</sup> There seems to be a lack of harmony in the decisions as to the form in which the consent to sue should be given; some of the courts have held that the order may allow the receiver to prosecute and defend all actions brought against him in his official capacity,<sup>5</sup> while other courts maintain that such general permission is too liberal for judicious management of the property. Such practice is criticised in New York as follows: “It seems to me, however, that that portion of the order which authorizes the receiver to prosecute and defend without the further order of the court all actions brought or about to be brought by or against said co-partners, or any of them, pertaining to said co-partnership business, . . . is improper, and its presence in the order was probably overlooked by the justice holding the special term at which the order was made. The rule requiring leave of court to be obtained before the receiver can either sue or be sued is in order to prevent any unnecessary waste of the assets in the receiver’s hands in unnecessary litigation, and contemplates at least some investigation by the court of the propriety of the commencement of such suits before permission is granted; and to authorize in advance the commencement of suits without any knowledge of what they are for, or of the necessity thereof, is a complete nullification of the rule, and exposes the estate to the very thing that the rule was intended to guard against, and is improper practice.”<sup>6</sup> In many states, the rule that the

<sup>4</sup> *Tibbets v. Cohn*, 116 Cal. 365, 48 Pac. 372; quoted with approval in *Bishop v. McKillican*, 124 Cal. 321, 71 Am. St. Rep. 68, 57 Pac. 76, refusing to allow a recovery of personal property of which the receiver had never had possession.

<sup>5</sup> *Taylor v. Canady*, 155 Ind. 671, 57 N. E. 524, 59 N. E. 20. See, also, *Wason v. Frank*, 7 Colo. App. 541, 44 Pac. 378; *Wyman v. Williams*, 52 Neb. 833, 73 N. W. 285; *Boyd v. Royal Ins. Co.*, 111 N. C. 372, 16 S. E. 389.

<sup>6</sup> *Witherbee v. Witherbee*, 17 App. Div. 181, 45 N. Y. Supp. 297.



receiver should obtain leave of court, prior to defending or bringing an action, has been changed by statute so that he may sue as freely as the one whom he represents, if it is necessary for the protection of the estate.<sup>7</sup>

§ 1602. (§ 181.) **Suits by Receiver, in Whose Name.** While the decisions are not altogether harmonious on the subject, it seems to be generally held that, in the absence of statute, the receiver should sue in the name of the party having the legal title, and over whose property he has been appointed.<sup>8</sup> In Indiana it is stated: "It is

7 See *Tibbets v. Cohn & Co.*, 116 Cal. 365, 48 Pac. 372 (refusing to extend the code provision to a sheriff acting as receiver *pendente lite*). In Indiana, a statute providing that "the receiver shall have power, under control of the court, or of the judge thereof in vacation to bring and defend actions," does not authorize a receiver to bring action without leave of court: *Rhodes v. Hilligoss*, 16 Ind. App. 478, 45 N. E. 666. But see *Manlove v. Burger*, 38 Ind. 211. In North Carolina, the statute giving "power to prosecute and defend" with no reference to the control of the court, it is held that the receiver may sue without leave having been obtained: *Gray v. Lewis*, 94 N. C. 392; *Weill v. First Nat. Bank*, 106 N. C. 1, 11 S. E. 277; *Worth v. Wharton*, 122 N. C. 376, 29 S. E. 370; *Everett v. State*, 28 Md. 190; *Baker v. Cooper*, 57 Me. 388; *Ueland v. Hangan*, 70 Minn. 349, 73 N. W. 169; *Boston & M. C. C. & S. M. Co. v. Montana etc. Co.*, 24 Mont. 142, 60 Pac. 990; *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015. See, also, *McBryan v. Universal Elevator Co.*, 130 Mich. 111, 97 Am. St. Rep. 453, 89 N. W. 683.

8 *Dick v. Struthers*, 25 Fed. 103; *Harland v. Bankers' & M. Tel. Co.*, 32 Fed. 305; *Garver v. Kent*, 70 Ind. 428; *Moriarty v. Kent*, 71 Ind. 601; *Wilson v. Welsh*, 157 Mass. 77, 31 N. E. 712; *Ft. Payne Coal & Iron Co. v. Webster*, 163 Mass. 134, 39 N. E. 786; *Hayward v. Leeson*, 176 Mass. 310, 49 L. R. A. 725, 57 N. E. 656; *Freeman v. Winchester*, 10 Smedes & M. (18 Miss.) 577; *Newell v. Fisher*, 24 Miss. 392 (the statement of the court would lead to the conclusion that the receiver could sue in his own name if he had the legal title); *State v. Gambs*, 68 Mo. 289; *Yeager v. Wallace*, 44 Pa. St. 294; *Murtey v. Allen*, 71 Vt. 377, 76 Am. St. Rep. 779, 45 Atl. 752 (inferring that he could sue at law in his own name if he had the legal title); *King v. Cutts*, 24 Wis. 627. He can bring the suit in his own

undoubtedly a correct general proposition that in the absence of authority derived from the statute, or from the court ordering his appointment, a receiver has no power to sue in his own name. . . . The reason is that the legal title to *choses in action*, or other property which he is authorized to reduce to possession, is ordinarily not transferred to the receiver, but remains in the owner, in whose name suits must be brought, unless the statute or the order of the court authorizes the receiver to proceed in his own name.”<sup>9</sup> A leading decision in North Carolina says, “the action must be brought in the name of the legal owner, and he will be compelled to allow the use of his name upon being properly indemnified out of the estate and effects, under the control of the court.”<sup>10</sup>

While recognizing the general rule, there are cases holding that in certain instances the receiver may maintain an action in his own name, without the aid of a statute. Thus it is said: “But where the goods have actually come into his possession, it can hardly be contended that he could not maintain this action against one who wrongfully invaded such possession and converted the goods committed to his care. Were such not the case he would not rise to the dignity and power of the most ordinary bailee. He would be the merest automaton that ever sprang from a legal workshop. In the case in hand, the goods were in the possession of the receiver and were sold by him by virtue of the power conferred upon him by the court for that purpose. The contract of sale was with him; his receipt for the money to the purchaser would have been good to discharge him from the price of the goods; and for them or their price he is

name in Vermont only if he has the legal title: *Underhill v. Rutland R. Co.*, 90 Vt. 462, 98 Atl. 1017.

<sup>9</sup> *Pouder v. Catterson*, 127 Ind. 434, 26 N. E. 66.

<sup>10</sup> *Battle v. Davis*, 66 N. C. 252 (the rule has since been changed by code).

responsible. We are of opinion, therefore, that the receiver might maintain this suit in his own name.”<sup>11</sup> And where a receiver sought the possession of land to which he as receiver was entitled, the court said: “The object of the suit is to obtain possession of the real estate in question for the receiver and not for the bank. A suit in the name of the bank would not accomplish that purpose; for the execution, or writ of possession, if one was obtained, would require the officer executing it to put the bank, and not the receivers, into possession. As it is the receivers that are seeking the possession, we think the suit is properly brought in their names. It is the direct road to the end in view.”<sup>12</sup> It has been said that where an assignee can sue in his own name, a receiver may also where he has analogous rights. The court said, “In the present case the receiver is called by the court in Washington a ‘*quasi* assignee for creditors.’ He is charged with the administration of a trust fund which does not take from nor come into actual existence until after his appointment, and he is the only person who can collect it. By virtue of his official relation to the corporation and its creditors, he is the owner of the legal title to this fund, as a trustee for the creditors. A suit could not have been brought in the name of the corporation, and he is the only person who can now, or who ever could, legally demand and collect the money. We are of opinion that the action is rightly brought in his name.”<sup>13</sup>

<sup>11</sup> *Singerly v. Fox*, 75 Pa. St. 112. See, also, *Wason v. Frank*, 7 Colo. App. 541, 44 Pac. 378. The statement by Henry, J., in *State v. Gambs*, 68 Mo. 289, is to the same effect.

<sup>12</sup> *Baker v. Cooper*, 57 Me. 388; *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015, states that though not authorized by statute or court order to sue in his own name, he may do so when ordered by statute to sue generally. See, also, *Evans v. Pease*, 21 R. I. 187, 42 Atl. 506.

<sup>13</sup> *Howarth v. Lombard*, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888; *Buswell v. Supreme Sitting etc. of Iron Hall*, 161 Mass. 224, 23

In those states where the code system prevails and it is provided that suits shall be brought in the name of the real party in interest, a receiver is allowed to sue in his own name on the ground that he is the real party in interest.<sup>14</sup> The supreme court of Minnesota says: "The receiver, as an officer of the court which has taken control of the property, is, for the time being, and for the purpose of the administration of the assets, the real party in interest in the litigation. There is no reason, therefore, why the suit should not be instituted in his own name. . . . Whatever technical reasons may have existed for refusing to permit common-law receivers to sue in their own names, they exist no longer, under our code."<sup>15</sup> In many of the states, the code or statute expressly provides that the suit may be in the name of the receiver, or gives such general authority to sue that the courts construe it as giving such power.<sup>16</sup>

L. R. A. 846, 36 N. E. 1065; *Ewing v. King*, 169 Mass. 97, 47 N. E. 597. See *Wilkinson v. Rutherford*, 49 N. J. L. 244, 8 Atl. 507, to the same effect where the statute, authorizing suit, did not provide that it should be in the receiver's name. In *Frank v. Morrison*, 58 Md. 423, the court states the Maryland practice to be to allow suits in the name of the receiver, regardless of statute.

<sup>14</sup> *Wason v. Frank*, 7 Colo. App. 541, 44 Pac. 378 ("but the cases in which it has been held that a receiver could not maintain an action in his own name were, for the most part, cases where the legal right existed in his principal before his appointment. . . . In his representative capacity he was the real party in interest; the suit could be brought and maintained only in his name").

<sup>15</sup> *Henning v. Raymond*, 35 Minn. 303, 29 N. W. 132. In *Davis v. Ladoga Creamery Co.*, 128 Ind. 222, 27 N. E. 494, it is said the suit cannot be in the name of the corporation, as long as a receiver has charge.

<sup>16</sup> *Cockrill v. Abeles*, 86 Fed. 505, 30 C. C. A. 223.

See statutes collected, *ante*, note to § 73.

**California.**—*Daggett v. Gray*, 5 Cal. Unrep. 74, 40 Pac. 959; *Tibbets v. Cohn & Co.*, 116 Cal. 365, 48 Pac. 372 (but the code provision was not extended to a receiver *pendente lite*).



§ 1603. (§ 182.) **Appointment cannot be Questioned Collaterally.**—The rule is well established that the regularity of the receiver's appointment cannot be attacked collaterally in suits brought by him as receiver.<sup>17</sup> In the case of a corporation receiver, suing to collect unpaid

**Illinois.**—Chicago Fire Proofing Co. v. Park Nat. Bank, 145 Ill. 481, 32 N. E. 534.

**Indiana.**—Manlove v. Burgess, 38 Ind. 211; Hatfield v. Cummings, 152 Ind. 280, 50 N. E. 231; Taylor v. Canaday, 155 Ind. 671, 57 N. E. 524, 59 N. E. 20.

**Maine.**—Hobart v. Bennett, 77 Me. 401.

**Minnesota.**—Weland v. Hangan, 70 Minn. 349, 73 N. W. 169.

**Missouri.**—Gill v. Balis, 72 Mo. 424; Alexander v. Relfe, 74 Mo. 516.

**Montana.**—Boston & M. C. C. & S. M. Co. v. Montana etc. Co., 24 Mont. 142, 60 Pac. 990.

**North Carolina.**—Gray v. Lewis, 94 N. C. 392; Weill v. First Nat. Bank, 106 N. C. 1, 11 S. E. 277; Davis v. Industrial Mfg. Co., 114 N. C. 321, 23 L. R. A. 322, 19 S. E. 371.

**Texas.**—Mathis v. Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015.

17 Fish v. Smith, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711 (one who was nominally a party to the appointing suit cannot so attack it); Title Ins. & Trust Co. v. Grider, 152 Cal. 746, 94 Pac. 601; Harned v. Beacon Hill Real Estate Co., 9 Del. Ch. 232, 80 Atl. 805; Com. Nat. Bank v. Burch, 141 Ill. 519, 33 Am. St. Rep. 331, 31 N. E. 420; St. Paul Trust Co. v. St. Paul Globe Pub. Co., 60 Minn. 105, 61 N. W. 813 (the order of court, empowering the receiver to sue, is not subject to such attack); Benjamin v. Staples, 93 Miss. 507, 47 South. 425; Cox v. Volkert, 86 Mo. 505; Block v. Estes, 92 Mo. 318, 4 S. W. 731; Thompson v. Greeley, 107 Mo. 577, 17 S. W. 962; Keokuk N. L. P. Co. v. Davidson, 13 Mo. App. 561; State v. Shelton, 238 Mo. 281, 142 S. W. 417; Guilbert v. Kessinger, 173 Mo. App. 680, 160 S. W. 17; Slaughter v. Louisville & Nashville R. R. Co., 125 Tenn. 292, 143 S. W. 603; Andrew v. Steel City Bank, 57 Neb. 173, 77 N. W. 342; Capital City Mut. Fire Ins. Co. v. Boggs, 172 Pa. St. 91, 33 Atl. 349; Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089. Thus, mere violation of local rules requiring notice of an application for a receiver will not justify a collateral attack upon the authority of the receiver: Lively v. Picton, 218 Fed. 401, 134 C. C. A. 189.

subscriptions, the court said: "The plaintiff's appointment as receiver cannot be attacked collaterally. The regularity, propriety and validity of the appointment of such a receiver can only be questioned in a direct proceeding to test that question;"<sup>18</sup> and "when a judgment debtor appears before a referee and submits to an examination without objection, this will amount to a waiver of any irregularity, and an order for the appointment of a receiver founded on such voluntary appearance and waiver will be valid, and cannot be affected by an objection to the jurisdiction in an action brought by the receiver."<sup>19</sup> The supreme court of Ohio states: "It must be borne in mind that he was an acting receiver. There was at least the form of a legal appointment, and that in a case which certainly invoked the discretion and consideration of the court in the determination of the question whether an appointment could or ought to be made. This was jurisdiction. The court acted. The appointment was made. The receiver proceeded to the discharge of the duties of the trust. This is not a direct proceeding to test the validity or regularity of the appointment. It is not a proceeding in error to review the order of appointment. It is a collateral inquiry. It is not enough that the court erred in its action. Unless it appear manifestly clear to us that the order of appointment was an absolute nullity by reason of the entire absence of jurisdiction in the court that made it, it cannot be assailed in this proceeding."<sup>20</sup>

If the order appointing the receiver is absolutely void, it is held that he cannot protect himself under it, when sued for money collected as rent from the premises in

<sup>18</sup> *Basting v. Ankeny*, 64 Minn. 133, 66 N. W. 266.

<sup>19</sup> Quoted in *Green v. Bookhart*, 19 S. C. 466, citing *Viburt v. Frost*, 3 Abb. Pr. 119; and *Bingham v. Disbrow*, 37 Barb. 24.

<sup>20</sup> *Barbour v. Nat. Exch. Bank*, 45 Ohio St. 133, 12 N. E. 5. See, also, *Edee v. Strunk*, 35 Neb. 307, 53 N. W. 70.

question.<sup>21</sup> It is necessary, in order to constitute a valid appointment, that the appointing court have jurisdiction of the subject-matter.<sup>22</sup>

§ 1604. (§ 183.) **Pleading in Suit by Receiver; must Allege His Authority.**—In a suit by a receiver, acting as he does in a purely representative character, it is necessary for him to allege in the complaint the authority and right that entitles him to maintain the action.<sup>23</sup> Thus it has been frequently held that “a receiver, in order to maintain an action, must set out facts showing his appointment, and by what jurisdiction appointed; setting out, also, so much of the proceedings in the cause as will show that his appointment is legal, as the defendant may insist that the facts constituting the appointment as receiver which are set out shall be sufficient to show that an appointment has been made, and that these facts must be so stated, and with such certainty, that they may be traversed.”<sup>24</sup> And since it is necessary for the re-

<sup>21</sup> *Johnson v. Powers*, 21 Neb. 292, 32 N. W. 62; approved, but distinguished and limited, in *Edee v. Strunk*, *supra*; *Harned v. Beacon Hill Real Estate Co.*, 9 Del. Ch. 232, 80 Atl. 805. Where notice of application for a receiver is given for November 3d, and the appointment is made November 2d, under the Nebraska statute the appointment is void and can be collaterally attacked: *Gibson v. Sexson*, 82 Neb. 475, 118 N. W. 77. In *Berryman v. Billings Mut. Heating Co.*, 44 Mont. 517, 121 Pac. 280, it was held that an order appointing a receiver for a corporation merely because of insolvency was void, and could be collaterally attacked.

<sup>22</sup> See cases cited *supra* in note 19, and *Attorney-General v. Guardian M. L. I. Co.*, 77 N. Y. 272.

<sup>23</sup> *Daggett v. Gray* (Cal.), 4 Pac. 959; *Wheat v. Bank of California*, 119 Cal. 4, 50 Pac. 842, 51 Pac. 47; *Cooper v. Bowers*, 42 Barb. 87, 28 How. Pr. 10 (supplementary proceedings); *Forker v. Brown*, 30 N. Y. Supp. 827, 10 Misc. Rep. 161; *Swing v. White River Lumber Co.*, 91 Wis. 517, 65 N. W. 174; *Worth v. Wharton*, 122 N. C. 376, 29 S. E. 370.

<sup>24</sup> *Rhorer v. Middlesboro Town and Land Co.*, 19 Ky. Law Rep. 1788, 44 S. W. 448. See *Rossman v. Mitchell*, 73 Minn. 198, 75 N. W.

ceiver to obtain leave of court to prosecute a suit, it has been held that "a complaint filed by a receiver which fails to allege that leave of the court to institute and prosecute the action has been obtained is fatally defective."<sup>25</sup> So, if the receiver has a right to sue in his own name, it is said he should allege the source of that right; the court states: "The authority from the court to the receiver to sue in his own name lies at the very basis of his right to bring the action"; and the complaint "must show by proper averments that leave of court to institute and prosecute the action has been first obtained."<sup>26</sup>

§ 1605. (§ 184.) **Same; Appointment and Authority, How Alleged.**—The rule laid down by the cases in the preceding paragraph, as to the particularity with which a receiver should allege his authority, has not been universally followed; in many cases it is held that an allegation that the plaintiff was "duly" appointed may be made in general terms. Thus it is said: "It never was necessary to set out all the proceedings by which a receiver was appointed, but merely that he show the mode

1053, stating: "But it is now settled by the weight of authority, and on principle, that an allegation in general terms by the plaintiff, suing as receiver, that at such a time, in such an action or proceeding, and by such a court or officer, he was duly appointed receiver of the estate of such a party, is sufficient, and that anything short of this is not sufficient." See, also, *White v. Joy*, 13 N. Y. 83; *Bangs v. McIntosh*, 23 Barb. 591; *Lever v. Bailey*, 56 N. J. L. 54, 27 Atl. 799.

<sup>25</sup> *Davis v. Ladoga Creamery Co.*, 128 Ind. 222, 27 N. E. 494, citing *Moriarty v. Kent*, 71 Ind. 601; approved in *Rhodes v. Hilligoss*, 16 Ind. App. 478, 45 N. E. 666; *Hatfield v. Cummings*, 142 Ind. 350, 39 N. E. 859. See, also, *Garver v. Kent*, 70 Ind. 428; *Morgan v. Bucki*, 30 Misc. Rep. 245, 61 N. Y. Supp. 929. It has been held that an order authorizing the commencement of a suit cannot be collaterally attacked: *Graves v. Denny*, 15 Ga. App. 718, 84 S. E. 187.

<sup>26</sup> *Hatfield v. Cummings*, 142 Ind. 350, 39 N. E. 859. See, also, the cases *supra*, note 25.



of his appointment.”<sup>27</sup> It is said that “the insertion of the word ‘duly’ in the allegation that the plaintiff was appointed receiver, gave him the right to show on the trial all the facts conferring jurisdiction.”<sup>28</sup> And where the petition alleged that the applicant was appointed receiver in certain proceedings named, it was held a sufficient allegation of the petitioner’s title. “He was not bound to plead each step in the proceeding to show his appointment was valid. That could be proven on the hearing, if his appointment was put in issue.”<sup>29</sup> It is also maintained that “while it is essential to the complaint that it appear, by clear and express averment, that the receiver was authorized by the court to bring the action, . . . it is not necessary that the complaint shall show that the receiver had specific authority from the court to bring this particular action.”<sup>30</sup> And it is said that where “it does not appear from the record that he did not have such leave, and, when the plaintiff’s authority to bring suit is not denied or disputed, it will be presumed to exist. The plaintiff, in the absence of any

<sup>27</sup> *Stewart v. Beebe*, 28 Barb. 34 (“it was sufficient to aver that he was appointed receiver, the court by which the appointment was made, and the date of the order”). It has been said that while it is necessary for the complaint to show that the receivers had authority from the court to bring the action, it is not necessary to allege specific authority to bring the particular action: *Spinney v. Hall*, 49 Ind. App. 502, 97 N. E. 571.

<sup>28</sup> *Rockwell v. Merwin*, 45 N. Y. 166, 8 Abb. Pr., N. S., 330.

<sup>29</sup> *In re Beecher’s Estate*, 19 N. Y. Supp. 971, citing the cases, *supra*, in notes 27 and 28. See, also, *Morgan v. Bucki*, 30 Misc. Rep. 245, 61 N. Y. Supp. 929; *Daggett v. Gray*, 5 Cal. Unrep. 74, 40 Pac. 959; *Wason v. Frank*, 7 Colo. App. 541, 44 Pac. 378; *Nelson v. Nugent*, 62 Minn. 203, 64 N. W. 392.

<sup>30</sup> *Taylor v. Canaday*, 155 Ind. 671, 57 N. E. 524, 59 N. E. 20. The court continued: “It is good if it is shown that in the order of appointment authority to sue was sufficiently broad to authorize the receiver to institute and prosecute such suits as become necessary and proper for the collection of the assets and for obtaining possession of the property over which he has charge.”

denial of his authority to bring such suit, is not required to allege and prove it.”<sup>31</sup> This was held to be true in Washington, though the receiver was suing in his own name.<sup>32</sup>

§ 1606. (§ 185.) **Proof by Receiver of His Appointment and Powers.**—When, in a proper proceeding, the authority of a receiver to act is questioned, he should prove his appointment and powers, as any fact would be proved, the proper and general course being to produce a copy of the order appointing him and defining his rights.<sup>33</sup> In the case of a suit by corporation receivers it was said: “Their alleged appointment as receivers is denied by the answer. The only proof that could be made is a certified copy of the order of dissolution and the appointment of receivers. That not having been filed, the court could not recognize their authority to bring this action and invoke the equitable jurisdiction of the court.”<sup>34</sup> Such certified copy is generally considered conclusive evidence of the regularity of the pro-

<sup>31</sup> *Howard v. Stephenson*, 33 W. Va. 116, 10 S. E. 66; approved in *Elliott v. Trahern*, 35 W. Va. 634, 14 S. E. 223. See, also, *Boyd v. Royal Ins. Co.*, 111 N. C. 372, 16 S. E. 387; *Worth v. Wharton*, 122 N. C. 376, 29 S. E. 370.

<sup>32</sup> *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138; approved in *Compton v. Schwabacker etc. Co.*, 15 Wash. 306, 46 Pac. 338.

<sup>33</sup> *Frank v. Morrison*, 58 Md. 423; *Seymour v. Newman*, 77 Mo. App. 578; *Potter v. Merchants' Bank*, 28 N. Y. 641, 86 Am. Dec. 273 (the pendency of an action resulting in the receivership may be proved by its recitals in the appointing order). See for a case where the defendant was estopped by the fact that the appointment had been declared valid in prior proceedings between the parties, *Griffin v. Long Island R. Co.*, 102 N. Y. 449, 7 N. E. 735. See, also, *Scott v. Duncombe*, 49 Barb. 73. In *Rousseau v. Call*, 169 N. C. 173, 85 S. E. 414, it is said that the defendant cannot question the propriety of the appointment.

<sup>34</sup> *Pearson v. Leary*, 126 N. C. 504, 36 S. E. 35, 127 N. C. 114, 37 S. E. 149.

ceedings and *prima facie* evidence of the jurisdiction of the court appointing the receiver.<sup>35</sup> And where the jurisdiction of the appointing court was questioned, and the certified copy of the order did not show that an action had been commenced, the court said: "It was necessary to prove the commencement of the action, and that the court obtained jurisdiction over the corporation, . . . to sustain the allegation that the plaintiff was duly appointed receiver."<sup>36</sup>

§ 1607. (§ 186.) **Receiver is Subject to the Same Defenses as the One Whom He Represents.**—It is generally held that a receiver can occupy no better position than those for whom he acts and is appointed;<sup>37</sup> that he is in the place of the ones he represents, and has only such rights as they had, so that the rights and liabilities of third parties are not increased, diminished or varied by his appointment. There passes to the receiver the property and rights of the one from whom he takes, precisely

<sup>35</sup> Wright v. Nostrand, 94 N. Y. 32, and cases cited *supra*, in note 33.

<sup>36</sup> Spings v. Bowery Nat. Bank, 63 Hun, 505, 18 N. Y. Supp. 574, where the receiver failed to prove that he had filed the bond required by law, but had been subsequently authorized to sue, the court said: "It is a reasonable inference that the court, when it granted the order to sue, was apprised of the facts affecting the plaintiffs' right to bring the action, and ascertained that he had duly qualified as receiver. . . . The question is not as to the weight of evidence but whether there was any evidence tending to show that the bond was filed": Hegewisch v. Silven, 140 N. Y. 414, 35 N. E. 658.

<sup>37</sup> Bell v. Shibley, 33 Barb. 614 ("it has been repeatedly held that a receiver is subject to all the rights and equities existing against the company"); Cooper v. Bowers, 42 Barb. 87, 28 How. Pr. 10; Falkenbach v. Patterson, 43 Ohio St. 359, 1 N. E. 757; Cox v. Volkert, 68 Mo. 505, 511; Reel v. Brammer, 56 Ind. App. 180, 101 N. E. 1043; Haskell v. Gardner (Ind. App.), 93 N. E. 458; McBride v. American R'y & Lighting Co., 60 Tex. Civ. App. 226, 127 S. W. 229; James Bradford Co. v. United States Co. (Del.), 97 Atl. 622.

in the same condition and subject to the same equities as before his appointment,<sup>38</sup> and any defense good against the original party is good against the receiver.<sup>39</sup> This is true in the case of a receiver who represents a corporation; the court saying: "He is as much bound by a settlement which the company was authorized to make as was the company itself. It would be strange, indeed, if the legal acts of a corporation did not bind the receiver of its effects. If the rule were not so no one would dare venture to deal with a corporation."<sup>40</sup> But in those cases where the receiver is held to represent, not only the corporation, but also the creditors, whose rights he is bound to protect, he may avail himself of any of those

<sup>38</sup> *Van Wagoner v. Paterson Gas Light Co.*, 23 N. J. L. 285.

<sup>39</sup> *Casey v. La Societe de Credit Mobilier*, 2 Woods, 77, Fed. Cas. No. 2496; *Tyler v. Hamilton*, 62 Fed. 187 (and therefore, in the absence of fraud, he cannot avoid the contracts of the corporation he represents); *Mayer v. Thomas*, 97 Ga. 772, 25 S. E. 761; *Hatch v. Johnson*, 79 Fed. 828, 836; *Perry v. Godbe*, 82 Fed. 141 (thus he may be bound by statements made in a complaint filed by the corporation before his appointment); *Bell v. Hanover Nat. Bank*, 57 Fed. 822; *Security Title & Trust Co. v. Schlender*, 170 Ill. 609, 60 N. E. 854; *State v. Sullivan*, 120 Ind. 197, 21 N. E. 1095, 22 N. E. 325; *Reynaud v. C. J. Walton & Son*, 136 La. 88, 66 South. 549; *Wardle v. Hudson*, 96 Mich. 432, 55 N. W. 992; *Kuser v. Wright*, 52 N. J. Eq. 825, 31 Atl. 397; *Little v. Garabrant*, 90 Hun, 404, 35 N. Y. Supp. 689; *Capital City Mut. Fire Ins. Co. v. Boggs*, 172 Pa. St. 91, 33 Atl. 349; *Shuey v. Holmes*, 20 Wash. 13, 54 Pac. 540; *State v. Thum*, 6 Idaho, 323, 55 Pac. 858 (not allowed to recover money held in trust by the bank he represents).

<sup>40</sup> *Hyde v. Lynde*, 4 N. Y. 387. In *McLaren v. First Nat. Bank of Milwaukee*, 76 Wis. 259, 45 N. W. 223, the court states it as follows: "The result is that we must regard the plaintiff [receiver] as standing in the shoes of the carriage company, and as having no more right to recover, as against the bank, than the carriage company would have had." See, also, *Ross & Meehan Brake Shoe Foundry Co. v. Southern M. L. Co.*, 72 Fed. 957; *Moise v. Chapman*, 24 Ga. 249.



rights, and is not subject to defenses that would not be good against the creditors.<sup>41</sup>

§ 1608. (§ 187.) **Set-off Against the Receiver—In General.**—As stated in a preceding paragraph, the general rule is that a receiver acquires no greater interest in an estate than the one from whom he takes, and it follows that choses in action pass to him subject to any right of set-off existing at the time of his appointment.<sup>42</sup> But

<sup>41</sup> *Atwater v. Stromberg*, 75 Minn. 277, 77 N. W. 963. In *McLaren v. First Nat. Bank of Milwaukee*, 76 Wis. 259, 45 N. W. 223, it is said: "If the plaintiff [receiver] should make it appear that he in fact represents creditors of the carriage company existing at the time of the misappropriation, then it may be he can make a case entitling him to recover as such receiver." When an act has been done in fraud of creditors, the receiver may maintain an action although the corporation itself might not have been able to sue. Thus, in *Lyons v. Benney*, 230 Pa. St. 117, 34 L. R. A. (N. S.) 105, 79 Atl. 250, a note was deposited with a bank to make it appear to the bank examiner and creditors that the bank had a valuable asset. It was held that the maker could not deny consideration when sued by the receiver. See, also, *Appleton v. Turnbull*, 84 Me. 72, 24 Atl. 592. See this subject discussed further, *post*, § 190.

<sup>42</sup> *Fisher v. Knight*, 61 Fed. 491, 9 C. C. A. 582, 17 U. S. App. 502; *Wheaton v. Daily Tel. Co.*, 124 Fed. 61, 59 C. C. A. 427; *Jefferson v. Edrington*, 53 Ark. 545, 14 S. W. 99, 903; *Baleh v. Wilson*, 25 Minn. 299; quoted approvingly in *Yardley v. Clothier*, 49 Fed. at 341; *Grant v. Buckner*, 49 La. Ann. 668, 21 South. 580; *Mercantile Nat. Bank v. McFarlane*, 71 Minn. 497, 70 Am. St. Rep. 352, 74 N. W. 287. This portion of the text is quoted in *People ex rel. Webb v. California Safe Deposit & Trust Co.*, 168 Cal. 241, L. R. A. 1915A, 299, 141 Pac. 1181; and cited in *Grief v. James H. Wright Co.*, 10 Del. Ch. 308, 91 Atl. 205. Where a receiver sues for an amount due on a contract, the defendant may set off damages suffered because of failure to fulfill the contract: *Kuebler v. Haines*, 229 Pa. St. 274, 78 Atl. 141. In *Butler v. Beah*, 82 Conn. 417, 74 Atl. 748, a corporation had agreed with a stockholder that he might pay for groceries by surrender of preferred stock. It was held that after receivership, the stockholder might invoke the aid of equity to accomplish this result. The right of set-off is said to be within

the right of set-off must exist before the receiver is appointed, for "when a receiver is appointed, the accounts of the insolvent are closed, and no changes can thereafter be made by any assignments of credits against the estate; as this, if allowed, would injure the trust fund, and defeat the ratable distribution to which each creditor is entitled."<sup>43</sup> The supreme court of Pennsylvania has said: "Now, if each creditor be allowed to purchase goods at the receiver's sale, and pay for them by a set-off, we can readily see how, at least, this part of the proceedings of a court of equity might degenerate from a regular and orderly process to a mere scramble for the debtor's goods."<sup>44</sup>

§ 1609. (§ 188.) **Set-off by Bank Depositor.**—The principles involved in a set-off against a receiver have received particular application in the case of receivers of insolvent banks, when suing parties who had money on deposit at the bank when it became insolvent. It is said to be well settled that in a suit by a receiver of an insol-

the statute of 1888 allowing suits against federal receivers without leave of court: *Grant v. Buckner*, 172 U. S. 232, 43 L. Ed. 430, 19 Sup. Ct. 163. Ordinarily unless there is mutuality, a set-off will not be allowed: *Spinney v. Hall*, 49 Ind. App. 502, 97 N. E. 571.

<sup>43</sup> In *re Hamilton*, 26 Or. 579, 38 Pac. 1088. See, also, *Chicago Arch. Iron Works v. McKey*, 93 Ill. App. 244 ("a claim of the debtor, accruing before the receiver was appointed, cannot be set off against a claim accruing after the receiver was appointed, and therefore due the receiver and not the insolvent"); *Greif v. James H. Wright Co.*, 10 Del. Ch. 308, 91 Atl. 205 (*dictum*); *Van Dyck v. McQuade*, 85 N. Y. 617; *United States Bung Mfg. Co. v. Armstrong*, 34 Fed. 94 (the existence of cross-demands or independent debts which could have been set off at law, had they been asserted at the proper time, cannot be asserted in equity). But it is the appointment of the receiver and not the filing of a bill which is to be taken as changing the situation: *United States Brick Co. v. Middletown Shale Brick Co.*, 228 Pa. St. 81, 77 Atl. 395.

<sup>44</sup> *Singerly v. Fox*, 75 Pa. St. 112.

vent bank upon a note or obligation due the bank, the defendant will be allowed to set off his deposit or certificate of deposit held by him at the time of the suspension of the bank.<sup>45</sup> But in order to avail himself of the right of set-off, the defendant must have acquired his right before the insolvency of the bank, as otherwise the transaction may be void as in fraud of creditors.<sup>46</sup> And it has been held that where a receiver sued a stockholder of an insolvent bank for unpaid subscriptions, the stockholder's deposit could not be set off, the court saying: "They are not in the same right. . . . To permit him to set off the debt due him would, where the corporation is insolvent, manifestly give him a preference as a creditor. To this he is not entitled. It is the right of the other creditors to have him pay in the money due from him for stock as part of the fund for the payment of debts."<sup>47</sup> There has been some conflict in the decisions as to whether the right of set-off existed when the note on which the receiver was suing did not mature until after his appointment; the right was denied in a federal

<sup>45</sup> *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 Sup. Ct. 148; *Snyder v. Armstrong*, 37 Fed. 18 (see the case for a discussion of the earlier cases); *Steelman v. Atchley*, 98 Ark. 294, 32 L. R. A. (N. S.) 1060, 135 S. W. 902; *State v. Brobston*, 94 Ga. 95, 47 Am. St. Rep. 138, 21 S. E. 146; *Reid v. Owensboro Savings Bank & Trust Co.*, 141 Ky. 444, 132 S. W. 1026; *Miller v. Receiver of the Franklin Bank*, 1 Paige, 444; *Davis v. Industrial Mfg. Co.*, 114 N. C. 321, 23 L. R. A. 322, 19 S. E. 371. This portion of the text is quoted in *People ex rel. Webb v. California Safe Deposit & Trust Co.*, 168 Cal. 241, L. R. A. 1915A, 299, 141 Pac. 1181. See the statement in *Hade v. McVay*, 31 Ohio St. 231, though the set-off was not allowed by reason of a statute; *Armstrong v. Warner*, 49 Ohio St. 376, 17 L. R. A. 466, 31 N. E. 877; *Clarke v. Hawkins*, 5 R. I. 219.

<sup>46</sup> *Stone v. Dodge*, 96 Mich. 514, 21 L. R. A. 280, 56 N. W. 75 (the case contains a full review of the authorities on the subject); *Venango Nat. Bank v. Taylor*, 56 Pa. St. 14; *Smith v. Mosby*, 9 Heisk. 501.

<sup>47</sup> *Williams v. Traphagen*, 38 N. J. Eq. 57.

case, stating: "When the plaintiff was appointed receiver, the defendant was in the list of unsecured depositors, to whom payment, the bank being insolvent, was prohibited. The defendant had thus no right of set-off, nor any equity against its note, not then matured, which passed to the receiver. To allow the set-off, now that the note has matured, and thereby make payment in full to the defendant in part discharge of its obligation to the bank, would be contrary, not only to the policy of the law, but also to the plain meaning of its provisions."<sup>48</sup> But the decision was reversed by the United States supreme court, and the weight of authority seems to be to the effect that the fact that the claim thus held does not mature until after the receiver's appointment, does not prevent the defendant from using it as a set-off.<sup>49</sup>

<sup>48</sup> *Armstrong v. Scott*, 36 Fed. 63, citing *Venango Nat. Bank v. Taylor*, 56 Pa. St. 14; the case was followed in *Stephen v. Schuckman*, 32 Mo. App. 333. It was reversed by the United States supreme court in *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 Sup. Ct. 148, after having been disapproved by *Yardley v. Clothier*, 49 Fed. 337, which has been favorably received. In *McManus-Kelly Co. v. Pope Mfg. Co.* (N. J. Eq.), 70 Atl. 297, a case not involving a bank deposit, it was held that a defendant could not set off notes not yet due.

<sup>49</sup> See *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 Sup. Ct. 148. The case of *Colton v. Drovers Perpetual Bldg. & Loan Ass'n of Baltimore*, 90 Md. 85, 78 Am. St. Rep. 431, 46 L. R. A. 388, 45 Atl. 23, contains such a clear presentation of the principles involved that I quote from it at length—Boyd, J.: "But it is said on behalf of the appellants that, inasmuch as the note fell due after the appointment of the first receiver, he took it free from all equities, just as a *bona fide* purchaser would have done, and that a claim in favor of the bank which did not mature until in the hands of the receiver is not subject to a set-off by a claim which existed against the bank before the receiver's rights accrued; in short, that in one case the debt is due by the bank to the customer, and in the other by the customer to the receiver. If that were strictly correct, there would be some ground for the contention; for if, for example, the appellee had purchased some property from the receiver, it would



§ 1610. (§ 189.) **Set-off Against Corporation Receiver, in Suit Against Stockholders.**—In the case of a receiver of an insolvent corporation, suing in behalf of its creditors to enforce the liability of the stockholders, the defendant cannot set off a claim that is good against the

not be permitted to set off its claim against such indebtedness to the receiver, for it would thereby not only obtain an unwarranted preference over other creditors, but it would prevent a proper settlement of the involved estate, and, moreover, they would not be mutual claims. But when the receiver was appointed, he took the assets of the bank, and among those assets was this note. It was a debt already incurred by the appellee and the bank. Although there are some authorities to the contrary, the great weight of authority is to the effect that the fact that the claim thus held by the receiver does not mature until after his appointment does not prevent a defendant from using his claim as a set-off." Among other decisions are *Berry v. Brett*, 6 Bosw. 627; *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 Sup. Ct. 148; *Platt v. Bently*, 11 Am. Law Reg., N. S., 171; *In re Hatch*, 155 N. Y. 401, 40 L. R. A. 664, 50 N. E. 49; *Northampton Bank v. Balliet*, 8 Watts & S. 311, 42 Am. Dec. 297; *Aldrich v. Campbell*, 4 Gray, 284; *Smith v. Spingler*, 83 Mo. 408; *McCagg v. Woodman*, 28 Ill. 84; *Armstrong v. Warner*, 49 Ohio St. 376, 17 L. R. A. 466, 31 N. E. 877; *Yardley v. Clothier*, 51 Fed. 506, 17 L. R. A. 462, 2 C. C. A. 349; *Skiles v. Houston*, 110 Pa. St. 254, 2 Atl. 30. See, also, *Fera v. Wickham*, 135 N. Y. 223, 17 L. R. A. 456, 31 N. E. 1028.

The federal courts have not been harmonious on the question of whether the set-off should be allowed in equity, or at law; their conclusion being influenced largely by statute. The case of *Yardley v. Clothier*, 49 Fed. 337, contains a full discussion of the question. See, also, *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 Sup. Ct. 148; *Armstrong v. Scott*, 36 Fed. 63; *Louis Snyder's Sons v. Armstrong*, 37 Fed. 18; *Adams v. Spokane Drug Co.*, 57 Fed. 888, 23 L. R. A. 334; approving *Yardley v. Clothier* in preference to *Armstrong v. Scott*; *Hale v. McVay*, 31 Ohio St. 231.

It has been held that a bank cannot set off notes not due against a deposit when a receiver was appointed for a corporation depositor: *Blum Bros. v. Girard National Bank*, 248 Pa. St. 148, Ann. Cas. 1916D, 609, 93 Atl. 940.

corporation only.<sup>50</sup> Where the action was for their unpaid subscription the court said: "They are debtors to the full amount subscribed by them, and cannot be allowed to appropriate any part of the fund belonging to the other creditors till their liability has been paid."<sup>51</sup> And where a stockholder was indebted to the corporation for misappropriation of funds, and the receiver had a surplus to divide among the stockholders, he was allowed to set off the amount due the corporation against the distributive share of the stockholder.<sup>52</sup> But where the stockholder had actually advanced money to prevent a burdensome assessment on the stockholders, he was allowed to set it off against his unpaid subscription on the ground that the real assets would not be diminished by such payment.<sup>53</sup>

**§ 1611. (§ 190.) Statutory Receiver of Insolvent Corporation Represents Its Creditors.**—The general rule that a receiver takes the title of the individual or corporation whose receiver he is, and that any defense which would have been good against the former may be asserted

<sup>50</sup> *Sheafe v. Larimer*, 79 Fed. 921, distinguishing the cases where set-off is allowed on a bank deposit; *Wallace v. Hood*, 89 Fed. 11 (refusing to allow a cross-petition for false representation upon the sale of the stock to defendant). In an action brought by a receiver of a mutual assessment insurance company to recover assessments, a policy-holder cannot set off a sum due for losses under the policy. "The members are under a contract liability to contribute to the payment of losses, and, unlike depositors in a savings bank, cannot escape with the loss of what they have already paid": *Stone v. New Jersey & H. R. R'y & Ferry Co.*, 75 N. J. L. 172, 66 Atl. 1072.

<sup>51</sup> *Bain v. Clinton Loan Ass'n*, 112 N. C. 248, 17 S. E. 154.

<sup>52</sup> *Merrill v. Cape Ann. Granite Co.*, 161 Mass. 212, 23 L. R. A. 313, 36 N. E. 797.

<sup>53</sup> *Bausman v. Denney*, 73 Fed. 69. See, also, *Van Wagoner etc. v. Paterson Gas Light Co.*, 23 N. J. L. 283.

against the latter, is subject to two important and well-recognized exceptions. The first of these relates to receivers of insolvent corporations, appointed under the varying terms of the statutes for the purpose of winding up their affairs. Such a receiver, it is almost universally held, "is to be regarded as the representative, not only of the corporation, having power of asserting its rights, taking its title and subject to its liabilities, but occupies a still broader position, for he represents not only the corporation, but also its creditors; and under his duties as representative of the latter class he is invested with powers and may do acts that could not be done by a mere representative of the corporation."<sup>54</sup> Since he stands

<sup>54</sup> *Peabody v. New England Waterworks Co.*, 184 Ill. 625, 75 *Am. St. Rep.* 195, 56 N. E. 957, reviewing many cases; *Hamor v. Engineering Co.*, 84 Fed. 393; *Bayne v. Brewer Pottery Co.*, 90 Fed. 754; *In re Wilcox etc. Co.*, 70 Conn. 220, 39 Atl. 163; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 *Am. St. Rep.* 302, 39 *L. R. A.* 725, 49 N. E. 592; *Farmers' Loan & Trust Co. v. Minneapolis etc. Works*, 35 Minn. 543, 29 N. W. 349; *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310; *Alexander v. Relfe*, 74 Mo. 516, 9 Mo. App. 133; *Werner v. Murphy*, 60 Fed. 769, reviewing New Jersey cases; *Mechanics' Nat. Bank v. Pennsylvania Steel Co.*, 57 N. J. L. 336, 30 Atl. 545; *Gillett v. Moody*, 3 N. Y. 479; *Curtis v. Leavitt*, 15 N. Y. 45 (a leading case); *Pittsburgh Carbon Co. v. McMillan*, 119 N. Y. 46, 7 *L. R. A.* 46, 23 N. E. 530; *Bien v. Bixby*, 18 Misc. Rep. 415, 41 N. Y. Supp. 433; *Cheney v. Maumee Cycle Co.*, 64 Ohio St. 205, 60 N. E. 207; *Cole v. Satsop R. R. Co.*, 9 Wash. 487, 43 *Am. St. Rep.* 858, 37 Pac. 700. "The effect of the appointment and the seizure of the property by the receiver was to fasten the claims of creditors upon it, and to give that officer control over it for the benefit of creditors; and in this respect his relation to it was, for all practical purposes, the same as that which an assignee would have had. The property thus sequestered was held by the receiver as effectually as an assignee could have held it, or as creditors could have held it by attachment or levy. In no other way than through him could the right of creditors be worked out, and in this aspect of the case he represented the creditors, rather than the debtor": *Cheney v. Maumee Cycle Co.*, 64 Ohio St. 205, 60 N. E. 207, holding that a mortgage of the corporation's land unrecorded

before the court invested with all the rights and equities of the creditors of the insolvent corporation, it is especially his duty to avoid any act of the corporation committed in fraud of those rights and equities.<sup>55</sup> "It is of no importance, so far as the present discussion is concerned, whether such agent of the law takes the technical title to the debtor's property, or takes only the possession of it. In either case he is the sole agent, through whom, and through whom alone, as a general rule, the rights of creditors can be protected and enforced; and, in protecting and enforcing those rights, he is the representative of creditors, and not of the debtor"; and this is especially true where the statute suspends the rights of the creditors to attach or levy upon the corporate property after the appointment of the receiver.<sup>56</sup> Some

before the appointment of the receiver was not a valid lien as against him. To the effect that for the benefit of creditors a receiver may sue the directors for diverting the assets, see *Hays v. Pierson*, 65 N. J. Eq. 353, 58 Atl. 728. The same principle was held applicable to a receiver of a partnership after dissolution in *Brockhurst v. Cox*, 71 N. J. Eq. 703, 64 Atl. 182.

<sup>55</sup> *Werner v. Murphy*, 60 Fed. 769 (creditor of the corporation cannot sue to set aside fraudulent conveyance on the mere refusal of the receiver to do so). The receiver may maintain a suit against stockholders to recover dividends paid while the corporation was insolvent: *Detroit Trust Co. v. Goodrich*, 175 Mich. 168, *Ann. Cas.* 1915A, 821, 141 N. W. 882. Where an act of a corporation violates an express prohibition of statute, receivers may avail themselves of the illegality, although the corporation has received the benefit from the illegal transaction: *Strickland v. National Salt Co.*, 79 N. J. Eq. 182, 81 Atl. 828.

<sup>56</sup> *In re Wilcox etc. Co.*, 70 Conn. 220, 39 Atl. 163; *Farmers' Loan & T. Co. v. Minneapolis etc. Works*, 35 Minn. 543, 546, 29 N. W. 349. "The pendency of the proceedings disables the creditors to go on, each in his own behalf, to enforce his claim by action, judgment, execution and levy. So that, unless all the rights of the creditors can be enforced in this proceeding, unless their right to avoid transfers can be made available by means of it, then it is, to some extent, an obstruction, rather than a remedy, to them."



limitations on these broad assertions of the receiver's character as representative of the creditors are noticed hereafter.<sup>57</sup>

<sup>57</sup> See *post*, chapter on Creditors' Bills. In *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150, 167, 177, 12 L. R. A. 328, 25 N. E. 680, 685, 688, it was said: "We understand the rule to be, that where a receiver is appointed for the purpose of taking charge of the property and assets of a corporation, he is, for the purpose of determining the nature and extent of his title, regarded as representing only the corporate body itself, and not its creditors or shareholders, being vested by law with the estate of the corporation, and deriving his own title under and through it; and that for purposes of litigation he takes only the rights of the corporation such as could be asserted in its own name, and that upon that basis only can he litigate for the benefit of either shareholders or creditors. . . . But, so far as his powers are derived from a statute, or from a lawful decree of court, and the powers do not involve rights which, at the time of his appointment, were vested in such owners, he is not merely their representative, but is the instrument of the law, and the agent of the court which appointed him. Such right and authority as the law and the court rightfully give him he possesses, and in respect to such right he is not circumscribed and limited by the right which was vested in and available to the owners." See, also, as supporting or tending to support a similar view, *Fairbanks v. Farwell*, 141 Ill. 354, 30 N. E. 1056; *Gottlieb v. Miller*, 154 Ill. 44, 39 N. E. 992; *Ray v. First Nat. Bank*, 111 Ky. 377, 63 S. W. 762; *Smith v. Johnson*, 57 Ohio St. 486, 49 N. E. 693; *McLaren v. First Nat. Bank*, 76 Wis. 259, 45 N. W. 223. The doctrine of the Illinois courts seems to have been brought into closer accord with that generally prevailing by the later case of *Peabody v. New England Waterworks Co.*, 184 Ill. 625, 75 Am. St. Rep. 195, 56 N. E. 957, *supra*, note 54.

In Indiana, the right of the receiver to represent the creditors is closely limited. "The receiver cannot represent subsequent creditors on the ground of estoppel, for their interests and his are opposed to each other. His claim must be founded on the theory that the subscription belonged to the corporation, and therefore is a part of the general assets; theirs must rest on the ground that, to the extent necessary to produce assets to pay their claims, they have an equity that authorizes them to insist that the defendant, having been silent, shall not be heard to speak; and their equity is such that it would be incompetent to deprive them of any part of the

§ 1612. (§ 191.) **Receiver in Supplementary Proceedings, How Far a Representative of Creditors.**—A receiver in proceedings supplemental to execution is also, in some respects, a representative of and trustee for the creditors at whose instance he was appointed,<sup>58</sup> especially for the purpose of attacking conveyances by the debtor made in fraud of their rights.<sup>59</sup> “For this pur-

money thus produced, if necessary to pay their debts, by requiring them to divide with creditors who have no equity”: *Marion Trust Co. v. Blish*, 170 Ind. 686, 688, 18 L. R. A. (N. S.) 347, 84 N. E. 814, 85 N. E. 344; *Reel v. Brammer*, 56 Ind. App. 180, 101 N. E. 1043.

On the general subject of the representative capacity of the corporation receiver, see, also, *Porter v. Sabin*, 149 U. S. 473, 37 L. Ed. 818, 13 Sup. Ct. 1008; *Movius v. Lee*, 30 Fed. 298; *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560; *Greene v. A. & W. Sprague Mfg. Co.*, 52 Conn. 330; *Davenport v. Lines*, 72 Conn. 118, 44 Atl. 17; *American T. and Sav. Bank v. McGettigan*, 152 Ind. 582, 71 Am. St. Rep. 345, 52 N. E. 793 (action by receiver on behalf of creditors not allowed, when not for the benefit of all the creditors); *Holden v. Phelps*, 135 Mass. 61; *Thompson v. Greeley*, 107 Mo. 577, 17 S. W. 962; *Harrington v. Connor*, 51 Neb. 214, 70 N. W. 911; *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237 (may attack judgment by confession against the corporation); *Williams v. Boice*, 38 N. J. Eq. 364 (suit to recover improperly paid dividends); *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775; *Graham Button Co. v. Spielman*, 50 N. J. Eq. 120, 24 Atl. 571; *Beebe v. George H. Beebe Co.*, 64 N. J. L. 497, 46 Atl. 168; *Southard v. Benner*, 72 N. Y. 424; *Whittlesey v. Delaney*, 73 N. Y. 571 (may sue to set aside collusive judgment); *Attorney-General v. Guardian M. L. Ins. Co.*, 77 N. Y. 272 (is exclusive representative of creditors, and may enjoin their separate actions to avoid the corporation's fraudulent transfers); *Stonebridge v. Perkins*, 141 N. Y. 1, 35 N. E. 980; *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837; *Osgood v. Laytin*, 3 Keyes, 521 (may recover illegal dividends, and enjoin separate suits of creditors for that purpose); *Powers v. C. H. Hamilton Paper Co.*, 60 Wis. 23, 18 N. W. 20.

<sup>58</sup> *Bostwick v. Menck*, 40 N. Y. 383; *Porter v. Williams*, 9 N. Y. 142, 59 Am. Dec. 519.

<sup>59</sup> See *Hill v. Western & A. R. Co.*, 86 Ga. 284, 12 S. E. 635; *Farmers' Loan & T. Co. v. Minn. E. & M. Works*, 35 Minn. 543, 29 N. W. 349 (may avoid invalid chattel mortgage); *Walsh v. Byrnes*,

pose he represents and stands in place of the creditor, and prosecutes the action in his behalf. The right to maintain the action does not depend upon any succession by the receiver to the title of the debtor, but upon the equitable right of the creditor to have set aside a conveyance which as to him is invalid, but which is effectual as a cloud to prevent the application of the property to the satisfaction of his debt. There is no need that the receiver take possession of the property for this purpose, nor that he be in any way invested with the title."<sup>60</sup> If the property fraudulently transferred has been sold by the transferee, the receiver may, in the right of the creditor, follow the fund or proceeds of the sale into the hands of any person not a *bona fide* owner or holder thereof.<sup>61</sup> But there is no statute and no rule of law which entitles him to sue for anything that does not belong or has not belonged to the debtor; he is not the representative of the creditor to enforce a cause of action to recover damages for a conspiracy between the judgment debtor and others to prevent the collection of the debt;<sup>62</sup>

39 Minn. 527, 40 N. W. 831; *Miller v. Mackenzie*, 29 N. J. Eq. 291; *Bergen v. Little*, 41 N. J. Eq. 18, 2 Atl. 614; *Boid v. Dean*, 48 N. J. Eq. 193, 21 Atl. 618; *Walsh v. Rosso*, 59 N. J. Eq. 123, 44 Atl. 708; *Porter v. Williams*, 9 N. Y. 142, 59 Am. Dec. 519 (a leading case); *Stephens v. Perrine*, 143 N. Y. 476, 39 N. E. 11 (may avoid invalid chattel mortgage); *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178, 73 Am. St. Rep. 678, 54 N. E. 781 (his right of action is equitable, not legal); *Reynolds v. Aetna Life Ins. Co.*, 160 N. Y. 635, 55 N. E. 305, affirming 28 App. Div. 591, 51 N. Y. Supp. 446 (may reach amounts due on insurance policies, concealed by debtor); *Hedges v. Polhemus*, 9 Misc. Rep. 680, 30 N. Y. Supp. 556 (may avoid chattel mortgage); *Pender v. Mallett*, 123 N. C. 57, 31 S. E. 351.

<sup>60</sup> *Dunham v. Byrnes*, 36 Minn. 106, 30 N. W. 402; *Wright v. Nosstrand*, 94 N. Y. 32, 43.

<sup>61</sup> *Mandeville v. Avery*, 124 N. Y. 376, 21 Am. St. Rep. 678, 26 N. E. 951.

<sup>62</sup> *Ward v. Petrie*, 57 N. Y. 301, 68 Am. St. Rep. 790, 51 N. E.

or to enforce a resulting trust created by statute in favor of creditors, in the case where the debtor pays the purchase price of land and causes the title to be conveyed to another.<sup>63</sup> Further, it should be noted that a receiver in supplementary proceedings, like a receiver in a creditor's bill in favor of particular creditors, is not a trustee for the benefit of all the creditors, but only for the benefit of those in whose behalf he is appointed.<sup>64</sup> His primary duty is to apply the funds which he realizes from the property of the debtor in satisfaction of the judgments which he was appointed to enforce, and no others.<sup>65</sup> He is "clothed with power to set aside transfers fraudulent as against the demands represented by him, only to an extent sufficient to satisfy such demands and costs."<sup>66</sup>

1002 (see this case for an instructive summary of the rights and remedies of receivers in supplementary proceedings in New York).

<sup>63</sup> Since in such case the trust is construed to result not *through* the debtor to the creditors, but directly to the creditors: *Underwood v. Sutcliffe*, 77 N. Y. 58.

<sup>64</sup> *Young v. Clapp*, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; *Russell v. Chicago T. & S. Bank*, 139 Ill. 538, 17 L. R. A. 345, 29 N. E. 37; *Bostwick v. Menck*, 40 N. Y. 383; *Goddard v. Stiles*, 90 N. Y. 199.

<sup>65</sup> *Young v. Clapp*, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; *Bostwick v. Menck*, 40 N. Y. 383; *Gifford v. Rising*, 59 Hun, 42, 12 N. Y. Supp. 428.

<sup>66</sup> *Bostwick v. Menck*, 40 N. Y. 383.



## CHAPTER VII.

RECEIVER'S RELATION TO PENDING SUITS;  
AND WHEN IS HE A NECESSARY PARTY.

## ANALYSIS.

- § 192. Substitution of receiver as plaintiff in pending actions; effect of his appointment on pending actions.
- § 193. Substitution of receiver as defendant in pending actions.
- § 194. Intervention by receivers.
- § 195. Effect of change of receivers on pending actions.
- § 196. When is receiver a necessary party.

§ 1613. (§ 192.) **Substitution of Receiver as Plaintiff in Pending Actions; Effect of His Appointment on Pending Actions.**—Authority may be found to the effect that the appointment of a receiver with the right to sue deprives the principal of the right to maintain actions, and therefore that pending proceedings abate by the appointment of a receiver.<sup>1</sup> But the tendency of modern deci-

<sup>1</sup> *Boston etc. Co. v. Montana Ore Purchasing Co.*, 24 Mont. 142, 60 Pac. 990, where the court says at page 991: "The necessary effect of clothing the receiver with power to sue was to deprive the plaintiff for the time being of like power. We have been cited to no case or text-book announcing the contrary rule, and have been unable to find any." To the same effect are the cases of *Idaho Gold Reduction Co. v. Croghan*, 6 Idaho, 471, 56 Pac. 164; *Kokoma etc. R'y Co. v. Pittsburg etc. R'y Co.*, 25 Ind. App. 335, 58 N. E. 211; *Davis v. Ladoga Creamery Co.*, 128 Ind. 222, 27 N. E. 494. All of these cases rest upon the text authority of Judge Thompson in § 6900 of his Commentaries on the Law of Corporations. The only authority which the learned author cites (*Milwaukee Mutual Fire Ins. Co. v. The Sentinel Co.*, 81 Wis. 207, 15 L. R. A. 627, 51 N. W. 440), was a case holding that a dissolved corporation could not continue an action for libel pending before its dissolution.

sions is in favor of the more reasonable rule that the appointment of the receiver has no effect upon pending actions, unless indeed the plaintiff in such action has been restrained from prosecuting the action by the court appointing the receiver, or, if a corporation, has been dissolved by a final decree.<sup>2</sup> A general injunctive order, however, will not, under this latter view, be construed as applying to pending actions.<sup>3</sup> Even the facts that a corporation is insolvent and that winding-up proceedings have been instituted in which a receiver has been appointed, do not prevent the action from continuing in the name of the corporation. The name is a mere shell, and the recovery, of course, will be for the benefit of those whom the receiver represents.<sup>4</sup> In cases of pending actions, of course, a receiver who is vested with the *choses in action* of the principal may be substituted as plaintiff, and such is doubtless the better practice. But the failure to substitute him is, at most, only a formal defect, and under the provisions of the codes, notwithstanding a change in interest, the action may be continued in the name of the original party.<sup>5</sup> Of course if the original party ceases to exist, as in case of the final dissolution of a corporation, actions begun by such party perish with it.<sup>6</sup>

<sup>2</sup> Hunt v. Columbia Ins. Co., 55 Me. 290, 92 Am. Dec. 592; Phoenix Warehousing Company v. Badger, 67 N. Y. 294, 299; Sigua Iron Co. v. Brown, 33 Misc. Rep. 50, 68 N. Y. Supp. 141; Warner v. Imbeau, 63 Kan. 415, 65 Pac. 648. The text is cited in Clements v. Hamilton-Brown Shoe Co., 99 Ark. 335, 138 S. W. 971.

<sup>3</sup> Sigua Iron Co. v. Brown, 33 Misc. Rep. 50, 68 N. Y. Supp. 141.

<sup>4</sup> High on Receivers, § 258; Warner v. Imbeau, 63 Kan. 415, 65 Pac. 648.

<sup>5</sup> Warner v. Imbeau, 63 Kan. 415, 65 Pac. 648; Vanderhorst Brewing Co. v. Amrhine, 98 Md. 406, 56 Atl. 833.

<sup>6</sup> Milwaukee Mutual Fire Ins. Co. v. The Sentinel Co., 81 Wis. 207, 15 L. R. A. 627, 51 N. W. 440; National Bank v. Colby, 21 Wall. 609, 22 L. Ed. 687.

§ 1614. (§ 193.) **Substitution of Receiver as Defendant in Pending Actions.**—The effect of an appointment of a receiver of a defendant's property is very different from the effect of the appointment of a receiver of the plaintiff's property. In the case of the plaintiff, it is always proper for the receiver to be substituted where vested with the right to sue, though sometimes, as has been seen, not necessary. But in the case of the receiver appointed for defendants, it is sometimes not proper to substitute the receiver. As the ordinary chancery receiver is not vested with title to the property, there is no change of ownership demanding a substitution in such cases, and as the appointment of such receiver is by no means equivalent to a dissolution, in cases of corporate receivers, there is no abatement of pending actions.<sup>7</sup> Such actions may therefore continue against the original defendant notwithstanding the receiver's appointment.

<sup>7</sup> *Decker v. Gardner*, 124 N. Y. 334, 11 L. Ed. 480, 26 N. E. 814. In this case, an action of trespass was pending against a corporation before the appointment of the receiver *pendente lite*; upon leave of court the receiver was substituted, and afterwards moved for a dismissal of the action on the ground that he was not the proper party, but that the corporation continued to be the proper party defendant. The court dismissed the action, and in a somewhat elaborate opinion discusses the distinction between the receiver *pendente lite* and the receiver on dissolution of the corporation. In *Hunt v. Columbia Ins. Co.*, 55 Me. 290, 296, 92 Am. Dec. 592, Barrows, J., says: "Like the apocalyptic church in Sardis, when its existence was recognized and it was addressed in the language of reproof by the apostle, though in some sort it may be said to be dead, 'it has a name to live'; and for the furtherance of justice it is best to 'strengthen the things that are ready to die'": *Griffith v. Burlingame*, 18 Wash. 429, 51 Pac. 1059; *Black v. Consolidated R'y & Power Co.*, 158 N. C. 468, 74 S. E. 468; *Kelley v. U. P. R. Co.*, 58 Kan. 161, 48 Pac. 843, with which compare *Seannell v. Felton*, 57 Kan. 468, 46 Pac. 948. While the suit may be prosecuted to judgment, the plaintiff must present his claim to the receiver if he desires to share in the assets: *Attorney General v. Supreme Council, A. L. H.*, 196 Mass. 151, 81 N. E. 966.

But if the effect of the proceeding disturb the receiver's possession of property, it is clear that he must be made a party under leave of court.<sup>8</sup> Or if the receiver be appointed upon the statutory dissolution of a corporation, it is plain that pending actions abate, and can be continued, if at all, only against the receiver, who can be sued, in general, only by leave of court.<sup>9</sup> Nothing short of an actual dissolution, however, abates actions already pending; the mere commencement of winding-up proceedings and the appointment of a receiver *pendente lite* does not have that result.<sup>10</sup> If a corporation be dissolved,

<sup>8</sup> Calhoun v. Lanoux, 127 U. S. 634, 32 L. Ed. 297, 8 Sup. Ct. 1345. In a pending suit for nuisance, the receiver may be joined as a defendant: Kaw Valley Drainage Dist. v. Missouri Pac. R'y Co., 99 Kan. 188, 161 Pac. 937.

<sup>9</sup> Nelson v. Hubbard, 96 Ala. 245, 11 South. 428; Rogers v. Haines, 96 Ala. 586, 11 South. 651; Combes v. Keyes, 89 Wis. 297, 46 Am. St. Rep. 839, 27 L. R. A. 369, 62 N. W. 89; Toledo etc. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; People v. Knickerbocker Life Ins. Co., 106 N. Y. 619, 13 N. E. 447; Morgan v. New York Nat. B. & L. Ass'n, 73 Conn. 151, 46 Atl. 877; Wilcox v. Continental L. Ins. Co., 56 Conn. 468, 16 Atl. 244; Pendleton v. Russell, 144 U. S. 640, 36 L. Ed. 574, 12 Sup. Ct. 743; National Bank v. Colby, 21 Wall. 609, 22 L. Ed. 687; Gray v. Taylor, 59 N. J. Eq. 621, 44 Atl. 668. But where in the prior action the court has taken possession of the *res* by its receiver, a subsequent dissolution of the corporation does not hinder the first court from rendering a valid decree: Leadville Coal Co. v. McCreery, 141 U. S. 475, 35 L. Ed. 824, 12 Sup. Ct. 28.

<sup>10</sup> Page v. Supreme Lodge K. & L. of P., 161 Mass. 584; Warner v. Imbeau, 63 Kan. 415, 65 Pac. 648. But the receiver *pendente lite* in winding-up proceedings may have the prosecution of such actions enjoined, for the corporation having no assets and no means of defense, it is proper that the claims should be adjudicated by the court administering its estate: Morton v. Stone Harbor Imp. Co. (N. J.), 44 Atl. 875. A recent writer (Alderson on Receivers, p. 510) suggests that this case is in direct conflict with another decision of the same court in the same volume, Gray v. Taylor, 59 N. J. Eq. 621, 44 Atl. 668. The latter case holds that the dissolution of a foreign corporation by a decree in the court of its domicile abates pending actions everywhere, but holds that the particular action was exempted from the decree of dissolution. In the *Morton* case there was not yet a



actions against it fall, unless expressly reserved by the decree of dissolution, and the plaintiffs in such actions must seek their relief in the administration proceedings in the court granting the order of dissolution.<sup>11</sup> The receiver, by appearing and defending without leave of court, or where he is not a proper party, cannot bind the fund, and the judgment against him will be without effect.<sup>12</sup>

§ 1615. (§ 194.) **Intervention by Receivers.**—The receiver's right to intervene in pending actions stands on a different footing both from his right to be substituted as plaintiff and from his right to be substituted as defendant in pending actions. While he may be substituted as plaintiff in every case, and while he may be made a defendant only in cases where the action disturbs his possession or where he has title in trust for creditors and others, the right to intervene stands on a middle ground. Such intervention is allowed where the receiver has an interest in the controversy which it is deemed expedient that he should protect, and is largely a matter for the exercise of the court's discretion.<sup>13</sup>

§ 1616. (§ 195.) **Effect of Change of Receivers on Pending Actions.**—"So long as the property of the corporation remains in the custody of the court and is administered through the agency of a receiver, such re-

decree of dissolution, though proceedings looking to that end were instituted. It is not perceived that any inconsistency exists between the two decisions.

<sup>11</sup> Gray v. Taylor, 59 N. J. Eq. 621, 44 Atl. 668.

<sup>12</sup> Pendleton v. Russell, 144 U. S. 640, 36 L. Ed. 574, 12 Sup. Ct. 743. But compare Smith v. United States Express Co., 135 Ill. 279, 25 N. E. 527; Gray v. Taylor, 59 N. J. Eq. 621, 44 Atl. 668.

<sup>13</sup> Andrews v. Steel City Bank, 77 Mo. 342; State v. Bank of Ottumwa, 76 Mo. 715; Hedrick v. McElroy (Iowa), 76 N. W. 716; Bowen v. Needles Nat. Bank, 76 Fed. 176. A receiver who is merely a stakeholder cannot intervene: National Bank v. Goddard, 65 Hun, 626, 20 N. Y. Supp. 526, 984.

ceivership is continuous and uninterrupted until the court relinquishes its hold upon the property, although its *personnel* may be subject to repeated changes. Actions against the receiver are, in law, actions against the receivership, and the funds in the hands of the receiver, and his contracts, misfeasances, negligences and liabilities are official and not personal and judgments against him are payable only from the funds in his hands."<sup>14</sup> Accordingly, where successive receivers are appointed, proceedings pending against one should be continued in the name of the successor. The liability continues only so long as the court retains the fund, and therefore the discharge of the receiver, and the turning over of the fund or *res* to the purchaser, terminates the receiver's liability.<sup>15</sup> In case of the termination of the proceedings, it is therefore usual for the court to allow a certain time within which intervening petitions against the receiver may be heard before the fund or *res* is finally surrendered.<sup>16</sup> An interesting extension of equitable principles has made the railroad company to which the property has been surrendered on the termination of the receivership liable for the receiver's wrongs to the extent of the betterments.<sup>17</sup>

<sup>14</sup> McNulta v. Lochridge, 141 U. S. 327, 332, 35 L. Ed. 796, 12 Sup. Ct. 11; Guaranty Co. of N. D. v. Hanway, 104 Fed. 369, 373, 44 C. C. A. 312; Robinson v. Mills, 25 Mont. 391, 65 Pac. 114. If the second receiver is appointed to control only a portion of the fund controlled by the first, he is not liable for his predecessor's wrongs: Jones v. Schlapback, 81 Fed. 274.

<sup>15</sup> Archambeau v. Platt, 173 Mass. 249, 53 N. E. 816; Kansas & G. S. R. R. Co. v. Dorough, 72 Tex. 111, 10 S. W. 711.

<sup>16</sup> Such was the decree in Texas & Pacific R'y v. Johnson, 151 U. S. 81, 38 L. Ed. 81, 14 Sup. Ct. 250; and compare Texas & Pacific R'y v. Bloom, 164 U. S. 639, 41 L. Ed. 580, 17 Sup. Ct. 216; Fidelity Ins. Co. v. Norfolk etc. R. Co., 88 Fed. 815.

<sup>17</sup> Texas & Pacific R. Co. v. Bloom, 164 U. S. 636, 41 L. Ed. 580, 17 Sup. Ct. 216; Bartlett v. Cicero etc. Co., 177 Ill. 68, 69 Am. St. Rep. 206, 52 N. E. 339.

§ 1617. (§ 196.) **When is Receiver a Necessary Party.** Where the right of action is vested in the receiver by the order of appointment, he is, of course, the only necessary party plaintiff.<sup>18</sup> And where he would be affected directly by the decree he must be made a party defendant. Thus, where a railroad company had its property placed in the hands of a receiver *pendente lite* appointed in foreclosure proceedings, it was held that he was the only necessary party defendant in a bill seeking specific performance of a contract made by the company.<sup>19</sup> So a partnership receiver is a necessary party defendant in an action to foreclose a mortgage given by the partnership.<sup>20</sup> But where the receiver is appointed to hold property in proceedings which do not look toward the ultimate disposition of the property, he is not a necessary party in actions subsequently commenced.<sup>21</sup> And

<sup>18</sup> Porter v. Sabin, 149 U. S. 473, 37 L. Ed. 815, 13 Sup. Ct. 1008, where a receiver of a manufacturing company has been appointed by a state court, no action can be maintained against its officers for fraudulent misappropriation of its funds by stockholders. The right of action is in the receiver, and even though the state court has refused to allow him to sue or to be made a party to the bill, his absence is not excused; cf. Brinkerhoff v. Bostwick, 88 N. Y. 52; Ackerman v. Halsey, 37 N. J. Eq. 356; Davis v. Gray, 16 Wall. 203, 21 L. Ed. 447.

<sup>19</sup> Express Co. v. Railroad Co., 99 U. S. 191, 25 L. Ed. 319; Southern Mutual B. & L. Ass'n v. Andrews, 122 Ala. 601, 26 South. 113.

<sup>20</sup> Kirkpatrick & Corning v. Corning, 38 N. J. Eq. 234; Kirkpatrick v. McElroy, 41 N. J. Eq. 539, 7 Atl. 647; Tyson v. Applegate, 40 N. J. Eq. 305; Comer v. Bray, 83 Ala. 217, 3 South. 554.

<sup>21</sup> Thus, where a receiver was appointed to take charge of mortgaged property and collect the rent thereof, he is not a necessary party to a bill subsequently filed to foreclose a mortgage: Heffron v. Gage, 149 Ill. 182, 36 N. E. 569; Keeney v. Insurance Co., 71 N. Y. 396, 27 Am. Rep. 60; Calhoun v. Lanoux, 127 U. S. 634, 32 L. Ed. 297, 8 Sup. Ct. 1345. A receiver appointed in an action for an accounting need not be made a party in actions subsequently brought by the creditors: Heath v. Missouri etc. R'y Co., 83 Mo. 617; Ohio &

of course where a contract is made by a receiver, say of a partnership, he alone need be sued, and the surviving partner need not be joined.<sup>22</sup> A receiver appointed by the comptroller of the currency to take charge of assets of a national bank is not a judicial officer, and is not a proper party, for example, in an action brought for rent due from the bank.<sup>23</sup>

*M. R'y Co. v. Russell*, 115 Ill. 52, 3 N. E. 561; *Paddack v. Staley*, 13 Colo. App. 363, 58 Pac. 363.

<sup>22</sup> *Painter v. Painter*, 138 Cal. 231, 94 Am. St. Rep. 47, 71 Pac. 90.

<sup>23</sup> *Chemical Nat. Bank of Chicago v. Hartford Deposit*, 156 Ill. 522, 41 N. E. 225; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383, 20 L. Ed. 840.



## CHAPTER VIII.

RECEIVERS—MANAGEMENT AND DISPOSITION  
OF PROPERTY.

## ANALYSIS.

- § 197. In general.
- § 198. Discretion allowed to managing receiver.
- § 199. Duty to obtain instructions.
- § 200. Duty to collect assets.
- §§ 201–203. Right to continue business.
- § 202. Executory contracts.
- § 203. Existing leases.
- § 204. Right to make contracts.
- § 205. Rights in relation to employees.
- § 206. Right to employ attorneys.
- § 207. Right to make repairs, improvements, etc.
- § 208. Right to lease property.
- §§ 209–213. Right to sell property.
- § 209. Sales—In general.
- § 210. Sale is subject to confirmation.
- § 211. Personal property.
- § 212. Sale is subject to existing liens.
- § 213. Effect of reversal of order appointing receivers.
- §§ 214–216. Receivers' certificates.
- § 214. In general.
- § 215. Nature of certificates.
- § 216. Purposes for which certificates may be issued.
- § 217. Liability for fraud, negligence, etc.

§ 1618. (§ 197.) **In General.**—When a receiver is appointed, and property is committed to him, as such, he becomes the officer and custodian of the court. It is his duty to keep and manage the property according to the directions and orders of the court. The court's orders are the measure of his authority, and he must neither

exceed nor ignore them. In managing, he must seek instruction on all matters of importance. If he exceeds his authority, he cannot charge the estate for the expenses incurred thereby; and if his wrong has resulted in loss, he must make good the deficiency.<sup>1</sup>

§ 1619. (§ 198.) **Discretion Allowed to Managing Receiver.**—While the receiver must, in general, confine his action within the scope of the orders of the court, in many matters of administrative detail he is allowed a discretion.<sup>2</sup> Mere mistakes of judgment in regard to such matters will not be charged against him. In many instances it would be impracticable to apply to the court for instructions; and frequently the questions arising are so numerous that the court could not conveniently consider them.<sup>3</sup> Such action by the receiver is at his own

<sup>1</sup> *Henry v. Henry*, 103 Ala. 582, 15 South. 916. And see cases cited in subsequent paragraphs. Thus, he may deposit the funds in a bank of good standing, using the degree of prudence ordinarily exercised by a reasonably cautious man. The fact that the bank is a creditor does not make the deposit wrongful: *State v. Corning State Sav. Bank*, 128 Iowa, 597, 105 N. W. 159.

<sup>2</sup> *Continental Trust Co. v. Toledo St. L. & K. C. R. Co.*, 59 Fed. 514; *Cowdrey v. Railroad Co.*, 1 Woods, 336, Fed. Cas. No. 3293; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909. "Modern practice permits them to exercise their sound discretion in many matters relating to the care and management of property in their custody, subject to the subsequent approval of the court, which will be given when the officer has acted in good faith, and, what he has done appears to have been beneficial to the parties interested": *State Central Sav. Bank v. Fanning Ball-Bearing Chain Co.*, 118 Iowa, 698, 92 N. W. 712. In general, see *Bull v. International Power Co.*, 86 N. J. Eq. 275, 98 Atl. 382; *Kansas City, M. & O. R'y Co. v. Weaver* (Tex. Civ. App.), 191 S. W. 591.

<sup>3</sup> "Doubtless the chancellor has power to retain in his hands the administration of such a trust and to personally direct and order each contract into which the receiver should enter. But it would obviously be impracticable to adopt such a course in running a railroad. To select and employ the necessary subordinates; to fix the

risk, and is subject to the subsequent approval of the court.<sup>4</sup> In important matters he should first obtain an order, and then keep strictly within its limits. These rules apply with special force to railway receiverships, where the details are many. Mr. Justice Bradley, of the supreme court of the United States, sitting as circuit judge, stated the rule as follows: "All outlays made by the receiver in good faith, in the ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful, are fairly within the line of discretion which is necessarily allowed to a receiver intrusted with the management and operation of a railroad in his hands. His duties, and the discretion with which he is invested, are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands. And to such outlays in ordinary course may properly be referred, not only the keeping of the road, buildings and rolling stock in repair, but also the providing of such additional accommodations, stock and instrumentalities as the necessities of the business may require."<sup>5</sup>

§ 1620. (§ 199.) **Duty to Obtain Instructions.**—A receiver should, in all matters of importance not covered

term of service and the amount of wages; to contract for and purchase materials and supplies; and to anticipate in these respects the future needs of one of the gigantic corporations by express orders in each case,—would require the whole time of the chancellor and could never have been intended by this legislation. . . . Whether a power to exercise such discretion would not be assumed to exist in every case, without a special order, need not be considered, for it is clear that the chancellor may accord such discretionary power to a receiver by a general order, such as was made in this cause": *Vanderbilt v. Little*, 43 N. J. Eq. 669, 12 Atl. 188, per Magie, J.

<sup>4</sup> *State Central Sav. Bank v. Fanning Ball-Bearing Chain Co.*, 118 Iowa, 698, 92 N. W. 712.

<sup>5</sup> *Cowdrey v. Railroad Co.*, 1 Woods, 336, Fed. Cas. No. 3293.

by the order of the appointing court, apply to the court for instructions. If he does not, he will be held liable in case the court shall subsequently disapprove of his action.<sup>6</sup> Instructions must be obtained in the receivership action, and frequently they are given on *ex parte* application.<sup>7</sup> In some instances they may be given by the judge in chambers.<sup>8</sup> The better practice is to require notice when any adverse rights are involved, so that the parties may be heard before an order is given. It has been intimated by a federal court that while an *ex parte* order may be binding upon the receiver, it is not conclusive, and may be set aside in the event that the judge changes his mind.<sup>9</sup> Matters of infinite variety may be

<sup>6</sup> *Braman v. Farmers' Loan etc. Co.*, 114 Fed. 18, 51 C. C. A. 644; *In re Angell*, 131 Mich. 345, 91 N. W. 611. If he acts without authority in making a purchase, and the act is beneficial, the court may subsequently ratify it: *Tinsley v. Etowah Power Co.*, 197 Fed. 602. When confronted with questions of intricacy and delicacy, an application by him for directions may always be made: *Bull v. International Power Co.*, 86 N. J. Eq. 275, 98 Atl. 382.

<sup>7</sup> *Free Gold Min. Co. v. Spiers*, 136 Cal. 484, 69 Pac. 143 (*ex parte* order directing receiver of mining property to purchase a cyanide plant sustained); *Weeks v. Weeks*, 106 N. Y. 626, 13 N. E. 96 (court may direct receiver to lease the property, upon *ex parte* application; receiver may make such application although original order is silent on question of leasing). An order made in another action is not binding upon the receiver: *Merritt v. Sparling*, 88 Hun, 491, 34 N. Y. Supp. 882.

<sup>8</sup> *State v. Port Royal etc. R'y Co.*, 45 S. C. 413, 23 S. E. 363 (by virtue of statute authorizing judges, at chambers, and upon reasonable notice, "to make, direct, and award all such process, commissions and interlocutory orders, rules, and other proceedings whenever the same are not grantable of course according to the rules and practice of the court").

<sup>9</sup> *Missouri Pac. R'y Co. v. Texas etc. R'y Co.*, 31 Fed. 862 ("If there are parties in interest, and they have their day in court, the advice may be decisive. But, if the matter is *ex parte*, the value of the advice depends largely upon the information and ability of the judge, and is probably binding only on the receivers, for the judge may change his mind on hearing full argument"). In *Weeks v.*



determined by the court on such application. It has been held, however, that no instructions as to the disposition of funds will be given until the funds are in court.<sup>10</sup>

§ 1621. (§ 200.) **Duty to Collect Assets.**—It is generally one of the first duties of a receiver in the performance of his trust to collect the assets. Here, as in all other matters, he must act under the direction of the court. The means by which he may possess himself of the property—by summary proceedings against parties and by action against others—are discussed at length elsewhere.<sup>11</sup>

§ 1622. (§ 201.) **Right to Continue Business.**—Unless directed by an order of the court, a receiver has no authority to continue a business. If he does, “it is sufficient to show the inventory and appraisal, and the burden is on him to explain and account for the property.”<sup>12</sup> In proper cases, where it is for the best inter-

Weeks, 106 N. Y. 626, 13 N. E. 96, Finck, J., said: “The general power of a court to modify or vacate its judgments or orders for fraud or irregularity, or where it has acted inadvertently, or imprudently, is well settled. It is true the law protects the title of a third person, being a *bona fide* purchaser on a sale on an execution under a judgment voidable but not void, although the judgment is subsequently reversed for error. This principle does not, we think, preclude the court from modifying or vacating a summary order made improvidently in the course of an action, although the rights of third persons may be affected thereby. . . . We think the court was authorized to award indemnity out of the funds arising under the judgment in partition, and that nothing else would satisfy the claims of justice.”

<sup>10</sup> Strauss v. Carolina Interstate B. & L. Ass’n, 117 N. C. 308, 53 Am. St. Rep. 585, 30 L. R. A. 693, 23 S. E. 450, 118 N. C. 556, 24 S. E. 116.

<sup>11</sup> See § 161, and chapter VI, *ante*; chapter XI, *post*. As to power to compromise, see Brown v. Allebach, 166 Fed. 488; Alexander v. Maryland Trust Co., 106 Md. 170, 66 Atl. 836.

<sup>12</sup> Pangburn v. American Vault, Safe & Lock Co., 205 Pa. St. 93, 54 Atl. 508. Where the receiver continues the business without

ests of all concerned, the court will direct the receiver to continue with the business.<sup>13</sup> Under such circumstances, much must of necessity be left to the discretion of the officer. Such an order impliedly authorizes him to

the court's order, at a loss, the amount of the loss may be deducted from his commissions: *Villere v. New Orleans Pure Milk Co.*, 122 La. 717, 48 South. 162.

<sup>13</sup> For instances where such orders have been given, see *Thornton v. Highland Ave. & B. R. Co.*, 94 Ala. 353, 10 South. 442; *Florence Gas, Electric L. & P. Co. v. Hanby*, 101 Ala. 15, 13 South. 343; *Rocheat v. Gee*, 137 Cal. 497, 70 Pac. 478; *Cake v. Woodbury*, 3 App. D. C. 60; *Leader Pub. Co. v. Grant Trust & Sav. Co.*, 182 Ind. 651, 108 N. E. 121; *Dayton v. Wilkes*, 17 How. Pr. 510; *Smith v. New York Con. Stage Co.*, 18 Abb. Pr. 419. And see the very numerous cases of railway receiverships cited in this chapter.

The authority must be conferred in express language. Authority to administer affairs for the best interest of all parties does not confer authority to continue the business: *Villere v. New Orleans Pure Milk Co.*, 122 La. 717, 48 South. 162. The court will not continue the business any further than to preserve assets and sell the same for the benefit of creditors: *Cronan v. District Court of Kootenai County*, 15 Idaho, 184, 96 Pac. 768.

Persons supplying a receiver with goods on credit are charged with notice of the order permitting him to carry on the business. They should assume that further orders permitting purchases may be made. If business is being conducted at a loss, their remedy is to apply to the court for relief: *In re J. B. & J. M. Cornell Co.*, 201 Fed. 381.

Ordinarily a receiver is not bound to operate at a loss: *Pennsylvania Steel Co. v. New York City R. Co.*, 165 Fed. 459. But he may be directed to do so when it is necessary to preserve a franchise: *Lorain Steel Co. v. Union R'y*, 165 Fed. 500. It has been held that the court cannot provide that loss arising from conduct of the business of a purely private corporation by the receiver shall be paid as a prior lien: *Dalliba v. Winschell*, 11 Idaho; 364, 114 Am. St. Rep. 267, 82 Pac. 107. As to the right to borrow money for the purpose of conducting the business, see *Re C. M. Burkhalter & Co.*, 182 Fed. 353. Where business of a partnership is conducted at a loss, one of the partners cannot be held for the deficiency, although the decree appointing the receiver was made by consent: *Boehm v. Goodall*, [1911] 1 Ch. 155.

contract debts and incur liabilities on account of the business.

§ 1623. (§ 202.) **Executory Contracts.**—Where a receiver is authorized by the court to continue the business, he is impliedly directed to complete such unfinished contracts as are for the best interests of the trust. He is not bound to complete contracts of which he disapproves;<sup>14</sup> but he is expected to investigate them and

<sup>14</sup> *Dushane v. Beall*, 161 U. S. 516, 40 L. Ed. 791, 16 Sup. Ct. 367 (*dictum*); *Central Trust Co. v. East Tennessee Land Co.*, 79 Fed. 19; *Coy v. Title Guarantee & Trust Co.*, 198 Fed. 275; *Peabody Coal Co. v. Nixon*, 226 Fed. 20, 140 C. C. A. 446 (receiver is entitled to reasonable time to decide); *Wells v. Hartford Manilla Co.*, 76 Conn. 27, 55 Atl. 599; *Brown v. Warner*, 78 Tex. 543, 22 Am. St. Rep. 67, 11 L. R. A. 394, 14 S. W. 1032. See, however, *Elmira Iron & Steel R. M. Co. v. Erie R'y Co.*, 26 N. J. Eq. 284, where the court, by its order, directed that "any person or corporation having a contract with the Erie company shall be at liberty to apply by petition in this suit, or by independent bill, for, and obtain relief and injunction, if entitled thereto, to require the company or the receiver to refrain from violating any such contract."

He does not, by continuing the operation of a railroad, assume a prior indebtedness under a transportation agreement with another company, so as to make the latter a preferred creditor: *Massey v. Camden & T. R'y Co.*, 79 N. J. 652, 82 Atl. 917. By completing a contract he does not obligate himself to incidental and collateral claimants concerning the contract in favor of third parties. Thus, where he has no notice that moneys to be paid under the contract had been assigned by the corporation whose business he is conducting, he is not bound to turn over moneys received by him upon his completion of the contract: *Cogan v. Conover Mfg. Co.*, 69 N. J. Eq. 358, 60 Atl. 408. Nor does he, by manufacturing and delivering automobile bodies in accordance with orders obtained by an agent prior to the receivership, become liable for commissions: *Brandenburg v. Coxe*, 228 Pa. St. 212, 77 Atl. 455. Where the completion of the contract will be unprofitable, he may abandon it: *In re Newdegate Colliery Co.*, [1912] 1 Ch. 468. He may repudiate a traffic agreement between railroads for interchange of business: *Baker v. Central Trust Co.*, 235 Fed. 17, 148 C. C. A. 511.

either act according to his own judgment or obtain the direction of the court.<sup>15</sup> "The privilege of the receiver in acting for the best interest of the estate and its creditors not only extends to the right to elect what contracts he will adopt, but also to make the election without at least subjecting the fund required for the satisfaction of existing claims of creditors to a charge for damages."<sup>16</sup>

§ 1624. (§ 203.) **Existing Leases.**—A receiver is not bound by an existing lease, unless he adopts it.<sup>17</sup> The circumstances authorizing such adoption are similar to those which enable him to take advantage of ordinary existing contracts. He is not bound to elect immediately upon his appointment. Instead, he may take and retain possession for such reasonable time as will enable him to intelligently elect whether the interest of his trust will be best subserved by adopting the lease and making it

If he elects not to complete the contract, the other party has a provable claim against the estate, the same as general creditors: *Chas. E. & W. F. Peck v. Southwestern Lumber & Exporting Co.*, 131 La. 177, 59 South. 113. He has a right to elect to retain property being purchased on conditional sale; and if he so elects, the right of the seller to rescind ceases: *Crawford v. Gordon*, 88 Wash. 553, **L. R. A.** 1916C, 516, 153 Pac. 363. In such case the receiver must elect either to adopt the contract or to give up the property. He cannot force the seller to make a new contract on the basis of a *quantum meruit*. It has been said that before adopting a contract he should submit the matter to the court for approval: *Maxwell v. Missouri Valley Ice etc. Co.* (Iowa), 164 N. W. 329.

Where the receiver does not carry on the business, contracts with officers and employees for services are suspended, and the corporation is not liable for breach of contract: *Law v. Waldron*, 230 Pa. St. 458, **Ann. Cas.** 1912A, 467, 79 Atl. 647.

<sup>15</sup> *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

<sup>16</sup> *Wells v. Hartford Manilla Co.*, 76 Conn. 27, 55 Atl. 599.

<sup>17</sup> *Dayton Hydraulic Co. v. Felsenthal*, 116 Fed. 961, 54 C. C. A. 537; *Morton Trust Co. v. Metropolitan St. R'y Co.*, 165 Fed. 489; *Pennsylvania Steel Co. v. New York City R. Co.*, 165 Fed. 459; *Pennsylvania Steel Co. v. New York City R'y Co.*, 192 Fed. 135; *Klein v. W. A. Gavenesch Co.*, 64 N. J. Eq. 50, 53 Atl. 196.



his own, or by returning the property to the lessor.<sup>18</sup> Accordingly, a railroad receiver may operate a leased line for a reasonable time in order to ascertain the situation of affairs, and such action will not amount to an adoption of the lease.<sup>19</sup> What is a reasonable time for him to so hold must depend largely upon the circumstances of each case.<sup>20</sup> If he holds the premises for a longer time, continues the business, and does nothing to show an election not to adopt, he will be held to the terms of the lease.<sup>21</sup> Payment of rent is a circumstance to be

<sup>18</sup> *Carswell v. Trust Co.*, 74 Fed. 88, 20 C. C. A. 282; *Dayton Hydraulic Co. v. Felsenthall*, 116 Fed. 961, 54 C. C. A. 537. See, also, *Johnson v. Lehigh Val. Traction Co.*, 130 Fed. 932; *Pennsylvania Steel Co. v. New York City R. Co.*, 198 Fed. 721, 117 C. C. A. 503; *Fisher v. Columbia National Bank*, 54 Ind. App. 558, 103 N. E. 119; *Tradesman Pub. Co. v. Knoxville C. W. Co.*, 95 Tenn. 634, 49 Am. St. Rep. 943, 71 L. R. A. 593, 32 S. W. 1097. The same principle applies to a lease of rolling stock: *Sunflower Oil Co. v. Wilson*, 142 U. S. 313, 35 L. Ed. 1025, 12 Sup. Ct. 235; *Platt v. Railroad Co.*, 84 Fed. 535, 28 C. C. A. 488.

<sup>19</sup> *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. Ed. 632, 12 Sup. Ct. 787.

<sup>20</sup> *Ames v. Union Pac. R. Co.*, 60 Fed. 967 (sixty-five days reasonable, in railroad lease); *Carswell v. Farmers' Loan etc. Co.*, 74 Fed. 88, 20 C. C. A. 282, 43 U. S. App. 300 (ten months reasonable); *Smith v. Goodman*, 149 Ill. 75, 36 N. E. 621 (four months); *Fisher v. Columbia National Bank*, 54 Ind. App. 558, 103 N. E. 119. And of course he is not required to cease all activities on the leased premises in the meantime: *Id.* In *Pennsylvania Steel Co. v. New York City R'y Co.*, 190 Fed. 609, the court had not decided after four years whether or not to adopt the lease.

<sup>21</sup> *Link Belt Machinery Co. v. Hughes*, 174 Ill. 155, 51 N. E. 179. Where the receiver completes the term without any act of disaffirmance, he cannot then repudiate and pay only on the basis of a *quantum meruit*: *Spencer v. World's Columbian Exposition*, 163 Ill. 117, 45 N. E. 250 (affirming 58 Ill. App. 637). Where the court expressly reserves the right to approve or disapprove leases, the fact that the receiver continues to occupy the premises does not amount to an adoption: *Kansas City Pipe Line Co. v. Fidelity Title & Trust Co.*, 217 Fed. 187, 133 C. C. A. 181.

considered as indicating an adoption, although it is not conclusive.<sup>22</sup> If he elects to adopt a lease, he "becomes vested with the title to the leasehold interest, and a privity of estate is thereby created between the lessor and the receiver, by which the latter becomes liable upon the covenant to pay rent."<sup>23</sup>

§ 1625. (§ 204.) **Right to Make Contracts.**—Receivers can make only such contracts as the court may previously authorize or subsequently approve. As we have already seen, the authority may frequently be inferred from the terms of the order, although not expressly given. Thus, where the order directs a receiver to continue the business, he is impliedly authorized to enter into necessary contracts. A party dealing with him, however, is bound to take notice of any want of authority, and cannot complain if the court sets aside the contract as unauthorized.<sup>24</sup> It has been held, on the other

<sup>22</sup> *Wells v. Higgins*, 132 N. Y. 459, 30 N. E. 861; *Commonwealth v. Franklin Ins. Co.*, 115 Mass. 278 (not an adoption when paid as a compromise). It may be merely an indication that the receiver thought that the rental value was what the lease called for: *Fisher v. Columbia National Bank*, 54 Ind. App. 558, 103 N. E. 119. See, also, *Pennsylvania Steel Co. v. New York City R'y Co.*, 176 Fed. 471.

<sup>23</sup> See *United States Trust Co. v. Wabash W. R'y Co.*, 150 U. S. 299, 37 L. Ed. 1085, 14 Sup. Ct. 86. Where a receiver completed a hotel on leased ground and operated it under order of court, he became liable for rent during the occupancy at the rate reserved in the lease. The claim for rent was held to be prior to claims of general creditors: *Perrin & Smith Printing Co. v. Cook Hotel & Excursion Co.*, 118 Mo. App. 44, 93 S. W. 337. If he remains in possession after the termination of the lease, he becomes a tenant at will, and not a tenant from year to year: *Dietrich v. O'Brien*, 122 Md. 482, 89 Atl. 717.

<sup>24</sup> *Tripp v. Boardman*, 49 Iowa, 410; *Stone v. St. Louis Union Trust Co.*, 183 Mo. App. 261, 166 S. W. 1091; *Delbridge v. Kaukauna Fibre Co.*, 165 Wis. 435, 162 N. W. 478. A receiver cannot be bound by an account stated claimed to arise from the delivery of a bank statement: *Stone v. St. Louis Union Trust Co.*, 183 Mo.

hand, that where the contracts are such as the receiver has discretion to make, and there is nothing to show any excess of authority, the court will not repudiate without providing compensation for loss incurred.<sup>25</sup> And where a contract within the discretion of the receiver has been fully performed, the contractor will not be deprived of the agreed compensation merely because the court regards the contract as improvident, injudicious and unreasonable, unless it appears that the contractor had notice of its improper character.<sup>26</sup> The receiver should not deal with and purchase supplies from another company composed of officials under him.<sup>27</sup>

§ 1626. (§ 205.) **Rights in Relation to Employees.**—A receiver authorized by the court to continue the busi-

App. 261, 166 S. W. 1091. If the receiver acts with authority, he is not personally liable for goods furnished: *John H. McGowan Co. v. Ingalls*, 60 Fla. 116, 53 South. 932; *Hillsborough Grocery Co. v. Ingalls*, 60 Fla. 105, 53 South. 930. A receiver appointed to conduct the management of a railroad is bound by a transportation contract made by his freight agent: *Farmers' Loan etc. Co. v. Northern Pac. R. Co.*, 120 Fed. 873. The court may authorize him to make a contract extending beyond the probable life of the receivership: *Gay v. Hudson River Electric Power Co.*, 173 Fed. 1003. Compare *Delbridge v. Kaukauna Fibre Co.*, 165 Wis. 435, 162 N. W. 478 (estate held liable only for period of receivership).

<sup>25</sup> *Vanderbilt v. Central R. Co.*, 43 N. J. Eq. 669, 12 Atl. 188; *Vanderbilt v. Little*, 51 N. J. Eq. 289, 26 Atl. 1025. See *State Bank of Virginia v. Domestic S. M. Co.*, 99 Va. 411, 86 Am. St. Rep. 891, 39 S. E. 141. To the effect that the receiver may bind himself personally without the sanction of the court, see *Allen v. Kittrell* (Tex. Civ. App.), 162 S. W. 397.

<sup>26</sup> *Vanderbilt v. Central R. Co.*, 43 N. J. Eq. 669, 12 Atl. 188.

<sup>27</sup> *Clarke v. Central R. & B. Co.*, 66 Fed. 16. ("Parties owing duties to the railroad by reason of their official relations thereto, and connected therewith, could not be permitted to deal, directly or indirectly, through the form of a company with the receiver, in respect to subjects or articles they might have to sell or contract about. Upon well-settled principles, this could not be tolerated by

ness has power to hire necessary employees.<sup>28</sup> In this he is allowed a wide discretion, and the court, which can know much less about the business than the receiver, will not interfere unless an abuse is shown.<sup>29</sup> This principle applies with special force to a receiver appointed to look after the business of a railroad. In recent years the courts have in several instances been required to pass upon disputes between receivers and employees of railroads, and the right of employees to be heard has been expressly affirmed.<sup>30</sup> The court will not countenance an unreasonable reduction of the salaries of railroad employees;<sup>31</sup> but where the reduction is reasonable, and appears to be necessary, the receiver will be authorized

the court. The dual trust relation occupied by parties in such situations would forbid such transactions.”)

<sup>28</sup> *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 59 Fed. 514; *Taylor v. Sweet*, 40 Mich. 736.

<sup>29</sup> *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 59 Fed. 514; *Taylor v. Sweet*, 40 Mich. 736. The court may set aside an unjust dismissal of a meritorious employee: *Farmers' Loan & Trust Co. v. Central R. & Bkg. Co.*, 166 Fed. 333.

<sup>30</sup> *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 59 Fed. 514.

<sup>31</sup> “The first and supreme duty of a court when it engages in the business of operating a railroad is to operate it efficiently and safely. No pains and no reasonable expense are to be spared in the accomplishment of these ends. Passengers and freight must be transported safely. If passengers are killed or freight lost through the slightest negligence to provide all the means of safety commonly found on first class roads, the court is morally and legally responsible. An essential and indispensable requisite to the safe and successful operation of the road is the employment of sober, intelligent, experienced, and capable men for that purpose. When a road comes under the management of a court on which the employees are conceded to possess all these qualifications—and that concession is made in the fullest manner here—the court will not, upon light or trivial grounds, dispense with their services or reduce their wages; and when the schedule of wages in force at the time the court assumes the management of the road is the result of a mutual agree-



to take such action.<sup>32</sup> It will generally refuse to interfere with the receiver's action in enforcing rules of long standing, or in dealing with strikers.<sup>33</sup> When a faithful employee has been injured in the service of the receiver, without any fault of either party, the court may order that he be paid wages for the time during which he is actually incapacitated.<sup>34</sup>

ment between the company and the employees, which has been in force for years, the court will presume the schedule is reasonable and just, and anyone disputing that presumption will be required to overthrow it by satisfactory proof": *Ames v. Union Pac. R'y Co.* 62 Fed. 7, per Caldwell, Cir. J. Where the wages are not excessive merely because of inability of the road to pay dividends or interest: *United States Trust Co. v. Omaha & St. L. R'y Co.*, 63 Fed. 737.

<sup>32</sup> It is said that the employees must show an abuse of the discretion allowed the receiver in order to be given relief. In the following cases the court held the reductions reasonable, under the circumstances: *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 59 Fed. 514; *Thomas v. Cincinnati, N. O. & T. P. R'y Co.*, 62 Fed. 17.

<sup>33</sup> Thus, in *Platt v. Philadelphia & R. R. Co.*, 65 Fed. 660, the court refused to restrain a receiver from enforcing a rule prohibiting employees from becoming members of labor unions. In *Booth v. Brown*, 62 Fed. 794, the court refused to direct a receiver to re-employ men who had engaged in a sympathetic strike.

<sup>34</sup> "To pay the intervener for his lost time is a gratuity, of course, there being no legal liability on the part of the receivers. The view of the circuit judge doubtless was that the receivers, as officers of the court, should be required to act toward their employees as persons of ordinary humanity and right feeling would do under similar circumstances toward their employees. If an individual acting for himself, or even as head of the corporation, who has a faithful employee who is injured, although without any fault on the part of the employer or the other employees, the injured employee being himself free from fault, the employer, if actuated by proper feeling, would feel disposed to at least allow the injured person compensation for his lost time": *Thomas v. East Tennessee, V. & G. R'y Co.*, 60 Fed. 7, per Newman, D. J. It is certainly a novelty to rest such a doctrine upon humanity. Officers of corporations, and receivers as well, are not permitted to use funds for merely charitable purposes. It is submitted that the true reason for authorizing such action is that a receiver, as well as a corpora-

§ 1627. (§ 206.) **Right to Employ Attorneys.**—A receiver has a right to employ counsel to advise him as to the management of the property placed in his hands, and as to his duties in the premises.<sup>35</sup> The compensation of

tion, can obtain better service from all of his employees by treating liberally those injured in his service. Wages were allowed injured employees in *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 33 Fed. 701, and upon another application in the same receivership in 41 Fed. 319. To the effect that only faithful employees are entitled to such consideration, see *Thomas v. East Tennessee, V. & G. R'y Co.*, 60 Fed. 7.

<sup>35</sup> *Hubbard v. Camperdown Mills*, 25 S. C. 496, 1 S. E. 5. "First, it is for necessary legal assistance that allowance may be made. A trustee has no authority to employ attorneys, at the expense of the estate, to perform the ordinary duties of the trust or office which any ordinarily competent business man is presumed to be capable of performing. Those are his duties, and he is paid for them. It is for services requiring special legal skill that he will be allowed counsel fees. To illustrate: He may have an attorney to obtain for him a necessary order of court to sell a stock of goods, but he can carry out the order as well as the attorney. . . . His acceptance of the trust presupposes that he is capable of performing all such duties, and, if he employs attorneys to advise and assist him in performing them, he must do so at his own expense. So, also, no legal skill is required in insuring and repairing storehouses, and in renting them out and collecting rents. Any business man, also, can assess and pay taxes. If a demand is made upon the receiver, of questionable legality, he may have legal advice and aid in reference to it. If he has a demand upon another, whose legality is questioned, or which requires legal aid to enforce it, he may have an attorney": *Henry v. Henry*, 103 Ala. 582, 15 South. 916. See, also, *Olson v. State Bank*, 72 Minn. 320, 75 N. W. 378. As to the purposes for which an attorney may be employed, see *Linen Thread Co. v. A. Booth & Co.*, 192 Fed. 515, 113 C. C. A. 71; *Bullock v. Clarke*, 53 Ind. App. 112, 101 N. E. 311 (not where receiver is mere custodian). A receiver may charge to the fund the fee of his attorney for successfully defending him against charges of malfeasance: *Missouri & K. I. R'y Co. v. Edson*, 224 Fed. 79, 139 C. C. A. 561. The appointment of a receiver terminates the employment of a general counsel for the corporation: *Burton v. Bay State Gas Co.*, 188 Fed. 161, 110 C. C. A. 197.

such attorneys is fixed by the court, and is not governed by agreement between the parties.<sup>36</sup> In general, the receiver is allowed to select his own counsel, subject, however, to certain limitations. He is not allowed to select an attorney of one of the parties to the proceeding in which he was appointed, when the interests involved are likely to be conflicting.<sup>37</sup> Where the receiver is not act-

<sup>36</sup> "It may be very proper for a receiver to have counsel to aid and advise him concerning legal questions arising in his management of the estate; but his contract for a term of employment or a rate of compensation, from the very nature of his office, must be subject to the power of the court to conclude the one or to disallow the other. And questions of this nature belong to the court controlling and settling the receivership. The right of the attorney to charge the property in court with his fee does not arise from the mere contract with the receivers": *International & G. N. R. Co. v. Herndon*, 11 Tex. Civ. App. 465, 33 S. W. 377. See, also, *Hickey v. Parrot Silver & Copper Co.*, 32 Mont. 143, 108 *Am. St. Rep.* 510, 79 *Pac.* 698. The compensation may be paid out of the fund when the services have been beneficial to the creditors: *Ross v. South Delaware Gas Co.*, 10 Del. Ch. 236, 89 *Atl.* 593. And the converse is sometimes held, viz., where the services are of no value to the creditors, the compensation should not be paid out of the fund: *Barker v. Southern Bldg. & L. Ass'n*, 181 *Fed.* 638. See *post*, § 221.

<sup>37</sup> *Veith v. Ress*, 60 Neb. 52, 82 N. W. 116; *Blair v. St. Louis, H. & K. R. R. Co.*, 20 *Fed.* 348. In this last case the court proceeded to say: "It seems that one who accepts the office of receiver under an appointment of this court ought to find some competent attorney of this court, and responsible to it, to aid him with legal advice if needed. If the bar of this circuit is so poor in ability or integrity as to have no member thereof fit for the desired position, then it might be well to seek elsewhere for needed aid. This court is not prepared to make even impliedly such a reflection on the bar of this circuit, nor will it grant a motion which seeks to make one, however able, but who is not a member of this bar, or has just come here with respect to this case mainly, so far as I know, the appointee of this court as attorney and counselor of its officers; nor will it sanction by its appointment the introduction from abroad of anyone, especially a kinsman of the receiver, through the latter's solicitation, under circumstances stated, to fill a position which others long known to the court are, to say the least, equally able to fill." An

ing adversely to the parties, and there is no conflict, he may select such an attorney.<sup>38</sup> Where a receiver is himself an attorney, he is still entitled to aid of counsel; and if he acts as his own attorney, he is not entitled to any additional compensation therefor.<sup>39</sup>

§ 1628. (§ 207.) **Right to Make Repairs, Improvements, etc.**—A receiver is appointed to preserve the property pending the litigation, and consequently, he will be authorized to make such repairs as are necessary to keep the property from deterioration.<sup>40</sup> The extent of repairs will depend largely upon the nature of the business, and whether it is being actively carried on by the receiver. In many matters of minor importance he is allowed to use his discretion.<sup>41</sup> He is sometimes permitted to make improvements and additions, such as the completion of a new line of railroad already begun;<sup>42</sup> but

attorney for one of the parties may be employed when there is no clash of interest: *Bartelt v. Smith*, 145 Wis. 31, **Ann. Cas.** 1912A, 41195, 129 N. W. 782.

<sup>38</sup> *Smith v. New York Con. Stage Co.*, 18 Abb. Pr. 419; *United States of Late Corp. of Church etc.*, 6 Utah, 9, 21 Pac. 516. He may employ an attorney without applying to the court and without consulting as to the particular attorney to be employed: *Villere v. New Orleans Pure Milk Co.*, 122 La. 717, 48 South. 162.

<sup>39</sup> *Olson v. State Bank*, 72 Minn. 320, 75 N. W. 378.

<sup>40</sup> *Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895; *Union Trust Co. v. Illinois Midland R'y Co.*, 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809; *Hoover v. Montclair & Greenwood Lake R'y Co.*, 29 N. J. Eq. 4; *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. 431. He may be authorized to abandon part of the line of a railroad: *State of Iowa v. Old Colony Trust Co.*, 215 Fed. 307, L. R. A. 1915A, 549, 131 C. C. A. 581.

<sup>41</sup> *Cowdrey v. Railroad Co.*, 1 Woods, 336, Fed. Cas. No. 3293.

<sup>42</sup> *Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895; *Union Trust Co. v. Illinois Midland R'y Co.*, 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809; *Kennedy v. St. Paul & P. R. Co.*, 5 Dill. 519, Fed. Cas. No. 7707; *Stanton v. Alabama & C. R. Co.*, 2 Woods, 506, Fed. Cas. No. 13,296; *Jefferson v. Edrington*, 53 Ark. 545, 14 S. W. 99. In



generally the court hesitates to grant such authority. The principle upon which these are allowed is that they are essential to the profitable enjoyment of the estate and inure to its permanent betterment. If not essential, the court will not speculate upon the probable result.<sup>43</sup> Under circumstances showing the great desirability, the court may authorize the receiver to add to an existing line by leasing another.<sup>44</sup>

§ 1629. (§ 208.) **Right to Lease Property.**—The court may authorize its receiver to lease certain of the prop-

Wallace v. Loomis, *supra*, a receiver was appointed “with power to put the road and property in repair, and to complete any uncompleted portions thereof, and to procure rolling stock, and to manage and operate the road to the best advantage, so as to prevent the property from further deteriorating, and to save and preserve it for the benefit and interest of the first mortgage bondholders, and all others having an interest therein.” But where to carry out an extension directed by a state commission it would be necessary to use property the title to which is in dispute, the court may refuse to permit it: Fidelity Title & Trust Co. v. Kansas Natural Gas Co., 219 Fed. 614. And it has been held that an order by state officials directing a railroad to make an extension is not binding upon a receiver appointed by a federal court: Kansas City, M. & O. R’y Co. v. State, 106 Tex. 249, 163 S. W. 582. In general, see John H. McGowan Co. v. Ingalls, 60 Fla. 116, 53 South. 932.

<sup>43</sup> Hand v. Savannah & C. R. Co., 10 S. C. 406. See, also, Pueblo Traction & Electric Co. v. Allison, 30 Colo. 337, 70 Pac. 424. See, also, Fidelity Title & Trust Co. v. Kansas Natural Gas Co., 219 Fed. 614.

<sup>44</sup> “A court of equity having in charge the mortgaged property of a railroad company, is authorized to do all acts that may be necessary within its corporate power to preserve the property, and to give to it additional value, not only for the benefit of the lien creditors, but also for the benefit of the company. . . . Any act, it would seem, necessary for the protection and preservation of the property, is a legitimate and proper act, and whatever is manifestly appropriate to such preservation and protection, or to the enhancement of the value of the property, not in excess of the powers of the corporation, will always be upheld and enforced by the courts”: Gibert v. Washington City, V. M. & G. S. R. Co., 33 Gratt. 586.

erty in his possession.<sup>45</sup> The court "should act with great circumspection, and see to it that the lease is not given for such a period of time as will needlessly prolong the litigation or endanger the rights of any parties thereto. If need be, clauses should be inserted in such leases reserving to the court the power to cancel them whenever it is deemed expedient to do so."<sup>46</sup> If no such right is reserved, the lessee is entitled to damages upon termination.<sup>47</sup>

§ 1630. (§ 209.) **Sales—In General.**—When the interests of the parties demand it, or make it desirable, the court may order a receiver to sell the whole or a part of the property. What facts are sufficient to induce the court to make such an order must of necessity vary with the circumstances of each particular case. When it appears that affairs are rapidly growing worse under the receiver's management, and a majority of those interested believe a sale to be desirable, it may be ordered.<sup>48</sup>

<sup>45</sup> *Mercantile Trust Co. v. Missouri, K. & T. R'y Co.*, 41 Fed. 8, 11; *Farmers' Loan etc. Co. v. Eaton*, 114 Fed. 14, 51 C. C. A. 640. But a receiver is not bound to renew a lease which by its terms gives the lessee the right of renewal: *Coy v. Title Guarantee & Trust Co.*, 198 Fed. 275.

<sup>46</sup> *Farmers' Loan etc. Co. v. Eaton*, 114 Fed. 14, 51 C. C. A. 640.

<sup>47</sup> *Farmers' Loan etc. Co. v. Eaton*, 114 Fed. 14, 51 C. C. A. 640. See, also, *McAnally v. Glidden*, 30 Ind. App. 22, 65 N. E. 291.

<sup>48</sup> *First Nat. Bank v. Shedd*, 121 U. S. 74, 30 L. Ed. 877, 7 Sup. Ct. 807; *State v. Shelton*, 238 Mo. 281, 142 S. W. 417. This portion of the text is quoted in *Boothe v. Summit Coal Min. Co.*, 63 Wash. 630, 116 Pac. 269. The right to order a sale should be exercised with extreme caution: *Lawton Mill & Elevator Co. v. Farmers & Merchants' Bank (Okl.)*, 164 Pac. 670. In making an order of sale, the court should as nearly as possible ascertain and preserve the rights and equities of the parties, so that one of them may not acquire an undue advantage: *Boothe v. Summit Coal Min. Co.*, 63 Wash. 630, 116 Pac. 269. A sale may be ordered without a right of redemption: *Denny v. Broadway Nat. Bank*, 118 Ga. 221, 44 S. E. 982. The court may order the receiver to sell the interest

On the other hand, when the condition of the property is such that an immediate sale will result in great loss, and where the purposes of the receivership have not been accomplished, the order will be refused.<sup>49</sup> An order which directs a receiver to sell all the real estate in his hands has been held sufficient to authorize him to sell any particular piece.<sup>50</sup>

of a corporation in an option contract for the purchase of land: *Blank v. Independent Ice Co.*, 153 Iowa, 241, 43 L. R. A. (N. S.) 115, 133 N. W. 344. Property cannot be sold without an order of court: *Mason v. Hubner*, 104 Md. 554, 65 Atl. 367.

<sup>49</sup> *Bibber-White Co. v. White River Val. Electric R. Co.*, 110 Fed. 473.

<sup>50</sup> *Barron v. Mullin*, 21 Minn. 374.

**General Principles.**—The sale may be made by a special master or an auctioneer: *Threadgill v. Colcord*, 16 Okl. 447, 85 Pac. 703. It need not be conducted in manner prescribed for execution sales: *Id.* It is not an abuse of discretion for a receiver to refuse to postpone a sale merely because creditors were arranging for an extension: *Fleming v. Fleming Hotel Co.*, 70 N. J. Eq. 509, 61 Atl. 739. Where furniture, etc., is of more value in connection with a hotel business than it would be alone, it is not an abuse of discretion to sell all the property together: *Fleming v. Fleming Hotel Co.*, 70 N. J. Eq. 509, 61 Atl. 739.

Party to action is estopped from attacking sale on the ground that the receiver was ineligible: *Threadgill v. Colcord*, 16 Okl. 447, 85 Pac. 703. Purchaser may pay for the property by turning in receiver's certificates: *Nisbet v. Great Northern Clay Co.*, 41 Wash. 107, 83 Pac. 15. Where the order requires a sale for cash, the court may extend the time for payment: *In re Great Western Beet Sugar Co.*, 22 Idaho, 328, 43 L. R. A. (N. S.) 671, 125 Pac. 799. Where petition for sale is required, the order of sale must not include more than the petition: *Riffle v. Sioux City & Rock Springs Coal Min. Co.*, 20 Wyo. 442, 124 Pac. 508.

Where the receiver does not purchase the property himself, he cannot be charged with the difference between what the property brought and what it should have brought: *In re Bonita Mercantile Co.*, 129 La. 1046, 57 South. 332. A receiver cannot purchase the property himself, although sold in another proceeding, without consent of the court which appointed him: *Nugent v. Nugent*, [1907] 2 Ch. 292; affirmed [1908] 1 Ch. 546. A purchase by a receiver

§ 1631. (§ 210.) **Sale is Subject to Confirmation.**—A sale by a receiver is a judicial sale, and, as a general rule, is subject to confirmation by the court.<sup>51</sup> In many states the proceedings are regulated entirely by statute, and the validity of the sale depends upon a strict adherence to the statutory provisions. “The rule is almost universal that, at a sale by a master or receiver under an order or decree in equity which contemplates a subsequent report and a confirmation of the sale, a bidder becomes a purchaser when the officer announces the sale to him. Thereafter he may be compelled to complete his purchase, and pay the price which he offered.”<sup>52</sup> Mere inadequacy of the price is not, in general, sufficient to authorize a refusal of confirmation, unless it be gross.<sup>53</sup> And where the consideration is fair, it has been held that confirmation will not be refused merely to let in a higher

at his own sale through a third party, although irregular and voidable at the option of the original owner and perhaps as to creditors, is not void and cannot be collaterally attacked: *Groeltz v. Cole*, 128 Iowa, 340, 103 N. W. 977.

In directing a sale, the court may fix the minimum amount for which a sale may be made: *Hewitt v. Walters*, 21 Idaho, 1, *Ann. Cas.* 1913C, 35, 119 Pac. 705; *Union Trust Co. v. Curtis*, 182 Ind. 61, *L. R. A.* 1915A, 699, 105 N. E. 562.

<sup>51</sup> It has been held that such a sale is impliedly subject to confirmation or rejection: *Patterson v. Patterson Dry Goods Co.*, 207 Pa. St. 252, 56 Atl. 442.

<sup>52</sup> *Files v. Brown*, 124 Fed. 133, 59 C. C. A. 403, per Sanborn, Cir. J.; *Rice v. Ahlman*, 70 Wash. 12, 126 Pac. 66. Where the purchaser does not tender the purchase price, he will be charged with interest: *Whitlock v. Auburn Lumber Co.*, 152 N. C. 192, 67 S. E. 504.

<sup>53</sup> *Files v. Brown*, 124 Fed. 133, 59 C. C. A. 403. The rule is stated by Grey, V. C., in *Porch v. Agnew Co.* (N. J. Eq.), 57 Atl. 726, as follows: “The rule is settled that mere inadequacy of price is not of itself sufficient ground for refusing confirmation of a judicial sale. The variance between the bids reported and the fair market value must be so great as to bring the court to the opinion that serious injustice would be done by a confirmation—so great,



bid.<sup>54</sup> It has been held that such sales are absolute, and that there is no right of redemption.<sup>55</sup>

§ 1632. (§ 211.) **Personal Property.**—The same strictness is not required in regard to sales of personal property. As a general rule, an order should be obtained before any sale of importance is made. When the receiver is authorized to continue the business, certain sales

indeed, that the purchaser himself could not fairly expect the court to ratify the sale, which he was notified it must do, in order that his bid should be finally accepted.” In this case the property was shown to be worth probably four times the amount of the bids. This was held to be an inadequacy so gross as to warrant a refusal of confirmation, but the court made a condition that a bond should be filed assuring the presentation of substantially higher bids. See *Copping v. Hillsboro Clay Mfg. Co.*, 153 N. C. 329, 69 S. E. 250. In *Strickland v. National Salt Co.*, 88 N. Y. Supp. 323, 43 Misc. Rep. 172, confirmation was refused for a sale at a price amounting to less than one-half of the value. After confirmation, the sale becomes final: *Thompson v. Brownlie*, 25 Ky. Law Rep. 622, 76 S. W. 172; *Southern Cotton Mills v. Ragan*, 138 Ga. 504, 75 S. E. 611; *Buehler v. Black*, 213 Fed. 880. On the other hand, it has been held that where the property has been greatly undersold, and the purchaser has, even in good faith, obtained an undue advantage of persons for whose benefit the sale was made, the court may, in its discretion, set it aside even after confirmation: *Gazette Printing Co. v. McConnell*, 45 Mont. 89, *Ann. Cas.* 1913C, 1327, 122 Pac. 561. Of course, in such event the purchaser should, if possible, be reimbursed for any damage he sustains by reason of its rescission. Mere lapse of time does not affect the jurisdiction of the court to set the sale aside; but it should be considered by the court in exercising its discretion: *Id.*

<sup>54</sup> *Rogers v. Rogers Locomotive Co.*, 62 N. J. Eq. 111, 50 Atl. 10 (“the settled policy of our law has been to encourage bidding and purchases at public sales, and that purchasers making *bona fide* bids are to be protected in the advantages of a fair purchase”); *Fleming v. Fleming Hotel Co.*, 70 N. J. Eq. 509, 61 Atl. 739.

<sup>55</sup> *Watkins v. Minnesota Thresher Mfg. Co.*, 41 Minn. 150, 42 N. W. 862. See, also, *Mercantile Realty Co. v. Stetson*, 120 Iowa. 324, 94 N. W. 859 (holding that the court, by its order, may declare that there shall be no right of redemption).

are, of course, authorized. In other cases, it is sometimes permissible for the receiver to sell part of the property and obtain subsequent approval from the court. Such sales, when ratified, are as valid as those authorized in the first instance.<sup>56</sup>

§ 1633. (§ 212.) **Sale is Subject to Existing Liens.**—A receiver's sale is subject to liens of those who are not parties to the receivership proceedings.<sup>57</sup> A lienholder has a right of which he cannot be deprived without an opportunity for a day in court. A purchaser is bound to take such title as an examination of the proceedings shows that he will get.<sup>58</sup> He is bound to examine for

<sup>56</sup> *Tobin v. Portland Flouring Mills*, 41 Or. 269, 68 Pac. 749, 1108.

<sup>57</sup> *Loreh v. Aultman*, 75 Ind. 162; *Snow v. Winslow*, 54 Iowa, 200, 6 N. W. 191; *In re Coleman*, 174 N. Y. 373, 66 N. E. 983. Compare *Lassiter v. Norfolk Southern R'y Co.*, 163 N. C. 19, 79 S. E. 264. Where an order for sale of a leasehold provides that the purchaser shall assume the lease, the purchaser becomes personally liable: *Zwietusch v. Luehring*, 156 Wis. 96, 144 N. W. 257. Where a sale is expressly made subject to certain liens, the purchaser cannot dispute them: *Federal Trust Co. v. Bristol County St. R'y Co.*, 218 Mass. 367, 105 N. E. 1064. As to his liability for interest on claims assumed, see *Moore v. Donahoo*, 217 Fed. 177, 133 C. C. A. 171. The sale passes such title as the court has power and jurisdiction to sell: *Pilliod v. Angola R'y & Power Co.*, 46 Ind. App. 719, 91 N. E. 829. As to the right to sell free from liens of parties before the court, see *Pilliod v. Angola R'y & Power Co.*, 46 Ind. App. 719, 91 N. E. 829.

<sup>58</sup> The text is quoted in *People v. New York Building-Loan Banking Co.*, 189 N. Y. 233, 82 N. E. 184; *Horner v. Continental & Commercial Trust & Sav. Bank*, 198 Fed. 832, 117 C. C. A. 474. See, also, *Southern Cotton Mills v. Ragan*, 138 Ga. 504, 75 S. E. 611; *Campbell v. Parker*, 59 N. J. Eq. 342, 45 Atl. 116; *Fall & Sockeye Fish Co. v. Point Roberts F. & C. Co.*, 24 Wash. 630, 64 Pac. 792. But see *Mullen v. Bromley*, 21 Colo. App. 399, 122 Pac. 66; *People v. New York Building-Loan Bkg. Co.*, 189 N. Y. 233, 82 N. E. 184. The purchaser is bound to ascertain that there is a suit in equity, that the receiver was appointed, that he was authorized to sell, that the sale was made under authority and confirmed, and that the deed

himself beforehand to see what title he will obtain by the sale. By statute in New Jersey, sales may be made free from liens in cases where the property is likely to deteriorate and there is a contest either as to the validity or as to the relative standing of the liens.<sup>59</sup> In such case the court will hold the proceeds until the rights are determined.

§ 1634. (§ 213.) **Effect of Reversal of Order Appointing Receiver.**—Where, upon appeal from an order appointing a receiver, it is determined that the action of the court in making the appointment and in issuing other orders was beyond its jurisdiction, the sale, of necessity, fails. The purchaser becomes entitled to the return of the price paid, and the property sold must be returned by him.<sup>60</sup>

accurately recites the property or interests sold: *Threadgill v. Colcord*, 16 Okl. 447, 85 Pac. 703.

<sup>59</sup> *Emmons v. Davis & Dowd Pottery Co.* (N. J. Ch.), 16 Atl. 158; *Randolph v. Larned*, 27 N. J. Eq. 557. See, also, *Hutchinson v. International & G. N. R'y Co.* (Tex. Civ. App.), 111 S. W. 1101. Compare *Randall v. Wagner Glass Co.*, 47 Ind. App. 439, 94 N. E. 739.

<sup>60</sup> *Lutey v. Clark*, 31 Mont. 45, 77 Pac. 305, 84 Pac. 73. ("The decision of this court was to the effect that no sale had been made; in other words, that the pretended sale was without effect, and conveyed no title to the property. Hubbard, having received the money belonging to Lutey Bros. on such void sale, became (on such sale being declared void) an involuntary trustee of Lutey Bros. for the amount of money received from them; and likewise Lutey Bros., having received such goods on such pretended sale, became an involuntary trustee for the mercantile company for the goods which they retained and for the money which they had received from a sale of the portion of the goods disposed of by them.") But where the court has jurisdiction, reversal on appeal does not affect the sale: *Threadgill v. Colcord*, 16 Okl. 447, 85 Pac. 703. In *Shaw v. Shaw*, 51 Tex. Civ. App. 55, 112 S. W. 124, a receiver leased property. Thereafter a bond was given in the receivership proceedings and he was ordered to surrender the property. It was held that the lessee would be protected.

§ 1635. (§ 214.) **Receivers' Certificates—In General.** Receivers of railroad corporations, and perhaps of a few other *quasi* public corporations, may be authorized to borrow money and to incur indebtedness for the general purpose of carrying out the obligation of the corporation to the public.<sup>61</sup> As security, certificates may be issued, to take priority over the mortgage indebtedness. The reason for the rule is that such corporations owe a peculiar duty to the public to keep their properties in operation. Lienholders take their obligations with that understanding, and when they seek to foreclose, they will not be permitted to interfere with this paramount public duty. This reasoning does not apply to purely private corporations, and consequently it is generally held that in receiverships of such corporations, no displacement of the mortgage priority by certificates is allowable.<sup>62</sup>

<sup>61</sup> *Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895; *Union Trust Co. v. Illinois Midland R'y Co.*, 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809; *Hoover v. Montclair & Greenwood L. R. Co.*, 29 N. J. Eq. 4. The reasons for the doctrine are well stated in *Meyer v. Johnston*, 53 Ala. 237: "But the inconvenience and loss which this [the deterioration of the property] would inflict upon the population of large districts, coupled with the benefit to parties who perhaps are powerless to take care of themselves, of preventing the rapid diminution of value, and derangement and disorganization that would otherwise result, seem to require, not for the completion of an unfinished work, or the improvement, beyond what is necessary for its preservation, of an existing one, but to keep it up, to conserve it as a railroad property, if the court has been obliged to take possession of it, that the court should borrow money for that purpose, . . . by causing negotiable certificates of indebtedness to be issued, constituting a first lien on the proceeds of the property and redeemable when it is sold or disposed of by the court." We shall see later that the certificates are not negotiable in the sense in which that term is used in the law-merchant. In general, see *People's Savings Bank & Trust Co. v. Rogers*, 177 Fed. 386, 100 C. C. A. 618; *Illinois Steel Co. v. Ramsey*, 176 Fed. 853, 100 C. C. A. 323 (power should be exercised only on notice to all persons interested).

<sup>62</sup> *Farmers' Loan etc. Co. v. Grape Creek Coal Co.*, 50 Fed. 481 (not allowed in receivership of mining corporation); *Bernard v.*



Some cases have extended the doctrine to other *quasi* public corporations owing a similar public duty, but it is in cases of railroads that the doctrine finds its most frequent application.<sup>63</sup>

§ 1636. (§ 215.) **Nature of Certificates.**—Receivers' certificates depend for their validity upon the order of the court authorizing them, and they are not negotiable instruments.<sup>64</sup> A purchaser is not bound, however, to

Union Trust Co., 159 Fed. 620, 16 L. R. A. (N. S.) 1118, 86 C. C. A. 610; Union Trust Co. v. Southern S. & L. Co., 166 Fed. 193, 92 C. C. A. 101; International Trust Co. v. Decker Bros., 152 Fed. 78, 11 L. R. A. (N. S.) 152, 81 C. C. A. 302; Central Trust & Sav. Co. v. Chester Co. Electric Co., 9 Del. Ch. 247, 80 Atl. 801; International Trust Co. v. United Coal Co., 27 Colo. 246, 83 Am. St. Rep. 59, 60 Pac. 621; Standley v. Hendrie & Balthoff Mfg. Co., 27 Colo. 331, 61 Pac. 600; Belknap Sav. Bank v. Lamar Land etc. Co., 28 Colo. 326, 64 Pac. 212; Lehman v. Trust Co. of America, 57 Fla. 473, 49 South. 502; Cronan v. District Court of Kootenai County, 15 Idaho, 184, 96 Pac. 768; Hooper v. Central Trust Co., 81 Md. 559, 29 L. R. A. 262, 32 Atl. 505; First State Bank of Hubbard v. Hubbard Farmers' Oil & Gin Co. (Tex. Civ. App.), 178 S. W. 1015. It has been held that certificates issued by a receiver for an industrial enterprise are not prior to bonds unless the bondholders consent to their issuance: Re J. B. & J. M. Cornell Co., 201 Fed. 381. But see Lazear v. Ohio Valley Steel Foundry Co., 65 W. Va. 105, 63 S. E. 772. As to issuance for purposes of paying expenses of saving property and of selling, see Lockport Felt Co. v. United Box Board & Paper Co., 74 N. J. Eq. 686, 70 Atl. 980; Title Insurance & Trust Co. v. California Development Co., 171 Cal. 227, 152 Pac. 564.

<sup>63</sup> Farmers' Loan etc. Co. v. Bankers & M. Tel. Co., 148 N. Y. 315, 51 Am. St. Rep. 690, 31 L. R. A. 403, 42 N. E. 707 (telegraph company); Ellis v. Vernon Ice, Light & Water Co., 86 Tex. 109, 23 S. W. 858 (water company). It has been held that the court should not permit the issuance of certificates by a receiver of a power and water company to complete work ordered by a public service commission: Farmers' Loan & Trust Co. v. Burbank Power & Water Co., 196 Fed. 539.

<sup>64</sup> Union Trust Co. v. Chicago & Lake H. R. Co., 7 Fed. 513; Stanton v. Alabama & C. R. Co., 2 Woods, 506, Fed. Cas. No. 13,296;

see to the application of the proceeds.<sup>65</sup> They constitute a lien upon the property prior to the first mortgage bonds.<sup>66</sup> As between certificates, priority has been given to those issued to pay for operating expenses over those issued to pay preferred claims.<sup>67</sup> In order that the

Turner v. Peoria & S. R. Co., 95 Ill. 134, 35 Am. Rep. 144; Bernard v. Union Trust Co., 159 Fed. 620, 16 L. R. A. (N. S.) 1118, 86 C. C. A. 610. It has been said that they are not only not negotiable, but that the holders take with notice of outstanding liens and subject to what the court may finally determine as to priorities: Cowden v. Wild Goose Min. & Trad. Co., 199 Fed. 561, 118 C. C. A. 35. But in some cases the court may give them the attributes of negotiable paper: Smythe v. Central Vermont R'y Co., 88 Vt. 59, 90 Atl. 901.

<sup>65</sup> Union Trust Co. v. Illinois Midland R'y Co., 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809; Stanton v. Alabama & C. R. Co., 2 Woods, 506, Fed. Cas. No. 13,296. Compare Knickerbocker Trust Co. v. Oneonta C. & R. S. R. Co., 201 N. Y. 379, 94 N. E. 871.

<sup>66</sup> Wallace v. Loomis, 97 U. S. 146, 24 L. Ed. 895; Union Trust Co. v. Illinois Midland R'y Co., 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809; Miltenberger v. Logansport R. R. Co., 106 U. S. 287, 27 L. Ed. 117, 1 Sup. Ct. 140; American Brake Shoe & Foundry Co. v. Pere Marquette R. Co., 205 Fed. 14, 123 C. C. A. 322; Merchants' Loan & Trust Co. v. Chicago R'ys Co., 158 Fed. 923, 86 C. C. A. 87; Stacy v. McNicholas, 76 Or. 167, 144 Pac. 96, 148 Pac. 67. Certificates have been held prior to a vendor's lien for rails: Royal Trast Co. v. Washburn, B. & Q. R. Co., 120 Fed. 11, 57 C. C. A. 31. They are prior to a deficiency judgment in the foreclosure suit: American Trust Co. v. Metropolitan S. S. Co., 190 Fed. 113, 111 C. C. A. 376. Holders of receiver's certificates cannot be compelled to exchange them for bonds in a reorganized company, in the absence of agreement: Shepard v. New Jersey Consol. Water & Light Co., 73 N. J. Eq. 578, 74 Atl. 140. Receiver's certificates cannot be made liens upon property in another state: Lockport Felt Co. v. United Box Board & Paper Co., 74 N. J. Eq. 686, 70 Atl. 980; Roberts v. W. H. Hughes Co., 86 Vt. 76, 83 Atl. 807.

<sup>67</sup> Bank of Commerce v. Central Coal & Coke Co., 115 Fed. 878, 53 C. C. A. 334. See St. Louis Union Trust Co. v. Texas Southern R'y Co., 59 Tex. Civ. App. 157, 126 S. W. 296. It is said that as a general rule receivers' certificates stand in the same class as the receiver's general liabilities. If they are issued with a limited liability and payable only in a certain way or rank, they are payable

priority over the mortgage may be certain, it is necessary that notice of the application for authority be given to the parties interested. "The receiver, and those lending money to him on certificates issued on orders made without prior notice to parties interested, take the risk of the final action of the court in regard to the loans."<sup>68</sup> Receivers' certificates, being merely evidences of indebtedness, can have no higher character than the debts of which they are representatives.<sup>69</sup>

**§ 1637. (§ 216.) Purposes for Which Certificates may be Issued.**—In general, it may be stated that money may be borrowed and certificates issued for purposes of protecting and safely operating the property in the hands

in no other way: *Id.* They are not promises to pay absolutely. If the estate is insufficient, they must be prorated: *Re C. M. Burkhalter & Co.*, 179 Fed. 403. Compensation of receiver and counsel fees must first be paid in full before the certificates are paid: *Jeffers v. New Jersey & P. R. Co.*, 86 N. J. Eq. 68, 97 Atl. 32. A holder of a certificate cannot contest the priority stated therein: *Nisbet v. Great Northern Clay Co.*, 41 Wash. 107, 83 Pac. 15. In general, where no priority is stated, a certificate prior in time is prior in right: *Nisbet v. Great Northern Clay Co.*, 41 Wash. 107, 83 Pac. 15. The court may authorize interest on certificates: *Hewitt v. Walters*, 21 Idaho, 1, *Ann. Cas.* 1913C, 35, 119 Pac. 705.

<sup>68</sup> *Union Trust Co. v. Illinois Midland R'y Co.*, 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809; *Raht v. Atrill*, 106 N. Y. 423, 60 *Am. Rep.* 456, 13 N. E. 282. It is not necessary that the creditors be made parties: *American Brake Shoe & Foundry Co. v. Pere Marquette R. Co.*, 205 Fed. 14, 123 C. C. A. 322. A creditor having a vendor's lien for part of the right of way of a railroad, who is not a party to the suit and had no notice of the application for issuance of certificates, is entitled to contest their priority: *Hubbell v. Texas Southern R'y Co.*, 59 Tex. Civ. App. 185, 126 S. W. 313.

<sup>69</sup> *Fidelity I. & S. D. Co. v. Shenandoah Co.*, 42 Fed. 372; *Pennsylvania Steel Co. v. New York City R'y Co.*, 165 Fed. 455; *In re Erie Lumber Co.*, 150 Fed. 817. To the effect that such certificates are subject to mechanics' liens, see *Gordon v. Newman*, 62 Fed. 686, 10 C. C. A. 587.

of the receiver. In a leading case they were authorized for necessary repairs, for betterments, and for the payment of tax liens.<sup>70</sup> They may be issued to pay for necessary improvements, such as additions to the line or equipment.<sup>71</sup> They have been authorized to enable the receiver to obtain funds with which to prosecute a suit for the collection of rent of a leased line.<sup>72</sup> In a number of instances they have been issued in payment of preferred claims, such as claims for labor, materials and supplies furnished a reasonable time before the receivership.<sup>73</sup> In all cases the issuance depends upon the necessity of the matter for which money is desired. For instance, if it is proper for the court to authorize improvements or repairs, it may direct that money be borrowed to pay for them. If, on the other hand, such

<sup>70</sup> *Union Trust Co. v. Illinois Midland R'y Co.*, 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809. In the following cases they were authorized for necessary repairs: *Credit Co., Ltd., v. Arkansas Cent. R. Co.*, 15 Fed. 46, 5 McCrary, 23; *Pennsylvania Steel Co. v. New York City R. Co.*, 165 Fed. 477; *Hoover v. Montclair & Greenwood Lake R'y Co.*, 29 N. J. Eq. 4; *Knickerbocker Trust Co. v. Oneonta C. & R. S. R'y Co.*, 201 N. Y. 379, 94 N. E. 871. It has been said, however, that the court should not permit certificates to be issued for permanent betterments not needed for operation: *Texas Co. v. International & G. N. Ry. Co.*, 237 Fed. 921, 150 C. C. A. 571.

<sup>71</sup> *Miltenberger v. Logansport R. R. Co.*, 106 U. S. 287, 27 L. Ed. 117, 1 Sup. Ct. 140 (issued for purposes of obtaining rolling stock, and for building six miles of road and a bridge, part of the main line of a road ninety-two miles long); *American Brake Shoe & Foundry Co. v. Pere Marquette R. Co.*, 205 Fed. 14, 123 C. C. A. 322. See, however, *Bibber-White Co. v. White River Val. E. R. Co.*, 53 C. C. A. 282, 115 Fed. 786, where an extension of the line would have been speculative and the court held an issuance of certificates for such purpose error.

<sup>72</sup> *Town of Vandalia v. St. Louis, V. & T. H. R. Co.*, 209 Ill. 73, 70 N. E. 662.

<sup>73</sup> *Union Trust Co. v. Illinois Midland R'y Co.*, 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809; *Miltenberger v. Logansport R'y Co.*, 106 U. S. 287, 27 L. Ed. 117, 1 Sup. Ct. 140.



work is, under the circumstances, not necessary, the application for an order must fail.

§ 1638. (§ 217.) **Liability for Fraud, Negligence, etc.** A receiver is bound to exercise such diligence in the care and management of the property as a prudent man would exercise in closing up his own estate. If, through his neglect, a loss occurs, he is personally liable. Thus, where he neglects to collect certain claims which might have been collected, he is liable and will be held for the amount lost.<sup>74</sup> In order to charge him, however, it has been held that the loss must be traced directly to his neglect.<sup>75</sup> He is not an insurer of the property, and is not

<sup>74</sup> In re Angell, 131 Mich. 345, 91 N. W. 611, 9 Detroit Leg. N. 380. See, also, In re Magner, 173 Iowa, 299, 155 N. W. 317. Thus, where he fails to collect interest which he could have collected by proper management, he is chargeable: Rosenthal v. McGraw, 138 Fed. 721, 71 C. C. A. 277. Where he wrongfully purchases supplies on credit, he may be compelled to pay for them out of his own pocket: Haines v. Buckeye Wheel Co., 224 Fed. 289, 139 C. C. A. 525. The court may either give a personal decree against him or direct an action to be brought against him and the sureties on his official bond: United States Blowpipe Co. v. Spencer, 61 W. Va. 191, 56 S. E. 345. See, also, State ex rel. Pope v. Germania Bank, 103 Minn. 129, 114 N. W. 651. The matter should be determined on the receiver's accounting: State ex rel. Pope v. Germania Bank, 103 Minn. 129, 114 N. W. 651. Where a receiver fails to invest funds which he has been directed to invest, he is chargeable with simple interest, and not compound: Roller v. Paul, 106 Va. 214, 55 S. E. 558. As to liability, in general, for interest, see Cecil v. Clark, 69 W. Va. 641, 72 S. E. 737.

<sup>75</sup> Thus, the fact of allowing animals to remain on a Texas cattle range, where they were lost, and a failure to insure property which afterwards burned, have been held to charge no loss upon the receiver: Hamm v. J. Stone & Sons Livestock Co., 13 Tex. Civ. App. 414, 35 S. W. 427. He should not be held liable for failure to sue stockholders where the court made an order that such suits be held in abeyance: Strauss v. Casey Machine & Supply Co. (N. J. Eq.), 66 Atl. 958. He is not personally liable for mismanagement unless his conduct has resulted in loss to the estate. He

a guarantor that any particular results will be worked out.<sup>76</sup> He must not become interested in any way in the property intrusted to him, and he must not use it for his own advantage. For instance, he must not loan money to himself nor to a firm of which he is a member.<sup>77</sup> And a mortgage taken by him upon property held by him as receiver to secure a debt to him personally, is void as against public policy.<sup>78</sup>

is only required to exercise ordinary care in the management of the property: *United States Blowpipe Co. v. Spencer*, 61 W. Va. 191, 56 S. E. 345. See, also, *Zielian v. Baltimore Plant Ice Co.*, 115 Md. 658, 81 Atl. 22. Where he acts under the advice of competent counsel, he is not ordinarily liable: *State v. Germania Bank*, 106 Minn. 164, 130 Am. St. Rep. 599, 118 N. W. 683.

<sup>76</sup> *Ripley v. McGavie*, 120 Iowa, 52, 94 N. W. 452. A receiver who exercises ordinary care is not liable for loss of funds arising from failure of the depository. He is not compelled to keep the funds in specie: *Groesbeck Cotton Oil & Compress Co. v. Oliver*, 44 Tex. Civ. App. 303, 97 S. W. 1092.

<sup>77</sup> *Ryan v. Morrill*, 83 Ky. 352; *Cook v. Martin*, 75 Ark. 40, 5 Ann. Cas. 204, 87 S. W. 625, quoting *Pom. Eq. Jur.*, § 1075. A receiver who purchases claims at a discount is not entitled to credit for the full amount of the claims but only for the amount he paid. The beneficiaries of the fund are not required to elect whether they will take interest or profits: *Roller v. Paul*, 106 Va. 214, 55 S. E. 558. While it is improper for a receiver to allow his wife to purchase land on which the corporation has an option, parties who take no action for a year are estopped from questioning the transaction: *Strang v. Edson*, 198 Fed. 813, 117 C. C. A. 455.

<sup>78</sup> *Thompson v. Holladay*, 15 Or. 34, 14 Pac. 725. A receiver may be held criminally liable for obstructing a crossing: *State of North Carolina v. Norfolk & S. R. Co.*, 152 N. C. 785, 21 Ann. Cas. 692, 26 L. R. A. (N. S.) 710, 67 S. E. 42. A receiver is not the agent of the parties to such an extent that they are liable for his wrongful or negligent act: *City Sav. Bank v. Carlon*, 87 Neb. 266, 127 N. W. 161.

## CHAPTER IX.

## RECEIVERS; CLAIMS AND ALLOWANCES.

## ANALYSIS.

- § 218. Duties and rights of receiver in regard to claims.
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§ 1639. (§ 218.) **Duties and Rights of Receiver in Regard to Claims.**—A receiver is “charged with the duty of carrying into execution the orders of the court, but he is also a custodian of property, and has, by virtue of such custody, certain obligations to the parties owning or interested therein.<sup>1</sup> Accordingly, he may defend, both in the court appointing him and by appeal, the estate in his possession against all claims which are antagonistic to the rights of both parties to the suit. For instance, he may thus contest a claim for taxes, because, if valid, they are superior to the rights of both parties. . . . He may likewise defend the estate against all claims which are antagonistic to the rights of either party to the suit, subject to the limitation that he may not, in such defense, question any order or decree of the court distributing burdens or apportioning rights between the parties to the suit, or any order or decree resting upon the discretion of the court appointing him. . . . Neither can he question any subsequent order or decree of the court distributing the estate in his hands between the parties to the suit.”<sup>2</sup>

<sup>1</sup> *Bosworth v. Terminal R. Ass’n*, 174 U. S. 182, 43 L. Ed. 941, 19 Sup. Ct. 625, per Brewer, J.

<sup>2</sup> *Id.*; *Metropolitan Trust Co. v. North Carolina Lumber Co.*, 162 Fed. 170 (cannot file exceptions to master’s report determining rights of creditors); *Whyel v. Jane Lew Coal & Coke Co.*, 67 W. Va. 651, 69 S. E. 192. Compare *In re Pleasant Hill Lumber Co.*, 126 La. 743, 52 South. 1010. As to the receiver’s right to appeal, see § 178.

**General Principles as to Claims.**—Claims on book accounts, notes, etc., are on an equal footing: *Blair v. Clayton Enterprise Co.*, 9 Del. Ch. 95, 77 Atl. 740. A judgment creditor is not entitled to priority of payment out of general assets: *Patterson v. Patterson*, 182 Fed. 952. A lessor is entitled to a preference as to rent collected by the receiver from a sub-lessee: *Kemp v. San Antonio Catering Co. (Earp)*, 118 Mo. App. 134, 93 S. W. 342. It is sometimes said that in determining priorities the court should follow the bankruptcy rules: *Old Colony Trust Co. v. Medfield & M. St. R’y Co.*, 215 Mass. 156, 102 N. E. 484. Dividends are payable on the



§ 1640. (§ 219.) **Priority of Claims—Taxes.**—The appointment of a receiver will not be allowed to defeat the collection of the public revenue. The claim of the

face of all claims, whether secured or not: *In re Bement's Sons* (Detroit Trust Co. v. State Bank of Michigan), 150 Mich. 530, 114 N. W. 327; *Merchants' Nat. Bank v. Flippen*, 158 N. C. 334, 74 S. E. 100. Secured creditors may apply the security to any deficiency remaining after receipt of dividends: *In re Bement's Sons* (Detroit Trust Co. v. State Bank of Michigan), 150 Mich. 530, 114 N. W. 327. Distribution is to be made according to the *status* of liens at the time the suit was filed: *Bisbee v. Mt. Battie Mfg. Co.*, 107 Me. 185, 77 Atl. 778. As between two lien claimants, the general rule that the first lien is to be satisfied in full first is followed: *Walter v. Peninsula Cut Stone Co.*, 9 Del. Ch. 374, 82 Atl. 961. And of course a lienholder is entitled to payment in full, both principal and interest, out of the proceeds of the property on which he has a lien, before general creditors are paid: *First Nat. Bank of Houston v. J. I. Campbell Co.*, 52 Tex. Civ. App. 445, 114 S. W. 887. And this is so although he does not sue to enforce his lien: *Randall v. Wagner Glass Co.*, 47 Ind. App. 439, 94 N. E. 739. Under the constitution of Missouri, claims for damages to abutting property constitute an equitable lien, and are preferred to mortgage liens: *Fordyce v. Kansas City & N. C. R. Co.*, 145 Fed. 566. In New Jersey, a secured creditor must apply his collateral securities to the payment of his debt, and prove only for the balance: *Butler v. Commonwealth Tobacco Co.*, 74 N. J. Eq. 423, 70 Atl. 319. Mortgage lien creditors are not chargeable with any part of the administration expense where there are general assets sufficient to meet them: *Walter v. Peninsula Cut Stone Co.*, 9 Del. Ch. 374, 82 Atl. 961. The mere fact that a judgment creditor is plaintiff in the suit gives him no right to a preference as to income: *Haehnlen v. Drayton*, 192 Fed. 300, 112 C. C. A. 558. The court has power to group claims in point of time, and to direct that certain claims be paid out of net earnings if any: *Waters-Pierce Oil Co. v. United States & Mexican Trust Co.*, 44 Tex. Civ. App. 397, 99 S. W. 212. The court may fix a time within which all claims must be presented: *Pennsylvania Steel Co. v. New York City R. Co.*, 176 Fed. 469; *Smith v. Jones Lumber & Mercantile Co.*, 200 Fed. 647. And it may extend such time: *Bisbee v. Mt. Battie Mfg. Co.*, 107 Me. 185, 77 Atl. 778. As to the allowance of contingent claims, see *In re Ross & Son*, 10 Del. Ch. 434, 95 Atl. 311. After a decree is made directing payment of a fund to a party, the court cannot subsequently

state is paramount to all other claims, and therefore the court will order its receiver to pay such taxes as have been legally assessed upon the property.<sup>3</sup> If the re-

direct the receiver to withhold payment to allow a general creditor to obtain judgment: *Spence v. Solomons Co.*, 129 Ga. 31, 58 S. E. 463. As to the conclusiveness of a judgment at law against the receiver when presented as a claim, see *Willcox v. Jones*, 177 Fed. 870, 101 C. C. A. 84 (liability fixed, but court may determine priority); *Guaranty Trust Co. v. Chicago Union Traction Co.*, 175 Fed. 284 (court may investigate and determine correctness of judgment); *Investment Registry Co. v. Chicago & M. Electric R'y Co.*, 204 Fed. 500.

**Rights of Creditors Contributing to Suits.**—The court may confine the right to share in the proceeds of a suit brought by the receiver to such creditors as share the expenses thereof. In such an event the receiver may deduct from the sum recovered the expenses of the suit and a reasonable compensation for conducting it; but he cannot pay general expenses out of it: *Cornell v. Nichols & Langworthy Machine Co.*, 201 Fed. 320, 119 C. C. A. 558.

**Interest on General Claims**, accruing after the appointment of a receiver, will not ordinarily be allowed: *Tredegear Co. v. Seaboard Air Line R'y*, 183 Fed. 289, 105 C. C. A. 501; *Blair v. Clayton Enterprise Co.*, 9 Del. Ch. 95, 77 Atl. 740. But see *Pennsylvania Steel Co. v. New York City R'y Co.*, 216 Fed. 458, 132 C. C. A. 518 (interest allowed where fund is ample). Compare *Spring Coal Co. v. Keech*, 239 Fed. 48, 152 C. C. A. 98. Interest on mortgages will be allowed: *Walter v. Peninsula Cut Stone Co.*, 9 Del. Ch. 374, 82 Atl. 961. In general, see *Meyer Rubber Co. v. Georgetown & W. R'y Co.*, 174 Fed. 731, disapproving *Bound v. South Carolina R. Co.*, 174 Fed. 729; *Bibber White Co. v. White River Valley Electric R. Co.*, 175 Fed. 470; *Atlantic Nat. Bank v. Four States Grocer Co.* (Tex. Civ. App.), 135 S. W. 1135 (interest on equitable lien denied when claims of other creditors cannot be paid in full).

<sup>3</sup> *First Nat. Bank v. Ewing*, 103 Fed. 168, 43 C. C. A. 150; *George v. St. Louis Cable & W. R. Co.*, 44 Fed. 117; *Hamilton v. David C. Beggs Co.*, 171 Fed. 157; *Texas Co. v. International & G. N. R'y Co.*, 237 Fed. 921, 150 C. C. A. 571; *In re United States Car Co.*, 60 N. J. Eq. 514, 43 Atl. 673; *Central Trust Co. v. New York City & N. R. Co.*, 110 N. Y. 250, 1 L. R. A. 260, 18 N. E. 92; *Taylor v. Sutherlin-Meade Tobacco Co.*, 107 Va. 787, 60 S. E. 132. See, also, *City of Los Angeles v. Los Angeles City Water Co.*, 137 Cal. 699,

ceiver believes the legality of the tax to be questionable, he may apply to the court for protection.<sup>4</sup>

§ 1641. (§ 220.) **Expenses of Receivership.**—In general, expenses of the receivership are payable out of the fund in the receiver's hands prior to the payment of a mortgage debt.<sup>5</sup> The reasons for such a rule are apparent. The receiver represents the court and acts for the interests of all concerned. Under such circumstances, it would be inequitable to allow a creditor to obtain the benefit of the receivership before the expenses necessarily incurred are paid. It becomes important, then, to determine what are proper expenses of administration.

§ 1642. (§ 221.) **What are Proper Expenses.**—As a general principle, it may be laid down that any reasonable expense incurred in the proper care, protection and control of the property should be allowed to the receiver as an expense of administration. What is proper in any given case must depend largely upon the particular circumstances. A receiver is entitled to a reasonable compensation, which, in general, is allowed by the court from the fund in his hands. Such a claim is clearly an ex-

70 Pac. 770 (applying Pol. Code, § 3647). That the property in the receiver's possession will be protected from seizure for taxes, see *ante*, § 168.

<sup>4</sup> Ex parte Chamberlain, 55 Fed. 704.

<sup>5</sup> *McLane v. Placerville & S. V. R. Co.*, 66 Cal. 606, 6 Pac. 748; *Central Trust Co. v. Thurman*, 94 Ga. 735, 20 S. E. 141; *State v. Active Bldg. & Loan Ass'n*, 102 Mo. App. 675, 77 S. W. 171. In general, see *Central Trust & Sav. Co. v. Chester County Electric Co.*, 9 Del. Ch. 247, 80 Atl. 801; *Hewitt v. Great Western Beet Sugar Co.*, 20 Idaho, 235, 118 Pac. 296; *In re Pleasant Hill Lumber Co.*, 126 La. 743, 52 South. 1010; *Teutonia Bank & Trust Co. v. Security Brewing Co.*, 137 La. 1046, 69 South. 833. Ordinarily, allowances for expenses should be made to the receiver himself and not to those who furnish supplies to or perform labor for him: *Virden v. Hubbard*, 37 Colo. 37, 86 Pac. 113.

pense of administration.<sup>6</sup> We have seen that for many purposes a receiver is authorized to employ an attorney. Compensation for such services is fixed by the court and allowed as a proper expense.<sup>7</sup> Costs of suits begun or

<sup>6</sup> See *post*, §§ 238-243.

<sup>7</sup> See *ante*, § 206. See, also, *Petersburg Sav. & Ins. Co. v. Della-torre*, 70 Fed. 643, 17 C. C. A. 310, 30 U. S. App. 504; *McLane v. Placerville & S. V. R. Co.*, 66 Cal. 606, 6 Pac. 748; *Central Trust Co. v. Thurman*, 94 Ga. 735, 20 S. E. 141; *Burroughs v. Toxaway Co.*, 185 Fed. 435, 107 C. C. A. 505; *In re Pleasant Hill Lumber Co.*, 126 La. 743, 52 South. 1010; *Berry v. Rood*, 209 Mo. 662, 108 S. W. 22; *State v. Active Bldg. & Loan Ass'n*, 102 Mo. App. 675, 77 S. W. 171; *Graham v. Carr*, 133 N. C. 449, 45 S. E. 847; *Kilpatrick v. Horton*, 15 Wyo. 501, 89 Pac. 1035. The court may authorize the receiver to fix the fees for temporary employments: *Bibber White Co. v. White River Valley Electric R. Co.*, 175 Fed. 470. It is only for services connected with the proper management or control of the property that compensation will be allowed. Thus, the unsuccessful effort of an attorney to defend his own claim before the master does not entitle him to any additional compensation: *In re University Magazine Co.*, 82 N. Y. Supp. 74, 83 App. Div. 641. Expenses incurred in the prosecution of litigation whose object is to diminish or destroy the fund are not payable out of the fund; and this is so although the result of the litigation is to establish a rule by which similar claims may be expeditiously settled without litigation: *Bartholomew v. Union Trust Co. (Myers v. Mutual Life Ins. Co.)*, 36 Ind. App. 328, 75 N. E. 31. An attorney employed to assist in the reorganization of the concern is not entitled to compensation from the fund: *Deputy v. Delmar Lumber Mfg. Co.*, 10 Del. Ch. 101, 85 Atl. 669. Nor is an attorney employed to resist the receivership proceedings: *Barker v. Southern Building & Loan Ass'n*, 181 Fed. 636; nor to resist a claim before the master: *Ely v. Vankannel Revolving Door Co.*, 184 Fed. 459; nor an attorney employed to resist a motion to vacate the appointment: *Burroughs v. Toxaway Co.*, 182 Fed. 129; nor an attorney whose employment is unauthorized: *Guaranty Trust Co. v. Chicago R'ys Co.*, 185 Fed. 411, 109 C. C. A. 18. In general, see *In re T. E. Hill Co.*, 159 Fed. 73, 86 C. C. A. 263; *Dalliba v. Winschell*, 11 Idaho, 364, 114 Am. St. Rep. 267, 82 Pac. 107.

Where an attorney is employed by creditors to recover a fund, and he recovers it and pays it to the receiver, he is entitled to a



defended by the receiver under the direction or approval of the court are also included.<sup>8</sup>

§ 1643. (§ 222.) **Expenses of Continuing Business.**—When a receiver is authorized to continue the business, expenses incurred are chargeable upon the fund prior to pre-existing liens.<sup>9</sup> As between costs of the litigation

preferred claim for compensation, whether the fund was recovered before or after the receivership. He may apply to the court for an allowance: *Butler v. Conwell*, 14 Wyo. 166, 82 Pac. 950. The receiver may be allowed for the fee of an attorney employed in another state: *Strauss v. Casey Machine & Supply Co.* (N. J. Eq.), 66 Atl. 958. The allowance should be made to the receiver and not to the attorney. Creditors should be given notice of the application: *City Bank of Wheeling v. Bryan*, 76 W. Va. 481, L. R. A. 1915F, 1219, 86 S. E. 8.

The allowance of attorney's fees is largely discretionary, and upon appeal is treated as presumptively correct: *Bartholomew v. Union Trust Co.* (*Myers v. Mutual Life Ins. Co.*), 36 Ind. App. 328, 75 N. E. 31. See, also, *Sullivan Timber Co. v. Black*, 159 Ala. 570, 48 South. 870.

<sup>8</sup> *Cumberland Lumber Co. v. Clinton Hill L. Co.*, 64 N. J. Eq. 521, 54 Atl. 452; *McLane v. Placerville & S. V. R. Co.*, 66 Cal. 606, 6 Pac. 748.

<sup>9</sup> *Clark v. Central R. & B. Co.*, 66 Fed. 803, 14 C. C. A. 112 (coal); *Diamond Match Co. v. Taylor*, 83 Md. 394, 34 Atl. 1015; *Hoover v. Montclair & G. L. R. Co.*, 29 N. J. Eq. 4 (repairs); *Ellis v. Vernon Ice, Light & Water Co.*, 86 Tex. 109, 23 S. W. 858; *Stacy v. McNicholas*, 76 Or. 167, 144 Pac. 96, 148 Pac. 67; *Teutonia Bank & Trust Co. v. Security Brewing Co.*, 137 La. 1046, 69 South. 833. He should be allowed credit for necessary repairs made by him: *In re Pleasant Hill Lumber Co.*, 126 La. 743, 52 South. 1010. That the expenses are a lien on the *corpus* as well as on the income, see *People's Nat. Bank v. Virginia Textile Co.*, 104 Va. 34, 7 Ann. Cas. 583, 51 S. E. 155, and many cases cited; *St. Louis Union Trust Co. v. Texas Southern R'y Co.*, 59 Tex. Civ. App. 157, 126 S. W. 296; cf. *infra*, § 225, as to "preferred" claims arising before the receivership. In *Stacy v. McNicholas*, 76 Or. 167, 144 Pac. 96, 148 Pac. 67, it is said that if expenses of continuing the business cannot be paid out of the income, they should be prorated with the general claims. As to what claims are properly chargeable as oper-

itself and the expenses incurred in continuing the business, it would seem that the former should have the priority.<sup>10</sup> Receivers' certificates are allowed a preference over mortgage debts and like claims.<sup>11</sup> Any reasonable expense incurred by authority of the court, express or implied, will be allowed. Owners of property used by a receiver are entitled to preferred payment.<sup>12</sup> No priority is allowed, however, to claims for money loaned without authority of the court, although it was intended that the funds so raised should be used for expenses of operation.<sup>13</sup>

§ 1644. (§ 223.) **Same—Liability for Torts.**—Receivers who are authorized to continue business and manage property are bound to the same degree of care as the

ating expenses, see *St. Louis Union Trust Co. v. Texas Southern R'y Co.*, 59 Tex. Civ. App. 157, 126 S. W. 296. Where the receiver continues the business without authority, expenses incurred therein are not entitled to priority: *United States Inv. Co. v. Portland Hospital*, 40 Or. 523, 56 L. R. A. 627, 64 Pac. 644, 67 Pac. 194; *Viden v. Hubbard*, 37 Colo. 37, 86 Pac. 113. And it has been held that where the court should not attempt to run the business, labor claims incurred by the receiver for that purpose should not be given preference: *Roberts v. Bowen Mfg. Co.*, 169 N. C. 27, 85 S. E. 45.

<sup>10</sup> "We consider the allowance as compensation to the receiver and his solicitors as part of the taxable costs in this case, and as such is preferred to the receiver's certificates, and entitled to prior payment": *Petersburg Sav. & Ins. Co. v. Dellatorre*, 70 Fed. 643, 17 C. C. A. 310, 30 U. S. App. 504.

<sup>11</sup> See *ante*, §§ 214–216.

<sup>12</sup> See *Miltenberger v. Logansport, C. & S. W. R. Co.*, 106 U. S. 286, 27 L. Ed. 117, 1 Sup. Ct. 140; *Thomas v. Western Car Co.*, 149 U. S. 95, 37 L. Ed. 663, 13 Sup. Ct. 824. Where a lease has not been adopted, the owner can claim only the actual value, not the amount stipulated for in the lease: *Lane v. Macon & A. R'y Co.*, 96 Ga. 630, 24 S. E. 157.

<sup>13</sup> *Union Trust Co. v. Illinois Midland R'y Co.*, 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809; *Maxwell v. Wilmington Dental Mfg. Co.*, 101 Fed. 852.

owner would have been under, and are in like manner liable, in their official character, for injuries resulting from the negligence of themselves or their agents and employees.<sup>14</sup> This principle applies strongly to railway receivers, who are held liable for injuries resulting from negligence in the operation of the properties committed to their charge. Claims of this character are treated as expenses of continuing the business, and are allowed priority.<sup>15</sup> Liability for statutory penalties depends

<sup>14</sup> Fullerton v. Fordyce, 121 Mo. 1, 42 **Am. St. Rep.** 516, 25 S. W. 587. As to liability, see *Missouri Pac. R. Co. v. Texas Pac. R. Co.*, 30 Fed. 169; *Rouse v. Hornsby*, 67 Fed. 219, 14 C. C. A. 377; *Central Trust Co. v. Denver & Rio Grande R. Co.*, 97 Fed. 239, 38 C. C. A. 143; *Malott v. Shimer*, 153 Ind. 35, 74 **Am. St. Rep.** 278, 54 N. E. 101; *Lyman v. Central Vt. R. Co.*, 59 Vt. 167, 10 Atl. 346. He is not liable for torts committed before the receivership: *Northern Pac. R. Co. v. Heflin*, 83 Fed. 93, 27 C. C. A. 460. See, also, *Gray v. Grand Trunk Western R'y Co.*, 156 Fed. 736, 84 C. C. A. 392; *Shedd v. Seefeld*, 230 Ill. 118, 120 **Am. St. Rep.** 269, 13 **L. R. A. (N. S.)** 709, 82 N. E. 580 (negligence in carrying out contract); *Emory v. Faith*, 113 Md. 253, **Ann. Cas.** 1912A, 586 (note), 77 Atl. 386; *Sheat v. Lusk*, 98 Kan. 614, **L. R. A.** 1916F, 614, 159 Pac. 407; see, also, *post*, § 237.

It has been held that a railroad in the hands of a receiver is not liable for the torts of the receiver nor for those of his employees: *Willson v. Colorado & S. R'y Co.*, 57 Colo. 303, 142 Pac. 174; *Hennings v. Sampsell*, 236 Ill. 375, 86 N. E. 274. In the absence of individual or personal misconduct, the liability of the receiver is official and not personal: *Hanlon v. Smith*, 175 Fed. 192. See, also, *Vandalia R'y Co. v. Keys*, 46 Ind. App. 353, 91 N. E. 173. Where judgment is obtained at law, and a claim is filed, based thereon, the court may examine the claim and disallow it if in its opinion it is not a proper judgment: *Guaranty Trust Co. v. Chicago Union Traction Co.*, 175 Fed. 284.

<sup>15</sup> *Knickerbocker v. Benes*, 195 Ill. 434, 63 N. E. 174; *Bartlett v. Cicero Light etc. Co.*, 177 Ill. 68, 69 **Am. St. Rep.** 206, 42 **L. R. A.** 715, 52 N. E. 339; *St. Louis S. W. R'y Co. v. Holbrook*, 73 Fed. 112, 19 C. C. A. 385, 41 U. S. App. 33. To the effect that such a claim should be paid out of the current receipts, see *Texas & P. R'y Co. v. Johnson*, 76 Tex. 421, 18 **Am. St. Rep.** 60, 13 S. W. 463; *Meyer*

largely upon the wording of the statutes themselves. It has been held that a statute imposing a liability upon a "proprietor, owner, charterer, or hirer" does not affect the receiver.<sup>16</sup> On the other hand, a statute inflicting penalties upon "all lessees or other persons owning or operating," is applicable to the receiver.<sup>17</sup> In some cases liability has been enforced against a corporation in the hands of a receiver, by reason of such statutes.<sup>18</sup>

**§ 1645. (§ 224.) Claims Arising Prior to Receivership—Statement and Rationale of Doctrine.**—In cases of

Rubber Co. v. Georgetown & N. R'y Co., 174 Fed. 731; Bound v. South Carolina R. Co., 174 Fed. 729.

<sup>16</sup> Such a statute imposing liability for death does not apply to the receiver: Texas & P. R. Co. v. Collins, 84 Tex. 121, 19 S. W. 365; Yoakum v. Selph, 83 Tex. 607, 19 S. W. 145; Turner v. Cross, 83 Tex. 218, 18 S. W. 578; Dillingham v. Blake (Tex. Civ. App.), 32 S. W. 77. A federal statute relating to the transportation of livestock, imposing a penalty upon "any company, owner or custodian of such animals," does not affect the receiver: United States v. Harris, 78 Fed. 290. On the other hand, it has been held that a statute declaring that "every railroad company" shall be liable for injuries to employees, and abolishing the fellow-servant rule, binds the receiver: Rouse v. Harry, 55 Kan. 589, 40 Pac. 1007; Hornsby v. Eddy, 56 Fed. 461, 5 C. C. A. 560.

<sup>17</sup> Brockert v. Central Iowa R. Co., 82 Iowa, 369, 47 N. W. 1026. A statute providing a liability for failure to ship goods after payment of freight may be enforced against a receiver: Robinson v. Harmon, 157 Mich. 272, 117 N. W. 664. The labor law of Michigan may be enforced against a receiver: United States v. Ramsey, 197 Fed. 144, 116 C. C. A. 568. In Investment Registry v. Chicago & M. Electric R. Co., 204 Fed. 500, a judgment in tort was rendered against the receiver and another corporation. The court ordered the claimant to endeavor to collect in the first instance from the other corporation. As to criminal liability of receiver, see State v. Norfolk & S. R. Co., 152 N. C. 785, 21 Ann. Cas. 692, 26 L. R. A. (N. S.) 710, 67 S. E. 42. In general, see Railroad Commission v. Alabama Great Southern R. Co., 185 Ala. 354, L. R. A. 1915D, 98, 64 South. 13.

<sup>18</sup> Ohio & Miss. R. Co. v. Russell, 115 Ill. 52, 3 N. E. 561.



railroad receiverships, and perhaps in a few other special instances, priority is allowed to certain claims for operating expenses incurred within a reasonable time before the appointment of a receiver. "The controlling principle appears to be that a railroad, having public duties to discharge, must be kept a going concern while in the hands of the court, and that to that end debts due its employees and other current debts incurred for its ordinary operations, which it is not usually practicable to pay in cash, and which are therefore payable on short terms, should be paid as they would have been paid if the court had not taken away from the corporation the control of the railroad. A cessation of the railroad's operations by failure to pay promptly the operatives or such other debts as railroads must necessarily incur for their ordinary, current operations, must be prevented."<sup>19</sup> "Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income."<sup>20</sup> It is frequently stated that the right to preference depends upon a diversion to the use of the mortgagees of funds which should properly be applied to the payment of current expenses.<sup>21</sup>

<sup>19</sup> Parlange, D. J., in *Lackawanna Iron & Coal Co. v. Farmers' Loan & Tr. Co.*, 79 Fed. 202, 24 C. C. A. 487 (affirmed, 176 U. S. 298, 44 L. Ed. 475, 20 Sup. Ct. 363). In *Moore v. Donahoo*, 217 Fed. 177, 133 C. C. A. 171, it was said that preference should be allowed only where it is necessary to enable the receiver to continue operation. For example, back pay of railroad employees may be paid for this reason, as well as claims for fuel where there is a single source of supply which will be cut off unless the bills are paid.

<sup>20</sup> Waite, C. J., in *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339. See, also, *Moore v. Donahoo*, 217 Fed. 177, 133 C. C. A. 171.

<sup>21</sup> Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36 L. Ed. 632, 12 Sup. Ct. 787; *Kansas Loan & Tr. Co. v. Electric R'y L. & P. Co.*, 108 Fed. 702; *Rhode Island Locomotive Works v. Continental Trust Co.*, 108 Fed. 5, 47 C. C. A. 147; *Central Trust Co. v. Chattanooga S. R. Co.*, 69 Fed. 295; *Cutting v. Tavares, O. & A. R.*

It is not necessary, however, that the funds be used to pay the mortgage debt, principal or interest.<sup>22</sup> And it would seem that the better rule is that no diversion whatever need be shown.<sup>23</sup> The practical reasons for the

Co., 61 Fed. 150, 9 C. C. A. 401; Finance Co. of Pa. v. Charleston, C. & C. R. Co., 48 Fed. 188; Chicago & A. R. Co. v. United States & Mexican Co. Trust Co., 225 Fed. 940, 141 C. C. A. 64; Martin Metal Mfg. Co. v. United States & Mexican Trust Co., 225 Fed. 961, 141 C. C. A. 85; Fordyce v. Omaha, K. C. & E. R. R., 145 Fed. 544; Loveland & Hinyan Co. v. Blair, 222 Fed. 207, 137 C. C. A. 521; Hammerly v. Mercantile Trust etc. Co., 123 Ala. 596, 26 South. 646; Citizens' Trust Co. v. National Equipment & Supply Co., 178 Ind. 167, 41 L. R. A. (N. S.) 695, 98 N. E. 865; Shugart & Barnes Bros. v. Atlantic N. & S. R'y Co., 161 Iowa, 351, 143 N. W. 90. It is said in some cases that the burden of proving such diversion is on the party claiming the preference: Kansas Loan & Tr. Co. v. Electric R'y, L. & P. Co., 108 Fed. 702; Lincoln Trust Co. v. Missouri Water, Light & Traction Co., 151 Mo. App. 322, 131 S. W. 889. The fact that the supplyman expected his claim to be paid out of current earnings gives him no right to preference: Martin Metal Mfg. Co. v. United States & Mexican Trust Co., 225 Fed. 961, 141 C. C. A. 85. In Crane Co. v. Fidelity Trust Co., 238 Fed. 693, 151 C. C. A. 543, the court said that if a claim for current expenses is payable out of the *corpus* ahead of bondholders, in the absence of diversion of income, it is only where such preferential payment is necessary to keep the railroad a going concern, or where it is necessary to prevent a loss at least equal to the payment.

<sup>22</sup> Union Trust Co. v. Souther, 107 U. S. 591, 27 L. Ed. 488, 2 Sup. Ct. 295.

<sup>23</sup> "It is immaterial, in such case, in determining the right to be compensated out of the surplus earnings of the receivership, whether or not during the operation of the railroad by the company there had been a diversion of income for the benefit of the mortgage bondholders, either in payment of interest on mortgage bonds or expenditures for permanent improvements upon the property": Virginia & A. Coal Co. v. Central R. & B. Co., 170 U. S. 355, 42 L. Ed. 1068, 18 Sup. Ct. 657 (affirming Clark v. Central R. R. & B. Co., 66 Fed. 803, 14 C. C. A. 112). See, also, Burnham v. Bowen, 111 U. S. 776, 28 L. Ed. 596, 4 Sup. Ct. 675 ("So far as anything appears on the record, the failure of the company to pay the debt to Bowen was due alone to the fact that the expenses of running the road

rule allowing preferences are as strong in both cases; for it is equally as important to keep the road a going concern where there has, or has not, been such diversion.<sup>24</sup>

§ 1646. (§ 225.) **Growth of the Doctrine.**—Although this doctrine is of comparatively recent origin, it has had a rapid development, and many of the decisions show a resulting conflict. It was originally said that the doctrine rested upon the implied consent of the mortgagees; that when they applied for a receiver they consented to do equity, and accordingly the court would proceed to adjust the claims.<sup>25</sup> Later, however, this theory was abandoned, and the same priority was allowed in a suit instituted neither by the bondholders nor the trustee.<sup>26</sup> It has been held that no preference can be allowed to claims arising prior to the receivership unless the court, at the time of the appointment, makes an order to that effect;<sup>27</sup> but the better rule seems to be that such order is not necessary.<sup>28</sup> By the weight of authority, the pref-

and preserving the security of the bondholders were greater than the receipts from the business. Under these circumstances, we think the debt was a charge in equity on the continuing income, as well that which came into the hands of the court after the receiver was appointed as that before'''); *Cleveland, C. & S. R'y Co. v. Knickerbocker Trust Co.*, 86 Fed. 73; *Wood v. New York & N. E. R. Co.*, 70 Fed. 741; *Finance Co. of Pa. v. Charleston, C. & C. R. Co.*, 62 Fed. 205, 10 C. C. A. 323, 8 U. S. App. 547; *Farmers' Loan & Tr. Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. 182.

<sup>24</sup> The text is quoted in *Spencer v. Taylor Creek Ditch Co.*, 194 Fed. 635, 114 C. C. A. 407, and cited in *General Electric Co. v. Canyon City Ice & Light Co.* (Tex. Civ. App.), 136 S. W. 78.

<sup>25</sup> *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339.

<sup>26</sup> *Union Trust Co. v. Illinois & M. R. Co.*, 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809.

<sup>27</sup> *Cutting v. Tavares, O. & A. R. Co.*, 61 Fed. 150, 9 C. C. A. 401; *Central Trust Co. v. Chattanooga S. R. Co.*, 69 Fed. 295.

<sup>28</sup> *Finance Co. of Pa. v. Charleston, C. & C. R. Co.*, 62 Fed. 205, 10 C. C. A. 323, 8 U. S. App. 547; *Wood v. New York & N. E. R. Co.*, 70 Fed. 741; *Farmers' Loan & Tr. Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. 182.

erence extends to the income only.<sup>29</sup> By some cases, however, it is held that preferred debts may be paid out of the *corpus* when the income is insufficient.<sup>30</sup>

§ 1647. (§ 226.) **To What Receiverships the Doctrine Applies.**—Most of the cases to which the doctrine has been applied have been cases of railroad receiverships, and the courts have been very slow to extend it. In the absence of statute, it cannot apply to receiverships of corporations owing no special obligation to the public.<sup>31</sup>

<sup>29</sup> Gregg v. Metropolitan Trust Co., 197 U. S. 183, 49 L. Ed. 717, 25 Sup. Ct. 415; International Trust Co. v. T. B. Townsend B. & C. Co., 95 Fed. 850, 37 C. C. A. 396; Street v. Maryland Cent. R. Co., 59 Fed. 25; Farmers & Merchants' Nat. Bank v. Waco Electric R'y & Lt. Co. (Tex. Civ. App.), 36 S. W. 131. See, also, Mersick v. Hartford & W. H. Horse R. Co., 76 Conn. 11, 100 Am. St. Rep. 977, 55 Atl. 664 (does not extend to *corpus* when there has been no diversion of income). It has been said that where a mortgage is made expressly to include income, the mortgagee is entitled to object to priority being allowed unsecured claims for supplies: United States & Mexican Trust Co. v. Western Supply & Mfg. Co. (Tex. Civ. App.), 109 S. W. 377. But see Citizens' Trust Co. v. National Equipment & Supply Co., 178 Ind. 167, 41 L. R. A. (N. S.) 695, 98 N. E. 865.

<sup>30</sup> Miltenberger v. Logansport, C. & S. W. R. Co., 106 U. S. 286, 27 L. Ed. 117, 1 Sup. Ct. 140; Union Trust Co. v. Illinois M. R. Co., 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809 (quoting from the former case); Farmers' Loan & Tr. Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. 182. See, also, Clark v. Central R. & B. Co., 66 Fed. 803, 14 C. C. A. 112. The very recent case of Gregg v. Metropolitan Trust Co., 197 U. S. 183, 25 Sup. Ct. 415, apparently overrules these cases, at least in part. It was there held that a claim for supplies cannot be given preference over the mortgage, out of the *corpus*.

<sup>31</sup> Thus, it has been held that there is no right of preference in a receivership of a mining company: Merriam v. Victory Min. Co., 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997; Farmers' Loan & Tr. Co. v. Grape Creek Coal Co., 50 Fed. 481, 16 L. R. A. 603; nor in a receivership of an iron company: Phillips v. Wise (Tex. Civ. App.), 31 S. W. 428; nor in a receivership of a brewing company:



In a few cases preferences have been allowed against mortgage creditors of common carrier corporations, such as telephone and telegraph companies;<sup>32</sup> but in at least one case the doctrine was held inapplicable to steamship companies.<sup>33</sup> In one instance priority

In *re* Benwood Brewing Co., 202 Fed. 326; nor in a receivership of a sawmill company: *George v. Pigford*, 97 Miss. 332, 52 South. 796. In general, see *Craver v. Greer* (Tex.), 179 S. W. 862. Claim for water right leased prior to receivership will not be allowed preference where it is never used by the receiver: *Lockport Felt Co. v. United Box Board & Paper Co.*, 182 Fed. 328. It has been held that where services are rendered a railroad company in its pursuit of a logging venture, which it undertakes in addition to its railroad, no preference should be allowed: *Security Sav. & Tr. Co. v. Goble, N. & P. R. Co.*, 44 Or. 370, 74 Pac. 919, 75 Pac. 697. It has been stated that the only claims entitled to preference over a mortgage in a receivership of a private concern are judgments obtained against the receiver for causes of action arising during the receivership: *Houston Ice & Brewing Co. v. Cline* (Tex. Civ. App.), 159 S. W. 409. For a preference arising out of statute, see *Hicks v. Consolidation Coal Co.*, 77 Md. 86, 25 Atl. 979; *Farmers & Merchants' Nat. Bank v. Waco Electric R'y & Lt. Co.* (Tex. Civ. App.), 36 S. W. 131. In Alabama, the doctrine has been extended independently of statute: *Drennen v. Mercantile Tr. & D. Co.*, 115 Ala. 592, 67 Am. St. Rep. 72, 39 L. R. A. 623, 23 South. 164 (mining company); and in Mississippi: *L'Hote v. Boyet*, 85 Miss. 636, 3 Ann. Cas. 705, 38 South. 1. In Texas it is held that creditors who furnish supplies prior to receivership may be paid out of net income; but that they are not entitled to preference where there is no net income: *General Electric Co. v. Canyon City Ice & Light Co.* (Tex. Civ. App.), 136 S. W. 78.

<sup>32</sup> *Keelyn v. Carolina etc. Tel. Co.*, 90 Fed. 29. In *Homer v. Baltimore Refrigerating & Heating Co.*, 117 Md. 411, 84 Atl. 176, preference was allowed for supplies furnished a public service corporation.

<sup>33</sup> *Bound v. South Carolina R'y Co.*, 50 Fed. 312. In discussing the reasons for the distinction, *Simonton, D. J.*, said: "Railroads are of public concern, not simply because they benefit the public; the sovereign power has contributed to their construction in a way to which none but the sovereign can contribute, and they are devoted to a public use. . . . The public use arises when the sovereign

was allowed to certain creditors of an irrigation company.<sup>34</sup>

§ 1648. (§ 227.) **Time Within Which Debts must have Been Contracted.**—In order that claims may be allowed a preference under this doctrine, they must have been contracted within a reasonable time before the receivership.<sup>35</sup> It is sometimes stated that six months is the limit.<sup>36</sup> This is not borne out, however, by the weight of authority.<sup>37</sup> What is a reasonable time de-

power is essential to the enterprise, and is exercised because of such use. This consideration does not exist in the case of a steamship company, or of any common carrier by water, or of any warehouse company. There are no sovereign, exclusive privileges granted to this navigation company."

<sup>34</sup> Atlantic Trust Co. v. Woodbridge Canal Co., 79 Fed. 39.

<sup>35</sup> Wood v. New York & N. E. R. Co., 70 Fed. 741; Central Trust Co. v. East Tenn. V. & G. R. Co., 80 Fed. 624, 26 C. C. A. 30; Guaranty Trust Co. v. Galveston City R. Co., 107 Fed. 311, 46 C. C. A. 305; Spencer v. Taylor Creek Ditch Co., 194 Fed. 635, 114 C. C. A. 407; Manchester Locomotive Works v. Truesdale, 44 Minn. 115, 9 L. R. A. 140, 46 N. W. 301; Central Trust Co. v. Utah Cent. R. Co., 16 Utah, 12, 50 Pac. 813. See, also, cases cited in note 37, *post*.

<sup>36</sup> National Bank of Augusta v. Carolina, K. & W. R. Co., 63 Fed. 25 (*dictum*); Westinghouse Air Brake Co. v. Kansas City So. R'y Co., 137 Fed. 26, 71 C. C. A. 1. In Helm v. Smith, 62 Colo. 203, 162 Pac. 143, it is said that this limit should be extended only in very exceptional cases. In Central Trust Co. v. Chicago, A. & N. R'y Co., 232 Fed. 936, it is said that the six months' limitation is not inflexible.

<sup>37</sup> Burnham v. Bowen, 111 U. S. 776, 28 L. Ed. 596, 4 Sup. Ct. 675 (claim for coal supplied eleven months before the appointment of a receiver allowed a preference); Northern Pac. R. Co. v. Lamont, 69 Fed. 23, 16 C. C. A. 364, 32 U. S. App. 480; Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. 182; Central Trust Co. v. St. Louis, A. & T. R'y Co., 41 Fed. 551; Wood v. New York & N. E. R. Co., 70 Fed. 741; Cleveland C. & S. R'y Co. v. Knickerbocker Trust Co., 86 Fed. 73; New York Guaranty etc. Co. v. Tacoma R. & M. Co., 83 Fed. 365, 27 C. C. A. 550; Citizens' Trust Co. v. National Equipment & Supply Co., 178 Ind. 167, 41 L. R. A. (N. S.) 695, 98 N. E. 865; Central Trust Co. v. Utah Cent. R. Co., 16 Utah, 12, 50 Pac. 813.

pend upon the circumstances of each particular case. The supreme court of the United States has given priority to a claim for materials furnished three years before the appointment of a receiver.<sup>38</sup>

§ 1649. (§ 228.) **Labor Claims.**—Wherever the doctrine is accepted, claims of employees for labor performed within a reasonable time before the receivership are allowed a preference.<sup>39</sup> All the reasons which exist in favor of allowance in any other case exist here. Without employees the road could not run for a moment.

§ 1650. (§ 229.) **Extent of This Class.**—It is impossible from the present state of the authorities to define

<sup>38</sup> Hale v. Frost, 99 U. S. 389, 25 L. Ed. 419.

<sup>39</sup> Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339; Miltenberger v. Logansport, C. & S. W. R. Co., 106 U. S. 286, 27 L. Ed. 117, 1 Sup. Ct. 140; Wood v. New York & N. E. R. Co., 70 Fed. 741; Finance Co. of Pa. v. Charleston, C. & C. R. Co., 62 Fed. 205, 10 C. C. A. 323, 8 U. S. App. 547; Douglass v. Cline, 12 Bush, 608; Litzenberg v. Jarvis-Conklin Trust Co., 8 Utah, 15, 28 Pac. 871; Central Trust Co. v. Utah Cent. R. Co., 16 Utah, 12, 50 Pac. 813; Texas Co. v. International & G. N. R'y Co., 237 Fed. 921, 150 C. C. A. 571.

**Preference of Labor Claims, in General.**—In some states preference is allowed to labor claims whether the receivership be for a railroad or a private business concern. In Colorado a laborer's claim is prior to other general claims, but not to a recorded mortgage: Central Savings Bank v. Newton, 59 Colo. 150, 147 Pac. 690. Under the Texas statute a labor lien is expressly given priority: Hubbell v. Texas Southern R'y Co., 59 Tex. Civ. App. 185, 126 S. W. 313, 315.

In Indiana where the statute gives priority to any person having a claim for wages, it will not be enforced in favor of the assignee of labor claims: Southern R'y Co. v. Bretz, 181 Ind. 504, 104 N. E. 19. Such a statute has been said to be in derogation of common law and common rights, and should therefore be strictly construed: Schmidtman v. Atlantic Phosphate & Oil Co., 230 Fed. 769. Claim for priority was denied in Martin v. Blytheville Water Co., 115 Ark. 230, 170 S. W. 1019.

exactly who are included within this class. It is sometimes stated that officers and employees of every grade are included;<sup>40</sup> but this is not warranted by the authorities. The ordinary clerks and employees are clearly entitled to the preference. The question is more difficult when applied to the officials of the company. It has been held, in accord with principle, that a president of a railroad corporation is not entitled to any priority for his salary claim. "If persons who give labor and materials were required in every instance to make careful examination into the condition of the company, so as to ascertain its solvent capacity for paying debts, all of its operations might be brought to a standstill. For this reason, persons dealing with a company are encouraged to do so, with the knowledge that the court will see that all such supplies of labor and material given, and not paid for within a reasonable time before the appointment of a receiver, will be provided for by the court. . . . No case can yet be found which extends the equity to the president of the company. He knows exactly its condition. He has full notice of the liens existing. He is not bound to furnish his services a day after his remuneration seems uncertain. He cannot be included among that class of employees who have no means of ascertaining whether a short credit to the company is safe or not."<sup>41</sup> An attorney whose services result in a recovery which inures to the benefit of the bondholders is entitled to preference for his fee. The party who takes the benefit of such a service ought to pay for it.<sup>42</sup> Likewise, it has been held that where the court orders the receiver

<sup>40</sup> *Farmers' Loan & Trust Co. v. Vicksburg & M. R. Co.*, 33 Fed. 778.

<sup>41</sup> *National Bank of Augusta v. Carolina, K. & W. R. Co.*, 63 Fed. 25.

<sup>42</sup> *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 34 L. Ed. 1023, 11 Sup. Ct. 405.



to pay wages due, a claim of an attorney regularly employed is entitled to preference.<sup>43</sup> But "claims for legal services rendered a railroad company in the ordinary course of its business under special employment, which do not directly contribute in some way to the advantage of mortgagees, do not stand upon a plane with the labor of operatives, or the claims of those who furnish materials or supplies to maintain it as a going concern."<sup>44</sup>

§ 1651. (§ 230.) **Claims for Supplies.**—Another class of claims entitled to preference includes those arising from the sale of supplies necessary for operating purposes.<sup>45</sup> Such claims clearly come within the reason of

<sup>43</sup> *Finance Co. of Pa. v. Charleston, C. & C. R. Co.*, 52 Fed. 526. A division counsel of a railroad was held to be an employee and entitled to preference in *Seaboard Air Line R'y v. Continental Trust Co.*, 166 Fed. 597. In *Dolph v. Cincinnati, B. & C. R. Co.*, 56 Ind. App. 137, 103 N. E. 13, an attorney who acted for bondholders who operated a railroad for two years prior to the receivership was allowed prior payment to the bondholders.

<sup>44</sup> *Gregg v. Mercantile Trust Co.*, 109 Fed. 220, 48 C. C. A. 318; *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 34 L. Ed. 1023, 11 Sup. Ct. 405.

<sup>45</sup> *Union Trust Co. v. Souther*, 107 U. S. 591, 27 L. Ed. 488, 2 Sup. Ct. 295; *Kneeland v. Bass Foundry & Mach. Works*, 140 U. S. 592, 35 L. Ed. 543, 11 Sup. Ct. 857; *Virginia & A. Coal Co. v. Central R. & B. Co.*, 170 U. S. 355, 42 L. Ed. 1068, 18 Sup. Ct. 657; *Wood v. New York & N. E. R. Co.*, 70 Fed. 741; *Southern R'y Co. v. Chapman Jack Co.*, 54 C. C. A. 598, 117 Fed. 424; *Grand Trunk R'y Co. v. Central Vt. R. Co.*, 88 Fed. 620; *Finance Co. of Pa. v. Charleston, C. & C. R. Co.*, 52 Fed. 524; *Pennsylvania Steel Co. v. New York City R'y Co.*, 208 Fed. 168; *Texas Co. v. International & G. N. R'y Co.*, 237 Fed. 921, 150 C. C. A. 571. A claim for a gear wheel and pinion, necessary parts of a cable railway, was allowed a preference in *Central Trust Co. v. Clark*, 81 Fed. 269, 26 C. C. A. 397. See, also, *New York Guaranty etc. Co. v. Tacoma R. & M. Co.*, 83 Fed. 365, 27 C. C. A. 550. For a statement as to when claims for supplies should be allowed a preference, see *Southern R'y Co. v. Ensign Mfg. Co.*, 117 Fed. 417, 54 C. C. A. 591. Preference for supplies sold before the receivership was denied in *City*

the rule. No railroad can run without supplies. Thus, coal being essential to the operation of a railroad, claims for coal are allowed a preference.<sup>46</sup> Some courts are

*Trust Co. v. Sedalia Light & Traction Co.*, 195 Fed. 845; *Carbon Fuel Co. v. Chicago, C. & L. R. Co.*, 202 Fed. 172, 120 C. C. A. 460 (bondholders not estopped because of delay in starting suit for foreclosure); *Martin Metal Mfg. Co. v. United States & Mexican Trust Co.*, 225 Fed. 961, 141 C. C. A. 85. The fact that some of the supplies were on hand at the time the receiver was appointed, and were used by him, gives no right to priority: *Carbon Fuel Co. v. Chicago, C. & L. R. Co.*, 202 Fed. 172, 120 C. C. A. 460. In *Carbon Fuel Co. v. Chicago C. & L. R'y Co.*, 202 Fed. 172, 120 C. C. A. 460, the claimant, who furnished supplies prior to receivership, was denied priority as a matter of right; but the court stated that the receiver would have been protected if he had paid it. In *Taylor v. Delaware & E. R. Co.*, 213 Fed. 622, 130 C. C. A. 214, a claim for supplies was denied preference where the receiver operated at a loss and no diversion of income was shown.

<sup>46</sup> "It was thus settled that, where coal is purchased by a railroad company for use in operating lines of railway owned and controlled by it, in order that they may be continued as a going concern, and where it was the expectation of the parties that the coal was to be paid for out of the current earnings, the indebtedness, as between the party furnishing the materials and supplies and the holders of bonds secured by a mortgage upon the property, is a charge in equity on the continuing income, as well that which may come into the hands of a court after a receiver has been appointed as that before": *Virginia & A. Coal Co. v. Central R. & B. Co.*, 170 U. S. 355, 42 L. Ed. 1068, 18 Sup. Ct. 657 (affirming *Clark v. Central R. R. & B. Co.*, 66 Fed. 803, 14 C. C. A. 112); *Burnham v. Bowen*, 111 U. S. 776, 28 L. Ed. 596, 4 Sup. Ct. 675; *Clark v. Central R. & B. Co.*, 66 Fed. 803, 14 C. C. A. 112; *Jackson Coal & Coke Co. v. Phillips Line*, 114 Va. 40, 75 S. E. 681. In *Pennsylvania Steel Co. v. New York City R'y Co.*, 216 Fed. 458, 132 C. C. A. 518, priority was allowed claims for coal used in a power-house, for lubricants and lights for cars, and for sand for tracks. But under the Texas statute, claims for coal and oil are not allowed preference: *Waters-Pierce Oil Co. v. United States & Mexican Trust Co.*, 44 Tex. Civ. App. 397, 99 S. W. 212. In *United States & Mexican Trust Co. v. Beaty*, 240 Fed. 592, preference was denied a claim for coal bought and used prior to the receivership because there were no net earnings; but it was allowed a claim for coal

disposed to narrow the class so as to include only claims for supplies which are actually necessary to keep the road in operation.<sup>47</sup> Accordingly, claims for advertising matter furnished have been refused priority.<sup>48</sup> Likewise, a claim for locomotives was denied priority when there was no showing that additional engines were necessary.<sup>49</sup>

§ 1652. (§ 231.) **No Priority When Credit Given.**—Priority is denied to claims for supplies sold on credit.<sup>50</sup>

bought prior to the receivership and used by the receiver. Claim for electric power furnished during two years prior to receivership was denied priority in *Old Colony Trust Co. v. Medfield & M. St. R'y Co.*, 215 Mass. 156, 102 N. E. 484.

<sup>47</sup> In *McCornack v. Salem Consol. St. R'y Co.*, 34 Or. 543, 56 Pac. 518, a claim for a heater furnished to a street railway company was refused a preference although it resulted in a saving of fuel, on the ground that it was not necessary in order to keep the company a going concern. It has been said that to be entitled to priority, the claims must be for such a quantity and payments must be so agreed upon as to indicate that they are necessary for current operations, and are to be met out of current earnings. But direct evidence of the latter is not necessary: *Pennsylvania Steel Co. v. New York City R'y Co.*, 216 Fed. 458, 132 C. C. A. 518.

<sup>48</sup> *Central Trust Co. v. East Tenn., V. & G. R. Co.*, 80 Fed. 624, 26 C. C. A. 30.

<sup>49</sup> *Gregg v. Mercantile Trust Co.*, 109 Fed. 220, 48 C. C. A. 318. See, also, *Rhode Island Locomotive Works v. Continental Trust Co.*, 108 Fed. 5, 47 C. C. A. 147. A claim for rolling stock was allowed priority in *St. Louis Union Trust Co. v. Texas Southern R'y Co.*, 59 Tex. Civ. App. 176, 126 S. W. 306. A claim for cross-ties and for ballast cars was denied preference in *Rodger Ballast Car Co. v. Omaha, K. C. & E. R. Co.*, 154 Fed. 629, 83 C. C. A. 403.

<sup>50</sup> *Bound v. South Carolina R'y Co.*, 58 Fed. 473, 7 C. C. A. 322; *Rhode Island Locomotive Works v. Continental Trust Co.*, 108 Fed. 5, 47 C. C. A. 147. This principle prevents priority when there is a conditional sale of rolling stock, title being retained until payment: *Huidekeper v. Locomotive Works*, 99 U. S. 258, 25 L. Ed. 344; *Fidelity Ins., Trust & S. D. Co. v. Shenandoah Valley R. Co.*, 86 Va. 1, 19 Am. St. Rep. 858, 9 S. E. 759. See, also, *Ruhlender v. Chesapeake, O. & S. W. R. Co.*, 91 Fed. 5, 33 C. C. A. 299.

In such a case it must be inferred that interest is to be paid on the mortgage indebtedness during the running of the credit. "The claim is quite different from those ordinary and necessary current expenses of operating a railroad contracted a short time before the receivership, and which, by the sudden action of the court in appointing a receiver, are left unpaid."<sup>51</sup>

§ 1653. (§ 232.) **Claims for Repairs—Construction—Reconstruction.**—In the operation of a railroad, repairs are continually necessary. Hence claims for labor performed and supplies furnished for ordinary and necessary repairs are allowed a preference.<sup>52</sup> It is held, however, that claims for the construction of the road are not such current debts as are entitled to this preference. An "original construction" is that which is necessary to be done before the road can be opened or used.<sup>53</sup> Such

<sup>51</sup> *Bound v. South Carolina R'y Co.*, 58 Fed. 473, 7 C. C. A. 322.

<sup>52</sup> *Southern R'y Co. v. Carnegie Steel Co.*, 176 U. S. 257, 44 L. Ed. 458, 20 Sup. Ct. 347 (affirming 76 Fed. 492, 22 C. C. A. 289); *Gregg v. Mercantile Trust Co.*, 109 Fed. 220, 48 C. C. A. 318; *Cleveland, C. & S. R'y Co. v. Knickerbocker Trust Co.*, 86 Fed. 73; *Citizens' Trust Co. v. National Equipment & Supply Co.*, 178 Ind. 167, 41 L. R. A. (N. S.) 695, 98 N. E. 865. Where a receiver of a private concern is authorized to continue the business, he should be allowed a credit for repairs made: *In re Pleasant Hill Lumber Co.*, 126 La. 743, 52 South. 1010. In Texas the right to a preference rests upon statute: *Waters-Pierce Oil Co. v. United States & Mexican Trust Co.*, 44 Tex. Civ. App. 397, 99 S. W. 212 (prior to statute there was no right to preference).

<sup>53</sup> *Wood v. Deposit Co.*, 128 U. S. 421, 32 L. Ed. 472, 9 Sup. Ct. 131; *Cleveland, C. & S. R'y Co. v. Knickerbocker Trust Co.*, 86 Fed. 73; *First Nat. Bank v. Ewing*, 103 Fed. 168, 43 C. C. A. 150; *American L. & T. Co. v. East & West R. Co.*, 46 Fed. 101; *Niles Tool Works Co. v. Louisville, N. A. & C. R'y Co.*, 112 Fed. 561, 50 C. C. A. 390; *Crane Co. v. Fidelity Trust Co.*, 238 Fed. 693, 151 C. C. A. 543 (claims for service extensions not allowed preference). See, however, *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705, 13 S. W. 655, where the court said: "Ordinarily, when mortgages



work is clearly not part of the ordinary course of business. Claims for reconstruction are also denied a preference. It is difficult to draw the line between repairs and reconstruction. Each case must depend upon its own facts. The extent of the work is the only criterion.<sup>54</sup>

§ 1654. (§ 233.) **Miscellaneous Claims.**—Preference has been allowed to claims for providing, furnishing and maintaining waiting-rooms for passengers, office room for ticket agents, and a convenient place for employees to lodge at reduced rates.<sup>55</sup> A like priority has been

are issued upon completed roads, it is not contemplated that its income is to be applied to the construction of new road. In such cases, debts incurred for such new construction ought to have no claim against the bondholders either, as to the *corpus* or the increase of the property. But when mortgages are executed upon an unfinished road, and they show upon their face that it was contemplated that the work, of construction should be prosecuted to completion, and when the mortgages attach to the new road as fast as it is finished, we are of opinion that the new road should be considered a 'useful improvement,' and that, if the road be put into the hands of a receiver, before the work and materials are paid for, the holders of the claims for such work and material should be paid from the net income of the road while under the control of the court, if there be any.' See, also, *Trocon v. Scott City Northern R'y Co.*, 91 Kan. 887, 139 Pac. 357 (priority allowed a bridge-builder). A claim for repair of boilers, in the nature of betterments was denied priority in *Central Trust Co. v. Colorado R'y, L. & P. Co.*, 200 Fed. 85. To establish priority, it must be shown that it was a current expense, and that some portion of the income had been diverted to the mortgagee's benefit, thus diminishing the fund out of which the work could have been paid for. Compare *Virginia Passenger & Power Co. v. Lane Bros. Co.*, 174 Fed. 513, 98 C. C. A. 295, where priority was allowed for construction work performed within a month prior to the receivership.

<sup>54</sup> *Lackawanna Iron & Coal Co. v. Farmers' L. & T. Co.*, 176 U. S. 298, 44 L. Ed. 475, 20 Sup. Ct. 363, affirming 79 Fed. 202, 24 C. C. A. 487.

<sup>55</sup> *Northern Pac. R. Co. v. Lamont*, 69 Fed. 23, 16 C. C. A. 364, 32 U. S. App. 480. In this case, Caldwell, Cir. J., tersely argued:

given to claims of other railroads for freight and ticket balances.<sup>56</sup> A claim for the use of terminal property has been held entitled to preference.<sup>57</sup>

§ 1655. (§ 234.) **Money Loaned.**—No preference is allowed claims for money loaned. This rule is adhered to although the money may have been used to pay current running expenses, and may have been loaned expressly for that purpose. The fact that the money is loaned to enable the company to pay interest on its mortgage bonds is likewise immaterial.<sup>58</sup>

“To defeat the preferential character of this claim, the court would have to be satisfied that waiting-rooms for passengers and an office for the ticket agents are not essential or necessary, at a town of several thousand population, on the Northern Pacific Railroad. We are asked, in effect, to hold that passengers on that road, while waiting to take passage on its trains, must endure the rigors of a North Dakota climate without shelter, and that its ticket agent must be content with an office on the public commons, and carry his tickets in his pocket or his hat.”

<sup>56</sup> *Miltenberger v. Logansport, C. & S. W. R. Co.*, 106 U. S. 286, 27 L. Ed. 117, 1 Sup. Ct. 140; *Finance Co. of Pa. v. Charleston, C. & C. R. Co.*, 62 Fed. 205, 10 C. C. A. 323, 8 U. S. App. 547; *Gregg v. Mercantile Trust Co.*, 109 Fed. 220, 48 C. C. A. 318; *Monsarrat v. Mercantile Trust Co.*, 109 Fed. 230, 48 C. C. A. 328.

<sup>57</sup> *Manhattan Trust Co. v. Sioux City & N. R. Co.*, 102 Fed. 710. But see, *contra*, *Gregg v. Mercantile Trust Co.*, 109 Fed. 220, 48 C. C. A. 318.

<sup>58</sup> *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. R'y Co.*, 137 U. S. 171, 34 L. Ed. 625, 11 Sup. Ct. 61; *Southern Dev. Co. v. Farmers' L. & T. Co.*, 79 Fed. 212, 24 C. C. A. 497; *Morgan's L. & T. R. & S. S. Co. v. Farmers' L. & T. Co.*, 79 Fed. 210, 24 C. C. A. 495; *Lackawanna Iron & Coal Co. v. Farmers' L. & T. Co.*, 79 Fed. 202, 24 C. C. A. 487; *Illinois Trust Co. v. Dowd*, 105 Fed. 123, 52 L. R. A. 481, 44 C. C. A. 389; *Contracting & Building Co. v. Continental Trust Co.*, 108 Fed. 1, 47 C. C. A. 143; *Illinois Trust etc. Bank v. Ottumwa El. R'y*, 89 Fed. 235.

**Claim for Return of Excess Rates Charged.**—Where a railroad charges rates in excess of those allowed by a state railroad commission, a claim for refund will be allowed priority over claims of

§ 1656. (§ 235.) **Rental of Leased Lines.**—No priority is allowed for claims for rental under a railroad lease accruing before the appointment of a receiver.<sup>59</sup> A distinction has been made, however, between claims for rent and claims arising out of an agreement to divide the earnings. In the latter case, it has been held that an equity arises which entitles the claimant to a preference.<sup>60</sup>

§ 1657. (§ 236.) **Car Rentals — Track Rentals.** — A claim for car rental that has accrued prior to the receivership is not entitled to preference. "The case of a corporation for the manufacture and sale of cars, dealing with a railroad company, whose road is subject to a mortgage securing outstanding bonds, is very different from that of workmen and employees, or of those who furnish, from day to day, supplies necessary for the

bondholders: *United States & Mexican Trust Co. v. Kansas City, M. & O. R'y Co.*, 240 Fed. 505; *Love v. North American Co.*, 229 Fed. 103, 143 C. C. A. 379 (allowed preference where excess rates collected were used for betterments).

<sup>59</sup> *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.*, 58 Fed. 268; *Pennsylvania Steel Co. v. New York City R'y Co.*, 216 Fed. 458, 132 C. C. A. 518. It has been held that the whole income of the whole system may be used to pay operating expenses: *Barber Asphalt Pav. Co. v. Forty-Second St., Manhattanville & St. N. Ave. R. Co.*, 180 Fed. 648, 103 C. C. A. 614.

<sup>60</sup> *Terre Haute & I. R. Co. v. Cox*, 102 Fed. 825, 42 C. C. A. 654. The court said: "Two railroad companies, each possessing, and separately operating, a railroad, found it advisable to unify the operation of their roads. They chose, in the execution of their project, that one company should operate, as one line, both roads. The undertaking was, in a certain sense, a joint one; each contributed a part of the means whereby it should be carried out. It certainly was within legal competency, either that the operating company should pay a strict rental for the use of the other's property, or that the earnings of the road, gross or net, as an entirety—the fruit of the joint enterprise—should be divided according to the agreement of the parties."

maintenance of the railroad. Such a company must be regarded as contracting upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity."<sup>61</sup> Priority is also denied to claims for track rentals.<sup>62</sup>

§ 1658. (§ 237.) **Personal Injuries.**—In accord with the general principle, it is well settled that claims for personal injuries arising out of negligence prior to the appointment of a receiver are not entitled to any preference.<sup>63</sup>

<sup>61</sup> *Thomas v. Western Car Co.*, 149 U. S. 95, 37 L. Ed. 663, 13 Sup. Ct. 824; *Grand Trunk R'y Co. v. Central Vt. R. Co.*, 90 Fed. 163; *Pullman's Palace-Car Co. v. American Loan & Trust Co.*, 84 Fed. 18, 28 C. C. A. 263 (mileage due under contract for use of Pullman cars). In *City Trust Co. v. Sedalia Light & Traction Co.* (Mo.), 195 Fed. 845, preference was denied for a debt to another railroad for maintaining flagmen at crossings.

<sup>62</sup> *Louisville & N. R. Co. v. Central Trust Co.*, 87 Fed. 500, 31 C. C. A. 89.

<sup>63</sup> The reasons are well stated in *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 74 Fed. 431. "But he who has a claim of damages for a negligent act of the railroad company prior to the receivership has no recognized equitable ground for demanding a preferred payment. He has done no act by which either the railroad company or the mortgagee has profited, nor has he surrendered property which has in any way inured to their benefit. Accidents, it is true, are liable to occur, and do occur in the operation of all railroads, and it is impossible to wholly avoid them; but it cannot be said that they are necessary to the road's existence in the same sense that supplies are necessary. . . . He who lends his money on railroad security undoubtedly does so with the contingency that the company may require supplies and equipment, and that, if it become necessary for the protection of the security that a court of chancery shall assume control over the mortgaged property, such claims may intervene between him and the payment of his lien. He incurs also the risk of the negligent conduct of the railroad company, so far as it may directly affect the condition or value of the property. But it cannot be said, and no court has held, that he assumes the risk of the negligence of the railroad company whereby injury re-



§ 1659. (§ 238.) **Compensation of Receiver—In General.**—A receiver being an officer of the court, provision will be made for his compensation. In cases where the court has jurisdiction to make the appointment, the amount will be fixed by the court and ordered paid out of the fund in the receiver's hands. In the absence of statute, no definite rule governing the allowance can be laid down. Much is left to the sound discretion of the court, and what is reasonable must be determined from a consideration of the particular circumstances of each case. In some states the matter is largely controlled by statute, but even then, provision is frequently made for additional allowances to be determined by the court

sults to third persons, and that he, in effect, becomes responsible for the torts which such railroad company may commit against others." In support of the text, see *Farmers' Loan & Trust Co. v. Northern Pac. R'y Co.*, 79 Fed. 227, 24 C. C. A. 511; *St. Louis Trust Co. v. Riley*, 70 Fed. 32, 30 L. R. A. 456, 16 C. C. A. 610, 36 U. S. App. 100; *Front St. Cable R'y Co. v. Drake*, 84 Fed. 257; *Farmers' Loan & Trust Co. v. Nestille*, 79 Fed. 748, 25 C. C. A. 194; *Veatch v. American Loan & Trust Co.*, 84 Fed. 274, 28 C. C. A. 384; *Central Trust Co. v. East Tennessee, V. & G. R. Co.*, 30 Fed. 895; *Central Trust Co. v. Chattanooga etc. R. R. Co.*, 89 Fed. 388; *Farmers' Loan & Trust Co. v. Green Bay etc. R. Co.*, 45 Fed. 664; *Farmers' Loan & Trust Co. v. Detroit etc. R. R. Co.*, 71 Fed. 29; *Davenport v. Alabama & C. R. Co.*, 2 Woods, 519, Fed. Cas. No. 3588. In general, see *Sundles v. Idaho-Oregon Light & Power Co.*, 218 Fed. 698; *Pennsylvania Steel Co. v. New York City R'y Co.*, 165 Fed. 457; *Pennsylvania Steel Co. v. New York City R'y Co.*, 216 Fed. 458, 132 C. C. A. 518; *Pennsylvania Steel Co. v. New York City R'y Co.*, 208 Fed. 168; *Atehison, T. & S. F. R'y Co. v. Osborn*, 148 Fed. 606, 78 C. C. A. 378; *Fountain v. Stickney*, 145 Iowa, 167, 139 Am. St. Rep. 410, 123 N. W. 947; *Crawford v. Seattle R. & S. R'y Co.*, 97 Wash. 651, 167 Pac. 44. A claim for damages for death caused by negligence is not entitled to preference: *Veatch v. American L. & T. Co.*, 79 Fed. 471, 25 C. C. A. 39; *Farmers' Loan & Trust Co. v. Green Bay etc. R. Co.*, 45 Fed. 664.

**Priority of Surety on Supersedeas Bond.**—In *City Trust Co. v. Sedalia Light & Traction Co.*, 195 Fed. 845, a judgment for personal injuries was obtained prior to the receivership. A super-

in the event of special or extraordinary services.<sup>64</sup> In England, the strict rule as to trustees is not applied to receivers.<sup>65</sup>

§ 1660. (§ 239.) **Discretion as to Amount.**—In the absence of any statutory regulation, the amount of the compensation is left to the discretion of the court.<sup>66</sup> A receiver is entitled to reasonable pay for his services, and such an amount the court will determine and allow.

sedeas bond was filed pending an appeal. The judgment was affirmed and the surety was obliged to pay. He was held to be entitled to repayment ahead of the mortgagee. But a contrary conclusion was reached in *Pennsylvania Steel Co. v. New York City R. Co.*, 165 Fed. 485.\*

There is a vigorous protest against this line of decisions in *Green v. Coast Line R. Co.*, 97 Ga. 15, 54 *Am. St. Rep.* 379, 33 *L. R. A.* 806, 24 S. E. 814. The court says: "Such corporations incur certain duties and obligations to the public, which adhere firmly to the franchises granted, and cannot be separated from them without legislative consent. These duties and obligations, equally with the franchises themselves, are matters of fundamental contract between the corporation and the sovereignty creating it,—a contract which is paramount to all subsequent contracts which the corporation is capable of entering into, with any person or for any purpose. By necessary implication, these latter contracts are always qualified and held in check by the former, and in every conflict they must be subordinated to it. The corporation can grant to others no immunity as to its franchises which it could not claim for itself; nor can it in behalf of its creditors, or any of them, free the franchises from being answerable out of the revenue produced by their exercise, for torts committed in the use of them, whether such torts be committed by the corporation itself or by others using the franchises with its consent or by its permission."

<sup>64</sup> For applications of such a statute, see *Spears v. Thomas*, 24 Ky. Law Rep. 1154, 70 S. W. 1060; *Fidelity Nat. Bank's Receiver v. Youtsey*, 26 Ky. Law Rep. 340, 81 S. W. 263; *United States Trust Co. v. New York, W. S. & B. R'y Co.*, 101 N. Y. 478, 5 N. E. 316; *Cameron v. Groveland Improvement Co.*, 72 *Am. St. Rep.* 77, note.

<sup>65</sup> *Harris v. Sleep*, [1897] 2 Ch. 81.

<sup>66</sup> *Stuart v. Boulware*, 133 U. S. 78, 33 *L. Ed.* 568, 10 Sup. Ct. 244; *Cake v. Mohun*, 164 U. S. 311, 41 *L. Ed.* 447, 17 Sup. Ct. 100

Upon appeal, "the action of the court below is treated as presumptively correct, 'since it has far better means of knowing what is just and reasonable than an appellate court can have.'"<sup>67</sup> This discretion is not absolute, however, and if it can be shown that the amount allowed is unreasonable under all the circumstances, the appellate court will interfere in the interests of justice.<sup>68</sup> Where the receiver is allowed a monthly stipend, the lower court retains the power to change it, and may, in its discretion, reduce the amount.<sup>69</sup>

**§ 1661. (§ 240.) Matters Considered in Determining Amount.**—By what means or in what manner the court

(amount sustained on appeal, although if question had been an original one, a lower amount would have been fixed); *Wilkinson v. Washington Trust Co.*, 102 Fed. 28, 72 C. C. A. 140; *Sullivan Timber Co. v. Black*, 159 Ala. 570, 48 South. 870; *Deputy v. Delmar Lumber Mfg. Co.*, 10 Del. Ch. 101, 85 Atl. 669; *Culver v. H. R. Allen, Sr. Med. & S. Ass'n*, 206 Ill. 40, 69 N. E. 53; *Heffron v. Rice*, 149 Ill. 216, 41 *Am. St. Rep.* 271, 36 N. E. 562; *Northrup Nat. Bank v. Varner*, 82 Kan. 691, 109 Pac. 394; *Lichtenstein v. Dial*, 68 Miss. 54, 8 South. 272; *Berry v. Rood*, 225 Mo. 85, 123 S. W. 888; *First Nat. Bank v. Oregon Paper Co.*, 42 Or. 398, 71 Pac. 144, 971; *Thames v. Rouse*, 85 S. C. 71, 67 S. E. 139; *Kilpatrick v. Horton*, 15 Wyo. 501, 89 Pac. 1035.

<sup>67</sup> *Stuart v. Boulware*, 133 U. S. 78, 33 *L. Ed.* 568, 10 Sup. Ct. 244, quoting from *Trustees v. Greenough*, 105 U. S. 527, 537, 26 *L. Ed.* 1157. See, also, *Graham v. Carr*, 133 N. C. 449, 45 S. E. 847; *State ex rel. Hadley v. People's United States Bank*, 197 Mo. 605, 95 S. W. 867.

<sup>68</sup> In *Spears v. Thomas*, 24 Ky. Law Rep. 1154, 70 S. W. 1060, compensation was reduced from \$15,000 to \$10,000. See, also, *Joralmón v. McPhee*, 31 Colo. 40, 76 Pac. 922; *Forrester v. Boston & M. Consol. C. & S. M. Co.*, 29 Mont. 397, 76 Pac. 211; *State v. State Bank & Trust Co.*, 36 Nev. 526, 137 Pac. 400. The order should not be made on the court's own motion. It should be made upon notice and after a hearing at which all parties interested have an opportunity to contest: *Ruggles v. Patton*, 143 Fed. 312. See, also, as to requirement of notice, *In re Wagner*, 173 Iowa, 299, 155 N. W. 317.

<sup>69</sup> In *re Angell*, 131 Mich. 345, 91 N. W. 611.

will arrive at its determination of what is reasonable, no positive rule can be stated. The court is allowed the largest liberty of inquiry and ascertainment. It may, "in connection with the evidence before it, take into consideration its personal knowledge of the general nature and character and value of the services alleged to have been rendered."<sup>70</sup> But it is only the value of the services as rendered in the particular class of business that

<sup>70</sup> *Culver v. H. R. Allen, Sr. Med. & S. Ass'n*, 206 Ill. 40, 69 N. E. 53. For a good statement of matters which may be considered, see *Hickey v. Parrot Silver & Copper Co.*, 32 Mont. 143, 108 *Am. St. Rep.* 510, 79 *Pac.* 698. The court should consider the amount and character of the time and responsibility devoted to the duty. This includes the kind and extent of time and labor rightly bestowed by the receiver on the trust, the responsibility assumed, the character and extent of the property committed to his care, the beneficial results of the management, and other matters that are incidental to the trust and its effective execution: *Hazen v. Stevens*, 60 Fla. 460, 53 *South.* 716.

**In General.**—He may be allowed compensation although he does not keep his accounts as carefully as he should, where he acts in good faith and manages with reasonable success: *Howard v. Gose*, 112 Va. 552, 72 S. E. 140. Where appointment is acquiesced in by the parties, mere irregularities in the appointment will not bar the right to compensation: *Nutter v. Brown*, 58 W. Va. 237, 6 *Ann. Cas.* 94, 1 *L. R. A. (N. S.)* 1083, 52 S. E. 88. No account should be taken of what he may have done improperly as president of the concern prior to his appointment as receiver: *Deputy v. Delmar Lumber Mfg. Co.*, 10 Del. Ch. 101, 85 *Atl.* 669. The fact that he is interested personally in the concern does not bar his right to compensation: *Cecil v. Clark*, 69 W. Va. 641, 72 S. E. 737. Where he continues business without the court's order, and at a loss, the amount of the loss should be deducted from his commissions: *Villere v. New Orleans Pure Milk Co.*, 122 La. 717, 48 *South.* 162. A receiver who is ineligible because a non-resident is not entitled to fees: *Roberts Telephone & Electric Co. v. Farmers & Merchants' Nat. Bank* (Tex. Civ. App.), 155 S. W. 629. Nor is a receiver who has been guilty of flagrant misconduct: *Dalliba v. Winschell*, 11 Idaho, 364, 114 *Am. St. Rep.* 267, 82 *Pac.* 107. See, also, *Nowell v. International Trust Co.*, 169 *Fed.* 497, 94 *C. C. A.* 589.



will be considered, not the value of the receiver's services in some other line of business.<sup>71</sup> "In receiverships of that character in which the officer is at once receiver and manager of a business, a gross sum may be allowed as specific compensation for services. . . . In other cases, in which the receiver's duties are confined to the receipt and disbursement of money, the court might wisely refer to the rule and rate of a given percentage in analogous cases, when such percentage is regulated by law, and might properly adopt such rule and rate, if, in its discretion, the same would amount to reasonable compensation."<sup>72</sup> Where the nature of the services is such that the greater part of the work will necessarily have to be done by the receiver's attorney, the court may consider such fact in determining the amount to award.<sup>73</sup>

**§ 1662. (§ 241.) Effect of Revocation or Reversal of Order Appointing Receiver.**—"If the order appointing a

<sup>71</sup> "It is very possible that his time was worth the munificent sum he demands for it, but the court must consider, not the value of his services in larger and more important affairs, but their value to the modest business of which he consented to take charge": *Stearns Paint Mfg. Co. v. Comstock*, 121 Iowa, 430, 96 N. W. 869. And the court should not make an allowance for services to be rendered in the future: *Riordan v. Horton*, 16 Wyo. 363, 94 Pac. 448. It is no part of the duty of a receiver to work up a reorganization of the concern; and he therefore should be allowed no compensation therefor: *Deputy v. Delmar Lumber Mfg. Co.*, 10 Del. Ch. 101, 85 Atl. 669.

<sup>72</sup> *Lichtenstein v. Dial*, 68 Miss. 54, 8 South. 272. See *First Nat. Bank v. Oregon Paper Co.*, 42 Or. 398, 71 Pac. 144, 971; *Tome v. King*, 64 Md. 166, 21 Atl. 279. See, also, *Jones v. Keen*, 115 Mass. 170, where the court intimated that compensation should not be computed upon a percentage basis; *Special Bank Comm'rs v. Franklin Sav. Inst.*, 11 R. I. 557 (same); *Tome v. King*, 64 Md. 166, 21 Atl. 279 (same); *Sullivan Timber Co. v. Black*, 159 Ala. 570, 48 South. 870.

<sup>73</sup> *Silvers v. Merchants' & M. Sav. Fund & Bldg. Ass'n (N. J. Eq.)*, 56 Atl. 294.

receiver is revoked" for want of jurisdiction, or for such cause is reversed upon appeal, "and he is directed to return the property to the persons entitled thereto, his compensation, as a general thing, will not be paid out of the funds placed in his hands. When the appointment of the receiver is upon an application adverse to the defendant in the cause, and is without authority of law, the receiver must look for his fees and compensation to the complainant in the suit, upon whose application he was appointed."<sup>74</sup> The amount allowed as compensation in such cases is taxed against the unsuccessful party as costs. In some cases, however, the receiver has been allowed to collect his compensation from the fund, the defendant being protected by being awarded a judgment for costs.<sup>75</sup> It has been held that where a receiver is appointed by the consent of the parties, his compensa-

<sup>74</sup> *McAnrow v. Martin*, 183 Ill. 467, 56 N. E. 168. See, also, *Link Belt Machinery Co. v. Hughes*, 195 Ill. 413, 63 N. E. 186 (affirming 95 Ill. App. 323); *Highley v. Deane*, 168 Ill. 266, 48 N. E. 50; *Ford v. Gilbert*, 42 Or. 528, 71 Pac. 971; *Chicago Title & Trust Co. v. Newman*, 187 Fed. 573, 109 C. C. A. 263; *Harrington v. Union Oil Co.*, 144 Fed. 235; *Atlantic Trust Co. v. Chapman*, 145 Fed. 820, 76 C. C. A. 396; *McIntosh v. Ward*, 159 Fed. 66, 67, 86 C. C. A. 256; *Wills Valley Min. & Mfg. Co. v. Galloway*, 155 Ala. 628, 47 South. 141; *Virden v. Hubbard*, 37 Colo. 37, 86 Pac. 113; *State ex rel. Hadley v. People's United States Bank*, 197 Mo. 605, 95 S. W. 867; *Joslin v. Williams*, 76 Neb. 594, 107 N. W. 837, 112 N. W. 343. See *St. Louis, K. & S. R. Co. v. Wear*, 135 Mo. 230, 33 L. R. A. 341, 36 S. W. 658, to the effect that when the appointment is in excess of power because the circumstances do not warrant it, compensation should not be deducted from the fund. To the same effect, see *Etna Steel & Iron Co. v. Hamilton*, 133 Ga. 85, 65 S. E. 145. But see *Palmer v. Texas*, 212 U. S. 118, 53 L. Ed. 435, 29 Sup. Ct. 230, where it was held that where a receiver is continued pending an appeal, the expenses may be paid out of the fund even though the order appointing a receiver is reversed. And see, also, *Beardsley Co. v. V. E. Ashdown & Co.*, 73 W. Va. 132, 80 S. E. 128.

<sup>75</sup> *Cutter v. Pollock*, 7 N. D. 631, 76 N. W. 235.

tion may be paid out of the fund in his hands, although it may subsequently develop that the court was without jurisdiction of the subject-matter.<sup>76</sup> And where the appointment was originally valid and within the power of the court, an allowance may be made from the fund, although it may finally be determined that the defendant should prevail.<sup>77</sup>

§ 1663. (§ 242.) **Effect of Agreement.**—The appointment of a receiver and the fixing of his compensation are judicial acts, and the court is not bound by agreements between individuals as to what it should or should not do.<sup>78</sup> Where, however, one subsequently appointed receiver agrees with a party to serve without compensation in consideration of an agreement of such party not to object to his appointment, the court will not permit him to repudiate his contract. In such case no compensation will be allowed.<sup>79</sup> Nor will compensation be allowed to

<sup>76</sup> Ford v. Gilbert, 42 Or. 528, 71 Pac. 971.

<sup>77</sup> Clark v. Brown, 119 Fed. 130, 57 C. C. A. 76; Hopfensack v. Hopfensack, 61 How. Pr. 498 ("The receiver's compensation cannot be made to depend upon the result of the litigation. He is the officer of the court who takes the property, the right to which is involved in dispute, and by order of the court holds it for the benefit of the party who shall ultimately be found to be entitled to it. . . . The property in the hands of the receiver is the fund from which his fees must be paid"); In re Wentworth Lunch Co., 189 Fed. 831 (bankruptcy receiver).

<sup>78</sup> Lichtenstein v. Dial, 68 Miss. 54, 8 South. 272; Polk v. Johnson (Ind. App.), 65 N. E. 536; affirmed, 160 Ind. 292, 98 Am. St. Rep. 274, 66 N. E. 752; Hall v. Stulb, 126 Ga. 521, 55 S. E. 172.

<sup>79</sup> Polk v. Johnson (Ind. App.), 65 N. E. 536; affirmed, 160 Ind. 292, 98 Am. St. Rep. 274, 66 N. E. 752 ("Beyond question one may waive compensation for any labor performed, both before and after completion; and it is a familiar doctrine that one cannot, after performance, change his mind, and charge for that which he agreed and undertook to do as a gratuity"). It has been held that an agreement with an intervener not to apply for compensation to the detriment of his claim does not entitle the intervener to the allowance of

a receiver who, being interested in the property, represents to the court at the time of his appointment that he will make no such claim.<sup>80</sup> And this has been insisted upon even where it has been shown that the work has proved much greater than was anticipated.<sup>81</sup>

§ 1664. (§ 243.) **Effect of Adjudication of Bankruptcy.**—The question has arisen as to the source of the receiver's compensation when the debtor goes into bankruptcy subsequently to the appointment of a receiver. It has been held that the receiver is entitled to compensation out of the fund before it is turned over to the trustee in bankruptcy. There is no breach of comity between the state and federal courts in such a practice, for the federal court would, if requested, allow such compensation. Ordinarily, the court appointing a receiver can measure more readily and accurately the amount of his services and expenses in the execution of its own decree.<sup>82</sup>

§ 1665. (§ 244.) **Payment of Costs When Fund not Sufficient.**—It sometimes happens that the expenses of the receivership are greater than the fund in the hands of the receiver.<sup>83</sup> In such cases the court may ascertain

his claim from commissions allowed from funds which would otherwise have been applied in payment of other claims: *Broomfield v. Roy*, 120 Fed. 502, 56 C. C. A. 652; *Hall v. Stulb*, 126 Ga. 521, 55 S. E. 172; *Riordan v. Horton*, 16 Wyo. 363, 94 Pac. 448.

<sup>80</sup> *Steel v. Holladay*, 19 Or. 517, 25 Pac. 77.

<sup>81</sup> *Id.*

<sup>82</sup> *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 344, 50 Atl. 387; but see *contra*, *Bloch v. Bloch*, 42 Misc. Rep. 278, 86 N. Y. Supp. 1047, holding that where suit was begun and a receiver appointed within four months of the adjudication of bankruptcy, the receiver must look for his compensation to the federal court. The right of the state court to settle the account, allowing payments properly made before the adjudication of bankruptcy was recognized.

<sup>83</sup> "If the complainant was not willing to pay the expenses of the receivership it asked for, in the event of the insufficiency of



the amount of the deficiency, and it must be borne by the party at whose instance the receiver was appointed. The receiver cannot be justly held to hold and operate the property at his own expense or at that of the court. The party who seeks the aid of the court must see that its officer is protected in his legitimate expenditures. The receiver may enforce his right by action after the receivership proceedings are dismissed.<sup>84</sup> In Oregon, however, it is held that employees cannot hold the parties liable for wages due unless terms imposing such liability are made a condition of the appointment or continuance in office of the receiver.<sup>85</sup>

the property to do so, it should not have asked the court to make the appointment, incur the liabilities, and pledge its faith to their payment. It was the duty of the complainant to keep informed in respect to the progress of the receivership, the property, and its probable outcome, and, whenever it became unwilling to further stand good for any deficiency, to ask the court to bring to an end the business it undertook and was conducting on complainant's petition": *Chapman v. Atlantic Trust Co.*, 119 Fed. 257, 56 C. C. A. 61. See, also, *Ephraim v. Pacific Bank*, 129 Cal. 589, 62 Pac. 177; *Virden v. Hubbard*, 37 Colo. 37, 86 Pac. 113; *Farmers' Nat. Bank v. Backus*, 74 Minn. 264, 77 N. W. 142. But see *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, 13 Ann. Cas. 1155, 52 L. Ed. 528, 28 Sup. Ct. 406 (*contra*).

<sup>84</sup> *Ephraim v. Pacific Bank*, 129 Cal. 589, 62 Pac. 177.

<sup>85</sup> "The appointment of a receiver in a suit to foreclose a railroad mortgage is not a matter of strict right, but rests in the sound judicial discretion of the court; and it may, as a condition to issuing the necessary order, impose such terms as may, under the circumstances of the particular case, appear to be reasonable, and, if not acceded to, may refuse to make the order. . . . No court is bound or ought to engage or continue in the operation of a railroad or any other enterprise without the ability to promptly discharge its obligations; and, unless it can do so, it should keep out, or immediately go out, of the business. But, unless such terms are imposed as a condition of the appointment or continuation in office of the receiver, his employees must look to the property in the custody of the court and its income for their compensation. . . . They are the employees and servants of the court, and not of the parties. Their

§ 1666. (§ 245.) **Payment of Costs Where Receiver-ship Proceedings Void.**—Where an order appointing a receiver is beyond the jurisdiction of the court, and is therefore void, the expenses and costs will not be deducted from the fund.<sup>86</sup> In such cases the receiver is left to pursue his remedy against the party at whose instance he was appointed. The same is true when it appears that the property belongs to a third person.<sup>87</sup> Where, however, the court has jurisdiction, the fact that the defendant finally prevails will not deprive the receiver of his right to resort to the fund.<sup>88</sup>

wages are in no sense costs of the litigation; and, although incurred during the progress of the suit, they are not incurred in the suit. They are neither expenses of the plaintiff, nor of the defendant, and are not fees or costs which can be charged against the successful party to the litigation, as is sought to be done in this case": *Farmers' Loan & Trust Co. v. Oregon Pac. R. Co.*, 31 Or. 237, 65 *Am. St. Rep.* 822, 38 *L. R. A.* 424, 48 *Pac.* 706, per Bean, J.

<sup>86</sup> See § 241, relating to the receiver's compensation in such cases, and authorities there cited. See, also, *Sullivan v. Gage*, 145 *Cal.* 759, 79 *Pac.* 537. Compare *Beach v. Macon Grocery Co.*, 125 *Fed.* 513, 60 *C. C. A.* 557; *Horn v. Bohn*, 96 *Md.* 8, 53 *Atl.* 576; *Hawes v. First National Bank*, 229 *Fed.* 51, 143 *C. C. A.* 645; *Myers v. Hines*, 122 *Ark.* 320, 182 *S. W.* 542; *West Riverside 350-Inch Water Co. v. Rogers*, 16 *Cal. App.* 262, 116 *Pac.* 683; *James H. Rice Co. v. McJohn*, 244 *Ill.* 264, 91 *N. E.* 448; *Bellamy v. Washita Val. Tel. Co.*, 25 *Okl.* 18, 25 *L. R. A. (N. S.)* 412, note, 105 *Pac.* 340. In *Wagner v. Philadelphia, B. & T. St. R'y Co.*, 233 *Pa. St.* 114, *Ann. Cas.* 1913B, 536, 81 *Atl.* 944, a complainant who procured the appointment of a receiver in an action to foreclose a mortgage, when he was not entitled to it under the terms of the mortgage, was charged with the costs and expenses. But see *contra*, *Palmer v. Texas*, 212 *U. S.* 118, 53 *L. Ed.* 435, 29 *Sup. Ct.* 230. And compare *In re T. E. Hill Co.*, 159 *Fed.* 73, 86 *C. C. A.* 263 (bankruptcy receiver discharged; funds ordered paid out of fund, leaving alleged bankrupt the right to proceed against petitioning creditors on their bond).

<sup>87</sup> *Howe v. Jones*, 66 *Iowa*, 156, 23 *N. W.* 376.

<sup>88</sup> *Clark v. Brown*, 119 *Fed.* 130, 57 *C. C. A.* 76; *Hopfensack v. Hopfensack*, 61 *How. Pr.* 498.

## CHAPTER X.

## REMOVAL AND DISCHARGE OF RECEIVERS.

## ANALYSIS.

§ 246. Removal of receiver.

§ 247. Discharge of receiver.

§ 1667. (§ 246.) **Removal of Receiver.**—It is within the discretion of the court to remove a receiver when it appears that for any reason he is not a proper party to remain in charge. If it is shown that he has not accomplished what he should, with due diligence, have succeeded in doing, or if he is incompetent, he may be removed.<sup>1</sup> Any active abuse of trust, such as working for the advancement of private interests at the expense of those of the parties to the proceeding, will warrant such action.<sup>2</sup> Where it appears that his duties as receiver will conflict with his private interests, the court will not hesitate to deprive him of his office.<sup>3</sup> It is his duty to

<sup>1</sup> In *re Angell*, 131 Mich. 345, 91 N. W. 611. A court has a right at any time to remove one receiver and appoint another in his place: *Wehrs v. Sullivan*, 217 Mo. 167, 116 S. W. 1104. A new receiver may be appointed without notice: *Taylor v. Easton*, 180 Fed. 363, 103 C. C. A. 509.

**Resignation of Receiver.**—The court may at any time accept the resignation of a receiver and appoint a successor: *Nichol v. Murphy*, 145 Mich. 424, 108 N. W. 704 (the order may be made *ex parte*).

To the effect that the receiver cannot appeal from the order removing him, see *Ellicott v. Warford*, 4 Md. 80, 85; also, § 178, *ante*.

<sup>2</sup> *Atkins v. Wabash, St. L. & P. R'y Co.*, 29 Fed. 161.

<sup>3</sup> *Eichberg v. Wickham*, 21 N. Y. Supp. 647 (duty as assignee to account to receiver). See, also, *Coy v. Title Guarantee & Trust Co.*, 157 Fed. 794.

stand neutral between the parties. When, therefore, it appears that there are two hostile parties, both seeking control, the court may remove the representative of one faction and appoint a successor who is not interested with either side.<sup>4</sup>

It has been held, however, that the mere fact that the receiver was a director and the treasurer of the defendant corporation is not alone ground for removal.<sup>5</sup> Nor will the fact that he has assisted in promoting a reorganization scheme warrant such action;<sup>6</sup> nor that in the future his private interests may possibly conflict with his

<sup>4</sup> *Wood v. Oregon Development Co.*, 55 Fed. 901 ("The feeling which his appointment creates in the party opposed to those asking his appointment is such that his position will be an embarrassing one, and his usefulness as an officer of the court impaired"); *Meier v. Railway Co.*, 5 Dill. 478, Fed. Cas. No. 9395 ("It becomes a duty of the court to see that its powers are exercised on principles of strict neutrality as regards the belligerents; and this can be done in this case by removing the representative of these hostile interests, and appointing a receiver who, in feeling and in conduct, will be strictly neutral and strictly honest"); *Hilliard v. Sterlingworth R'y Supply Co.*, 221 Pa. St. 503, 70 Atl. 819.

<sup>5</sup> *Townsend v. Oneonta, C. & R. S. R'y Co.*, 83 N. Y. Supp. 1034, 86 App. Div. 604, 13 N. Y. Ann. Cas. 402. See *ante*, §§ 152, 153.

<sup>6</sup> *Clark v. Central R. & B. Co.*, 66 Fed. 16; *Fowler v. Jarvis-Conklin Mtg. Co.*, 63 Fed. 888. In the former case, Jackson, Cir. J., said: "It is not improper for a receiver in cases like the present, to advise, aid, and encourage reorganization schemes, which offer the prospect of securing the largest measure of protection to the various interests connected with or concerned in the property and assets in the custody of the court, and in the possession of such receiver, for administration and distribution." In the latter case Lacombe, Cir. J., said: "Nor is it any ground for removal that one of the receivers has become a member of a reorganization committee. Several federal courts have approved of such a practice; and although this court entertains a different opinion, and will require absolute neutrality on the part of its officers, as between conflicting plans of reorganization, it will be sufficient if the receiver, now that some conflict over the plan of reorganization is foreshadowed, promptly resign from membership of the committee."



duties.<sup>7</sup> The receiver of a large railroad corporation will not be removed on account of fraudulent misconduct of his employees, of which he could know nothing.<sup>8</sup> Mere mistakes in management are not sufficient ground, unless so gross as to show the receiver to be incompetent.<sup>9</sup>

§ 1668. (§ 247.) **Discharge of Receiver.**—The removal of a receiver merely changes the personnel; the discharge terminates the receivership.<sup>10</sup> Both of these matters rest largely within the sound discretion of the court.<sup>11</sup> When the object of the appointment has been fulfilled, the receiver should, in general, be discharged.<sup>12</sup>

<sup>7</sup> *Land Title & Trust Co. v. Asphalt Co. of America*, 120 Fed. 996.

<sup>8</sup> *Clarke v. Central R. & B. Co.*, 66 Fed. 16.

<sup>9</sup> *Clarke v. Central R. & B. Co.*, 66 Fed. 16. In this case the court said: "In the management of these extensive properties it is a great deal easier to look back and find faults than it is to guard in advance against mistakes. I see things in this case that I disapprove. Some things have been done that were not the best under the circumstances, but, after a careful consideration of the situation, I do not see that the receiver is to be blamed therefor."

<sup>10</sup> For a good statement of the distinction between the terms, see *Pagett v. Brooks*, 140 Ala. 257, 37 South. 263.

<sup>11</sup> *Hoffman v. Bank of Minot*, 4 N. D. 473, 61 N. W. 1031. See, also, *Adams v. Farmers' National Bank*, 167 Ky. 506, 180 S. W. 807 (court refused to discharge receiver where corporation was barely solvent and rights of creditors might be imperiled). The order of discharge cannot be collaterally attacked: *Ferguson v. Toledo, A. A. & N. M. R. Co.*, 83 N. Y. Supp. 283, 85 App. Div. 352.

<sup>12</sup> Thus, where a receiver is appointed in a stockholder's suit for mismanagement of corporate affairs, the receiver should be discharged when a new set of officers is elected and takes charge: *Duncan v. George C. Treadwell Co.*, 82 Hun, 376, 31 N. Y. Supp. 340. Where the amount of the mortgage debt has been definitely fixed by the court, the defendant has been allowed to pay the sum and have the receiver discharged: *Milwaukee & M. R. R. Co. v. Soutter*, 69 U. S. 510, 17 L. Ed. 900. In general, see *Branner v. Webb*, 10 Kan. App. 217, 63 Pac. 274. It has been said that the

The property should pass, with as little delay as is reasonably practicable, into the possession and control of the owners; and where the parties unduly prolong the proceedings, the court may consider means of ending the matter.<sup>13</sup> It is said that neither entry of judgment in favor of the defendant nor a sale of the property will of itself discharge the receiver. In both cases, however, the court will generally make an order to that effect.<sup>14</sup> It is said that a receiver should not be discharged upon motion of the complainant upon satisfaction of his claim, against the protest of a non-satisfied creditor, who might be injured thereby.<sup>15</sup> It is held, however, that general creditors are not entitled to notice of the proceedings for discharge.<sup>16</sup> "The effect of a discharge of a receiver, and the surrender of jurisdiction over the trust, without any reservation of existing claims, is to release

order may be vacated at any time when it appears on the face of the record that it was made without authority: *Wiencke v. Bibby*, 15 Cal. App. 50, 113 Pac. 876.

<sup>13</sup> *Taylor v. Philadelphia & R. R. Co.*, 9 Fed. 1; *Platt v. Philadelphia & R. R. Co.*, 65 Fed. 872.

<sup>14</sup> To the effect that his official character remains until he is discharged by order of the court, see *Erb v. Popritz*, 59 Kan. 264, 68 Am. St. Rep. 362, 52 Pac. 871. A discharge upon judgment for the defendant is proper, although an appeal may be taken from the judgment: *Harris v. Root*, 28 Mont. 159, 72 Pac. 429. See, also, *Baughman v. Superior Court*, 72 Cal. 572, 14 Pac. 207; *Wiencke v. Bibby*, 15 Cal. App. 50, 113 Pac. 876. When the order appointing has been vacated, and no property has come into the receiver's hands, he should be discharged: *People v. Bushwick Chem. Co.*, 63 Hun, 633, 18 N. Y. Supp. 542; affirmed, 133 N. Y. 694, 31 N. E. 627. A temporary receiver should be discharged when the bill is dismissed for want of jurisdiction: *Beardsley Co. v. V. E. Ashdown & Co.*, 73 W. Va. 132, 80 S. E. 128.

<sup>15</sup> *Lenoir v. Linville Imp. Co.*, 117 N. C. 471, 23 S. E. 442; *Fountain v. Mills*, 111 Ga. 122, 36 S. E. 428.

<sup>16</sup> *New York & W. U. Tel. Co. v. Jewett*, 115 N. Y. 166, 21 N. E. 1036; *Rockwell v. Portland Sav. Bank*, 31 Or. 431, 50 Pac. 566.

not only the receiver, but also the property, from further liability."<sup>17</sup>

<sup>17</sup> *Johnson v. Central Trust Co.*, 159 Ind. 605, 65 N. E. 1028. To the effect that he cannot be sued after discharge, see *ante*, § 179. See, also, *Interstate Trust & Banking Co. v. Dierks Lumber & Coal Co.*, 133 Mo. App. 35, 113 S. W. 1. Where, however, the decree of discharge declares that he may defend suits, a suit commenced at the time may be continued against him: *Denver & R. G. R. Co. v. Gunning*, 33 Colo. 280, 80 Pac. 727. For a case holding that the discharge leaves the property subject to all claims and charges, see *Texas Pac. R. Co. v. Johnson*, 76 Tex. 421, 18 Am. St. Rep. 60, 13 S. W. 463. Where the receiver is discharged pending a suit by him, the suit is not necessarily abated. Either the corporation may be substituted as plaintiff, or he may continue as trustee: *Interstate Trust & Banking Co. v. Dierks Lumber & Coal Co.*, 133 Mo. App. 35, 113 S. W. 1.

In general, secured creditors, after discharge of the receiver, are not liable for expenses incurred in operating the property: *Finance Co. of Pennsylvania v. Trenton & N. B. R'y Co.*, 189 Fed. 282. Where the property is restored to the corporation owner, upon its agreement to assume the liabilities of the receivership, a tort claimant may maintain an action against the corporation for injuries sustained during the receivership: *Kansas City, M. & O. R'y of Texas v. Latham* (Tex. Civ.), 182 S. W. 717. After discharge of the receiver, the railroad company, if it has not assumed liabilities, is not liable for torts of the receiver or his employees: *Beaumont, S. L. & W. R'y Co. v. Daniel* (Tex. Civ. App.), 195 S. W. 625.

## CHAPTER XI.

## FOREIGN RECEIVERS; ANCILLARY RECEIVERS.

## ANALYSIS.

- § 248. General tendency toward recognition of rights of foreign receiver.
- § 249. Right of foreign receiver to sue outside of jurisdiction of court of appointment is only recognized where that court has conferred the power.
- § 250. Right of foreign receiver to sue not dependent on existence of cause of action in state exercising comity.
- § 251. Right of attaching creditors against foreign receiver.
- § 252. Right of attaching creditors with reference to citizenship or residence.
- § 253. Rights of foreign receivers against subsequent attaching creditors.
- § 254. Same; as affected by question of citizenship or residence.
- § 255. Actions by foreign receiver not dependent on comity;
  - (1) Property rights.
- § 256. Same; (2) Rights by contract.
- § 257. Power of court of appointment over receiver and other parties.
- §§ 258-261. Ancillary receivers.
  - § 258. Appointment.
  - § 259. Administration of the fund.
  - § 260. Same; how far conclusive on primary receiver.
  - § 261. Surrender of fund.

§ 1669. (§ 248.) **General Tendency Toward Recognition of Rights of Foreign Receiver.**—It has often been said that a receiver appointed by a court of equity has no extra-territorial powers.<sup>1</sup> But while this statement is strictly true, it is apt, under modern conditions, to

<sup>1</sup> Booth v. Clark, 17 How. 322, 15 L. Ed. 164.



be misleading. Every reason that would operate, for example, in favor of the recognition of the rights of a foreign corporation would operate with equal force in favor of the recognition of the foreign receiver. The latter owes his powers to the order appointing him, which is "the charter of his powers," just as the corporation owes its existence to the charter from the legislature. Both are enabled to act outside of the state of their creation solely by the comity of other states and nations.<sup>2</sup> Those cases which, following *dicta* in the case of *Booth v. Clark*, broadly lay down the statement that the foreign receiver cannot sue outside of the state of appointment are not in line with the tendency of modern authorities, which is to extend to citizens of or artificial persons created by foreign states the same recognition afforded to the citizens or artificial creatures of the domestic state.<sup>3</sup>

<sup>2</sup> *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274. The receiver's decree of appointment is called the "charter of his powers" in *Schultz v. Phenix Ins. Co.*, 77 Fed. 375, 387.

<sup>3</sup> *Gilman v. Ketcham*, 84 Wis. 60, 36 Am. St. Rep. 899, 23 L. R. A. 52, 54 N. W. 395, where Pinney, J., says: "The tendency of modern adjudications is in favor of a liberal extension of interstate comity, and against a narrow and provincial policy, which would deny proper effect to judicial proceedings of sister states under their statutes and rights claimed under them, simply because, technically, they are foreign and not domestic"; *Boulware v. Davis*, 90 Ala. 207, 9 L. R. A. 601, 8 South. 84; *Hurd v. City of Elizabeth*, 41 N. J. L. 1; *Tompkins v. Blakey*, 70 N. H. 584, 49 Atl. 111. In *Lewis v. American Naval Stores Co.*, 119 Fed. 391, 397, the court says: "The constant tendency of the courts is toward a more enlarged and liberal policy—the recognition of the receiver's right to the possession of the property embraced by the decree appointing him, although situated without the jurisdiction of the court making the appointment. . . . This tendency is so pronounced and so well sustained by authority that it is probable that the doctrine ultimately to be established will give to receivers the same right of action in all the states of the Union with which they are invested in the jurisdiction in which they are appointed."

§ 1670. (§ 249.) **Right of Foreign Receiver to Sue Outside of Jurisdiction of Court of Appointment is Only Recognized Where That Court has Conferred the Power.** There is no doubt that the prevailing rule in America

**Cases Denying the Right of the Receiver to Sue Outside the State of Appointment.**—The rule that a receiver, not vested with title, cannot sue outside the jurisdiction of the appointing court is still adhered to by many courts. The leading case, *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164, is followed. See *Hale v. Allinson*, 188 U. S. 56, 47 L. Ed. 380, 23 Sup. Ct. 244; *Finney v. Guy*, 189 U. S. 335, 47 L. Ed. 839, 23 Sup. Ct. 558; *Great Western Min. & Mfg. Co. v. Harris*, 198 U. S. 561, 49 L. Ed. 1163, 25 Sup. Ct. 770; *Coal & Iron R'y Co. v. Reherd*, 204 Fed. 859, 123 C. C. A. 155; *In re Dunseath & Son Co.*, 168 Fed. 973 (receiver in bankruptcy cannot sue in another jurisdiction); *Covell v. Fowler*, 144 Fed. 535; *Fowler v. Osgood*, 141 Fed. 20, 4 L. R. A. (N. S.) 824, 72 C. C. A. 270; *Edwards v. National Window Glass Jobbers' Ass'n*, 139 Fed. 795; *McCague v. Dodge*, 50 Colo. 205, 114 Pac. 648 (receiver of corporation having no other right or title than that derived from the order of court appointing him, has no power to sue in courts of a foreign jurisdiction to recover property or assets of the corporation); *Shipman v. Treadwell*, 208 N. Y. 404, 102 N. E. 634; *Dillingham v. Traders' Ins. Co.*, 120 Tenn. 302, 16 L. R. A. (N. S.) 220, 108 S. W. 1148 (foreign receiver cannot sue to recover property never in his individual possession); *Malone v. Johnson*, 45 Tex. Civ. App. 604, 101 S. W. 503. And it is held that such a receiver appointed by a federal court in one district cannot sue in a federal court of another district: *Fairview Fluorspar & Lead Co. v. Ulrich*, 192 Fed. 894, 113 C. C. A. 372. Compare *Morrill v. American Reserve Bond Co.*, 151 Fed. 305. To the effect that suit may be maintained only by leave of the court in which it is commenced, see *Malone v. Averill*, 166 Iowa, 78, 147 N. W. 135. In Iowa, the claim of a foreign receiver will not be recognized if the result would be to relegate resident creditors to a foreign jurisdiction for relief: *Shloss v. Metropolitan Surety Co.*, 149 Iowa, 382, 128 N. W. 384. A distinction is made between chancery receivers who have no title and receivers who have title, the latter being allowed to sue outside the jurisdiction: *Strout v. United Shoe Machinery Co.*, 195 Fed. 313; *Coal & Iron R'y Co. v. Reherd*, 204 Fed. 859, 123 C. C. A. 155; *Irvine v. Elliott*, 203 Fed. 82; *Edwards v. National Window Glass Jobbers' Ass'n*, 139 Fed. 795. See *post*, §§ 255, 256.

accords the foreign receiver the right to sue outside of the appointing jurisdiction where that right has been conferred upon him in the state of his appointment, when the statutes or public policy of the state do not forbid such suit, and when the rights of domestic creditors, or foreign creditors who have prior attachments are not affected.<sup>4</sup> Of course, a preliminary question in regard

<sup>4</sup> In *Hurd v. City of Elizabeth*, 41 N. J. L. 1, the court, by Beasley, C. J., after quoting the general rule laid down in *High on Receivers*, § 239, that the foreign receiver cannot sue, says: "There are certainly *dicta* that go even to that extent, so that text-writers seem to have felt themselves warranted in declaring that the powers of an officer of this kind are strictly circumscribed by the jurisdictional limits of the tribunal from which he derives his existence, and that he will not be recognized as a suitor outside of such limits. But I think the more correct definition of the legal rule would be that a receiver cannot sue, or otherwise exercise his functions, in a foreign jurisdiction whenever such acts, if sanctioned, would interfere with the policy established by law in such foreign jurisdiction. There seems to be no reason why this should not be the accepted principle. . . . The question thus raised has nothing to do with that other inquiry that is frequently discussed in the books, whether a receiver at common law is in point of fact clothed with the power to sue in a foreign jurisdiction. . . . Conceding that the officer is invested with this fullness of authority, it would appear to be in harmony with those legal principles by which the intercourse of foreign states is regulated, for every government, when its tribunals are appealed to, to render every assistance in its power in furtherance of the execution of such authority, except in those cases when, by so doing, its own policy would be displaced or the rights of its own citizens invaded or impaired. . . . To sanction such a plea would be to frustrate, as far as possible, the foreign procedure, simply for the purpose of doing so, the single result being that a court would be baffled, and perhaps prevented from doing justice. Such ought not to be the legal attitude of governments towards each other": *Graydon v. Church*, 7 Mich. 36; *Hale v. Hardon*, 95 Fed. 747, 37 C. C. A. 240; *Kelly v. Dolan*, 218 Fed. 966; *Childs v. Cleaves*, 95 Me. 498, 50 Atl. 714; *Tompkins v. Blakey*, 70 N. H. 584, 49 Atl. 111; *National T. Co. v. Miller*, 33 N. J. Eq. 155; *Sobernheimer v. Wheeler*, 45 N. J. Eq. 614, 18 Atl. 234; *Bidlack v. Mason*, 26 N. J. Eq. 230; *Edwards v. National Window Glass Jobbers' Ass'n* (N. J.),

to his capacity is always to be answered: Has he been authorized by the appointing jurisdiction to sue? Such power should appear from his pleading; as that he has

68 Atl. 800; *Stone v. Penn Yan etc. R'y*, 197 N. Y. 279, 134 *Am. St. Rep.* 879, 90 N. E. 843 (suit by receiver to collect assessments); *Howarth v. Angle*, 162 N. Y. 179, 47 *L. R. A.* 725, 56 N. E. 489; *Hazlett v. Woodhead*, 28 R. I. 452, 67 Atl. 736; *Lycoming Ins. Co. v. Wright*, 55 Vt. 526; *Parker v. Stoughton Mill Co.*, 91 Wis. 174, 51 *Am. St. Rep.* 881, 64 N. W. 751; *Rogers v. Riley*, 80 Fed. 759; *Barley v. Gittings*, 15 App. Dec. 427; and cases cited below in sections on Rights of Attaching Creditors. The foreign receiver may even sue to recover real property, or to foreclose a mortgage on such property: *Lewis v. Clark*, 129 Fed. 570, 64 C. C. A. 138; *Small v. Smith*, 14 S. D. 621, 86 *Am. St. Rep.* 808, 86 N. W. 649. Many cases, however, go to the length of denying the foreign receiver the right to sue, even where no rights of creditors or others intervene: *Holmes v. Sherwood*, 16 Fed. 725, 3 *McCrary*, 405; *Hazard v. Durant*, 19 Fed. 471, 476; *Commercial Nat. Bank v. Motherwell Iron & Steel Co.*, 95 Tenn. 172, 29 *L. R. A.* 164, 31 S. W. 1002; *Moreau v. Du Bellet* (Tex. Civ. App.), 27 S. W. 503; *Moseby v. Burrow*, 52 Tex. 402. See, also, the recent case, *Great Western Min. & Mfg. Co. v. Harris*, 198 U. S. 561, 49 *L. Ed.* 1163, 25 Sup. Ct. 770. These cases all rest on the *dicta* in *Booth v. Clark*, *supra*, which, it is submitted, decided no such point. The foreign receiver's right rests on a somewhat more substantial ground than "by favor of courtesy" (*Boulware v. Davis*, 90 Ala. 207, 9 *L. R. A.* 601, 8 South. 84), nor should it be denied because the court in its "discretion" thinks that the cause of action is inequitable: *Wyman v. Eaton*, 107 Iowa, 217, 70 *Am. St. Rep.* 193, 43 *L. R. A.* 695, 77 N. W. 865. "Comity is neither matter of absolute obligation nor of mere courtesy and good-will. It is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of the laws": *Hilton v. Guyot*, 159 U. S. 113, 40 *L. Ed.* 95, 16 Sup. Ct. 139. It must be remembered that the recognition of the foreign act is made by the political branch of the government, the courts merely declaring the state's mandates. See *Wyman v. Kimberly Clark Co.*, 93 Wis. 554, 67 N. W. 932, for a proper conception of "comity." Where the corporation for which the receiver has been appointed has violated the laws of the state, the courts will not allow the receiver appointed in the state of the



been expressly authorized to sue,<sup>5</sup> or that he is an assignee vested with an interest which would enable him to maintain an action,<sup>6</sup> or that the defendant has recognized his right.<sup>7</sup> The question is therefore often complicated by local rules of practice and pleading. Thus, in states where the assignee cannot sue at law on an assigned chose in action in his own name, a receiver to whom such chose in action has been assigned by judicial proceedings in the state of his appointment cannot maintain an action at law on such assigned claim.<sup>8</sup> Generally the rules as to capacity of parties depend upon the *lex fori*.<sup>9</sup>

corporation's domicile to sue: *Parker v. Lamb*, 99 Iowa, 265, 34 L. R. A. 704, 68 N. W. 686. Compare article on Extra-territorial Jurisdiction of Receivers in 22 Am. L. Reg. 289 (1883), by Adelbert Hamilton, with article on same subject, 58 Cent. L. J. 284 (1903), to illustrate development of law on the subject of rights of foreign receivers. In Tennessee it is held that while a mere chancery receiver appointed in another state may not, as a matter of right, sue in Tennessee, yet unless such a suit is inimical to the interest of local creditors, or to the interest of those who have acquired rights under a local statute, or unless the suit is in contravention of the policy of the forum, the right should be granted as a matter of comity: *Hardee v. Wilson*, 129 Tenn. 511, 167 S. W. 475.

<sup>5</sup> *Swing v. White River L. Co.*, 91 Wis. 517, 65 N. W. 174 (receiver must aver right to sue, unless he is assignee); *Castleman v. Templeman*, 87 Md. 546, 67 Am. St. Rep. 363, 41 L. R. A. 367, 40 Atl. 275.

<sup>6</sup> See *infra*, Action by Receivers not Dependent on Comity; (1) Property Rights, § 255.

<sup>7</sup> See *infra*, Actions by Receivers not Dependent on Comity; (2) Rights by Contract, § 256.

<sup>8</sup> *Murtey v. Allen*, 71 Vt. 377, 76 Am. St. Rep. 779, 45 Atl. 752; *King v. Cochran*, 72 Vt. 107, 47 Atl. 394.

<sup>9</sup> Minor on Conflict of Laws, § 206, to the effect that all these matters are determined by the *lex fori*. An ordinary foreign receiver cannot sue in his own name: *Wilson v. Welch*, 157 Mass. 77, 31 N. E. 712; even though authorized to do so by the court of appointment: *Hayward v. Leeson*, 176 Mass. 310, 49 L. R. A. 725, 57

§ 1671. (§ 250.) **Right of Foreign Receiver to Sue not Dependent on Existence of Cause of Action in State Exercising Comity.**—It is no objection, however, to the right of a foreign receiver to maintain an action in the local courts that the cause of action is unknown to the law administered in those courts. "It is not necessary that the process to enforce the liability in question," says Vann, J., "should be that required by statute in this state in the case of domestic corporations, as that would be frequently impossible and would withhold the right of comity altogether. It is sufficient if the method of procedure in our courts is such that no injustice is done to the defendant or to any citizen of this state, and the established policy of the state is not interfered with."<sup>10</sup>

§ 1672. (§ 251.) **Rights of Attaching Creditors Against Foreign Receivers.**—In accordance with these principles it is well settled that courts will permit receivers appointed by tribunals in foreign jurisdictions (in whom, strictly speaking, no *rights* are vested in things outside of the state of appointment) to recover possession of personal property or to enforce the collection of choses in action, even from its own citizens, where no rights of third persons have intervened.<sup>11</sup> Some of the cases seem to place this right of the foreign receiver to sue for choses in action upon the ground that the situs of the chose in action is at the domicile of the creditor, and therefore he becomes vested with the property by

N. E. 656. See, also, *Rogers v. Haines*, 96 Ala. 586, 11 South. 651, 103 Ala. 198, 15 South. 606.

<sup>10</sup> *Howarth v. Angle*, 162 N. Y. 179, 47 L. R. A. 725, 730, 56 N. E. 489. The rule of comity which permits a foreign receiver to sue is not affected by the fact that he is a federal receiver and that the practice in the federal courts is otherwise, nor by his failure to allege the non-existence of local creditors: *Stevens v. Tilden*, 122 Minn. 250, 142 N. W. 315.

<sup>11</sup> See cases cited in note 4, *supra*.

assignment at the domicile,<sup>12</sup> but this principle could not explain his right to sue for tangible and immovable things in the second jurisdiction, and it is submitted that the better ground upon which these decisions rest is the right of comity. The real reason is, as was said by the New Hampshire court: "The question is not strictly one of law. It is, rather, one of courteous treatment of an officer of a sister state."<sup>13</sup>

§ 1673. (§ 252.) **Right of Attaching Creditors With Reference to Citizenship or Residence.**—Where the rights of third persons, citizens of the state in which the foreign receiver sues, have attached to property, or to a fund, before the foreign receiver has been appointed, it is generally held that such rights will prevail, and that the rule of comity does not extend to aiding the foreign receiver in collecting the fund or property so as to impair such vested rights.<sup>14</sup> The cases have usually had to deal

<sup>12</sup> Gilbert v. Hewetson, 79 Minn. 326, 79 *Am. St. Rep.* 486, 82 N. W. 655; Parker v. Stoughton Mill Co., 91 Wis. 174, 51 *Am. St. Rep.* 881, 64 N. W. 751.

<sup>13</sup> Tompkins v. Blakey, 70 N. H. 584, 49 *Atl.* 111.

<sup>14</sup> Catlin v. Wileox Silver Plate Co., 123 Ind. 477, 18 *Am. St. Rep.* 338, 8 *L. R. A.* 62, 24 N. E. 250; Solis v. Blank, 199 Pa. St. 600, 49 *Atl.* 302; Frowert v. Blank, 205 Pa. St. 299, 54 *Atl.* 1000; Southern B. & L. Ass'n v. Price, 88 Md. 155, 42 *L. R. A.* 206, 41 *Atl.* 53; Taylor v. Columbian Ins. Co., 14 Allen, 353; Ward v. Connecticut Pipe Mfg. Co., 71 Conn. 345, 71 *Am. St. Rep.* 207, 42 *L. R. A.* 706, 41 *Atl.* 1057; Ward v. Pacific Mut. Life Ins. Co., 135 Cal. 235, 67 *Pac.* 124; Zacher v. Fidelity T. & S. V. Co., 106 Fed. 593, 45 C. C. A. 480; Hunt v. Columbian Ins. Co., 55 Me. 290, 92 *Am. Dec.* 592; Booth v. Clark, 17 How. 322, 15 *L. Ed.* 164. Even where no rights by way of lien appear courts will not exercise comity to the prejudice of other creditors: Olney v. Tanner, 10 Fed. 101; Baldwin v. Hosmer, 101 Mich. 119, 25 *L. R. A.* 739, 59 N. W. 432; Holbrook v. Ford, 153 Ill. 633, 46 *Am. St. Rep.* 917, 27 *L. R. A.* 324, 39 N. E. 109. In the case of Falk v. Janes, 49 N. J. Eq. 484, 23 *Atl.* 813, a foreign receiver appointed on a creditor's bill was held entitled to maintain the action even to the prejudice of a citizen of New Jersey,

with the rights of attaching creditors who were also citizens or residents of the state in which the attachment was levied, but where the question has been raised it has been held that a *bona fide* attaching creditor, even though he be not a citizen of the state, will be protected in his lien or possession as against a foreign receiver subsequently appointed.<sup>15</sup> It is submitted that this doctrine is not only equitable, but also that no distinction can be permitted between citizens and other persons under the equal protection of the law clause in the federal constitution. Even where the attaching creditor is a resident or citizen of the state where the receiver is appointed, there would seem to be no reason on principle why he should not be allowed to retain his preference by the courts of the state of the attachment,<sup>16</sup> unless he has been enjoined by the state of his citizenship in the order appointing a receiver from maintaining the attachment proceeding. If such injunction has been issued—and it is well settled that the appointing court may enjoin those subject to its jurisdiction from prosecuting attachments in foreign states—the court of the state in which the attachment was issued would doubtless have power to suspend proceedings until the court in which the receiver

where he prosecuted the action solely for the benefit of another citizen of New Jersey.

<sup>15</sup> Ward v. Connecticut Pipe Mfg. Co., 71 Conn. 345, 71 Am. St. Rep. 207, 42 L. R. A. 706, 41 Atl. 1057; Linville v. Hadden, 88 Md. 594, 43 L. R. A. 222, 41 Atl. 1097; Solis v. Blank, 199 Pa. St. 600, 49 Atl. 302; Catlin v. Wilcox Silver Plate Co., 123 Ind. 477, 18 Am. St. Rep. 338, 8 L. R. A. 62, 24 N. E. 250. That the same protection is often extended to such creditors, attaching *after* the appointment of the foreign receiver, see Gerding v. East Tennessee L. Co., 185 Mass. 380, 70 N. E. 206, and cases cited; cf. next section.

<sup>16</sup> Hibernia National Bank v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518.



was appointed could enforce its orders, and, in a spirit of comity, such would probably be the procedure.<sup>17</sup>

§ 1674. (§ 253.) **Rights of Foreign Receiver Against Subsequent Attaching Creditors.**—Difficult questions often arise where the attaching creditors in the local state have attached after the appointment of the receiver in the domiciliary state. If the receiver has obtained possession, his possession should be protected. His possession is in the nature of a property right, and is held so to be almost universally.<sup>18</sup> But where the receiver has not yet collected the fund or taken the property into his possession, and creditors or others have obtained rights or liens upon the property or fund in the state where it is situated, some distinctions must be observed. If the appointment of the receiver is involuntary, especially in aid of a statutory judicial proceeding, the prevailing doctrine seems to be that, where the rights of domestic creditors are involved, the assignment will not be recog-

<sup>17</sup> *Avery v. Boston Safe Deposit & T. Co.*, 72 Fed. 700. In *American Waterworks Co. v. Farmers' L. & T. Co.*, 20 Colo. 203, 46 *Am. St. Rep.* 285, 25 *L. R. A.* 338, 37 *Pac.* 269, the court, on motion of a foreign receiver, granted a motion to dismiss a writ of error brought by the corporation's officers, where the court of appointment had enjoined them from taking such proceedings.

<sup>18</sup> *Chicago etc. R'y v. Keokuk etc. Packet Co.*, 108 Ill. 317, 48 *Am. Rep.* 557, where the receiver appointed in the foreign state brought into Illinois a vessel which was attached by local creditors. The foreign receiver was allowed to replevy the vessel: *Robertson v. Staed*, 135 Mo. 135, 58 *Am. St. Rep.* 569, 33 *L. R. A.* 203, 36 *S. W.* 610, where the receiver was appointed in Mexico; *Osgood v. Maguire*, 61 *N. Y.* 524; *Merchants' etc. Bank v. McLeod*, 38 *Ohio St.* 174; *Bagby v. Atlantic etc. R. R. Co.*, 86 *Pa. St.* 291; *Pond v. Cooke*, 45 *Conn.* 126, 29 *Am. Rep.* 668; *Merchants' Nat. Bank v. Penn. Steel Co.*, 57 *N. J. L.* 336, 30 *Atl.* 545. The case of *Humphreys v. Hopkins*, 81 *Cal.* 551, 15 *Am. St. Rep.* 176, 6 *L. R. A.* 792, 22 *Pac.* 892, is out of the line of authority.

nized outside of the jurisdiction of appointment.<sup>19</sup> But if the appointment be by voluntary act, as on the dissolution of a corporation on its own petition, or if a common-law assignment be made to the receiver, the assignment will be recognized elsewhere.<sup>20</sup> In the latter case, therefore, if the foreign receiver's title be recognized, those who attach after such assignment have nothing to levy upon, and the receiver's title will prevail over the attaching creditor's.<sup>21</sup> This is almost uniformly held to be the law in cases where the attaching creditors are not domestic creditors, but many states protect the domestic creditor, though his lien be subsequent to the assignment, without recognizing the distinction between voluntary

<sup>19</sup> *Security Trust Co. v. Dodd, Mead & Co.*, 173 U. S. 624, 43 L. Ed. 835, 19 Sup. Ct. 545; *Cole v. Cunningham*, 133 U. S. 107, 129, 33 L. Ed. 538, 10 Sup. Ct. 269; *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477, 18 Am. St. Rep. 338, 8 L. R. A. 62, 24 N. E. 250; *Gray v. Covert*, 25 Ind. App. 561, 81 Am. St. Rep. 117, 58 N. E. 731; *Ward v. Connecticut Pipe Co.*, 71 Conn. 345, 71 Am. St. Rep. 207, 42 L. R. A. 706, 41 Atl. 1057; *Gilbert v. Hewetson*, 79 Minn. 326, 79 Am. St. Rep. 486, 82 N. W. 655. See, also, *Hieronymous Bros. v. China Mut. Ins. Co.*, 6 Ala. App. 97, 60 South. 452. In *Reynolds v. Adden*, 136 U. S. 348, 354, 34 L. Ed. 360, 10 Sup. Ct. 843, the supreme court of the United States says: "When the transfer of a debtor's property is the result of a judicial proceeding, there is no provision of the constitution which requires the courts of another state to carry it into effect, and as a general rule no state court will do this to the prejudice of the citizens of its own state." See, also, *Zacher v. Fidelity Trust etc. Co.*, 109 Ky. 441, 59 S. W. 493; *Zacher v. Fidelity Trust etc. Co.*, 106 Fed. 593, 45 C. C. A. 480.

<sup>20</sup> In addition to cases cited in last note, see note in 23 L. R. A. 33.

<sup>21</sup> "A voluntary conveyance of goods made by the owner at his domicile in a form which is sufficient there and also at common law, is effectual to transfer the title, although they may be at the time in another state, unless the statutes or the local policy of that state forbid": *Ward v. Connecticut Pipe Mfg. Co.*, 71 Conn. 345, 71 Am. St. Rep. 207, 42 L. R. A. 706, 41 Atl. 1057; *Weller v. J. B. Pace Tobacco Co.*, 2 N. Y. Supp. 292, in which a foreign receiver was given preference over a subsequent domestic attaching creditor.

and involuntary assignments.<sup>22</sup> If the assignment and appointment were involuntary, it is uniformly held that the rights of the attaching creditors will prevail.<sup>23</sup>

§ 1675. (§ 254.) **Same; as Affected by Questions of Citizenship or Residence.**—In some of the cases the attaching creditor has been a citizen of the state in which the foreign receiver was appointed, and notwithstanding the appointment of the receiver in the creditor's home state, has attached property in a foreign state. If he had been enjoined from so proceeding, or had been a party to the proceeding in which the receiver was appointed—in this case even though not a citizen of the state of appointment—and has attempted to gain a priority by attaching before the receiver could get possession, he will not only be adjudged guilty of a contempt by the court of appointment, but his attachments will not be allowed to prevail in the other jurisdiction.<sup>24</sup> If no

<sup>22</sup> *Lackmann v. Supreme Council*, 142 Cal. 22, 75 Pac. 583.

<sup>23</sup> *Gray v. Covert*, 25 Ind. App. 561, 81 Am. St. Rep. 117, 58 N. E. 731; *Ward v. Connecticut Pipe Mfg. Co.*, 71 Conn. 345, 71 Am. St. Rep. 207, 42 L. R. A. 706, 41 Atl. 1057; *Barth v. Backus*, 140 N. Y. 230, 37 Am. St. Rep. 545, 23 L. R. A. 47, 35 N. E. 425; *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477, 18 Am. St. Rep. 338, 8 L. R. A. 62, 24 N. E. 250; *Thum v. Pingree*, 21 Utah, 348, 61 Pac. 18; *The Willamette Valley*, 66 Fed. 565, 13 C. C. A. 635; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518; *Gilman v. Ketcham*, 84 Wis. 60, 36 Am. St. Rep. 899, 23 L. R. A. 52, 54 N. W. 395; *Choctaw Coal & M. Co. v. Williams-Echols Dry Goods Co.*, 75 Ark. 365, 87 S. W. 632; *Gerding v. East Tenn. L. Co.*, 185 Mass. 380, 70 N. E. 206.

<sup>24</sup> *Gilman v. Ketcham*, 84 Wis. 60, 36 Am. St. Rep. 899, 23 L. R. A. 52, 54 N. W. 395; *Cole v. Cunningham*, 133 U. S. 107, 129, 33 L. Ed. 538, 10 Sup. Ct. 269; *Farmers' L. & T. Co. v. Bankers' Tel. Co.*, 148 N. Y. 315, 51 Am. St. Rep. 690, 31 L. R. A. 403, 42 N. E. 707; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518; *Bacon v. Horne*, 123 Pa. St. 452, 2 L. R. A. 355, 16 Atl. 794; *Schindelholz v. Cullum*, 55 Fed. 885, 5 C. C. A. 293; *Barth v. Backus*, 140 N. Y. 230, 37 Am. St. Rep. 545, 23 L. R. A. 47, 35 N. E.

injunction had been issued, however, even though the attaching creditor was not only subject to the jurisdiction of the appointing court as a citizen or resident, but also had actual notice of the appointment of the receiver, some courts permit him to enter into a race with the receiver to get possession and reward his diligence by holding that while he is on the same footing with other persons, the receiver appointed in involuntary proceedings will not be recognized so as to prejudice the diligent creditor's rights. It is submitted that the better rule is with those courts which deny priority to a creditor attaching under such circumstances.<sup>25</sup>

§ 1676. (§ 255.) **Actions by Foreign Receiver not Dependent on Comity; (1) Property Rights.**—Some confusion has arisen from the failure on the part of certain courts to recognize the difference between acts of the receiver which are permitted by comity and acts which give rise to rights in the receiver. Of the latter class are the assignments already mentioned where the receiver is clothed with the legal title to the assets of the corporation or person whom he represents. In such cases he sues in the foreign jurisdiction not by reason of the comity of the state, but as a matter of right. It matters not whether the thing was in possession or a chose in action; the assignee or receiver who has been invested with the title should, on principle, have the right, aside from comity, to sue on his legal title in any state of the Union. The owner of the thing has a right to transfer it, and such transfer passes title. Not so with a judicial

425; *Rhawn v. Pierce*, 110 Ill. 350, 51 *Am. Rep.* 691; *Faulkner v. Hyman*, 142 Mass. 53; *Castleman v. Templeman*, 87 Md. 546, 67 *Am. St. Rep.* 363, 41 *L. R. A.* 367, 40 *Atl.* 275.

<sup>25</sup> *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 *Am. Rep.* 518; *Barth v. Backus*, 140 N. Y. 230, 37 *Am. St. Rep.* 545, 23 *L. R. A.* 47, 35 N. E. 425; *Gilman v. Ketcham*, 84 Wis. 60, 36 *Am. St. Rep.* 899, 23 *L. R. A.* 52, 54 N. W. 395, and cases cited in last note.



transfer which owes its force to a statute, the effect of which can only be carried out by foreign states through the exercise of comity. The modern cases recognize the difference and hold that a receiver who is in effect a trustee or assignee may sue in his own name. "The effect of such a transfer on goods in another state is not to be determined simply by the rule of comity which is applicable to extra-territorial assignments by operation of law, but rests on the general principles of jurisprudence as to the right of every one to dispose of what he owns."<sup>26</sup>

<sup>26</sup> Baldwin, J., in *Ward v. Connecticut Pipe Mfg. Co.*, 71 Conn. 345, 71 *Am. St. Rep.* 207, 42 *L. R. A.* 706, 41 *Atl.* 1057. Where the receiver is practically an assignee or trustee he may sue in his own name: *Howarth v. Lombard*, 175 Mass. 570, 49 *L. R. A.* 301, 56 N. E. 888; *Cushing v. Perot*, 175 Pa. St. 66, 52 *Am. St. Rep.* 835, 34 *L. R. A.* 737, 34 *Atl.* 447; *Merchants' National Bank v. Northwestern Mfg. etc. Co.*, 48 Minn. 349, 51 N. W. 117; *American Nat. Bank v. National Ben. etc. Co.*, 70 Fed. 420; *Failey v. Talbee*, 55 Fed. 892; *Avery v. Boston S. D. & T. Co.*, 72 Fed. 700; *Homer v. Barr Pumping Engine Co.*, 180 Mass. 163, 91 *Am. St. Rep.* 269, 61 N. E. 883; *Buswell v. Order of Iron Hall*, 161 Mass. 224, 23 *L. R. A.* 846, 36 N. E. 1065; *Howarth v. Angle*, 162 N. Y. 179, 47 *L. R. A.* 725, 56 N. E. 489. In general, see *Strout v. United Shoe Machinery Co.*, 195 Fed. 313; *Irvine v. Elliott*, 203 Fed. 82; *Irvine v. Baker*, 225 Fed. 834; *John W. Cooney Co. v. Arlington Hotel Co. (Del. Ch.)*, 101 *Atl.* 879 (Delaware receiver is a *quasi* assignee and may sue anywhere). Where a receiver recovers a judgment in his own state, he may sue as a judgment creditor in another state: *McBride v. Oriental Bank of New York*, 200 Fed. 895. See, also, *Childs v. Blethen*, 40 Wash. 340, 82 *Pac.* 405; *Orient Ins. Co. v. Rudolph*, 63 N. J. Eq. 570, 61 *Atl.* 26. Compare *Trotter v. Lisman*, 209 N. Y. 174, 102 N. E. 575. A foreign receiver may maintain a creditor's suit against corporation stockholders where legal title is vested in him: *Goss v. Carter*, 156 Fed. 746, 84 C. C. A. 402; *Irvine v. Putnam*, 190 Fed. 321; *Converse v. Hamilton*, 224 U. S. 243, *Ann. Cas.* 1913D, 1292, 56 *L. Ed.* 749, 32 *Sup. Ct.* 415; *Bernheimer v. Converse*, 206 U. S. 516, 51 *L. Ed.* 1163, 27 *Sup. Ct.* 755 (the receiver was held to be a *quasi* assignee and representative of creditors); *Shipman v. Treadwell*, 200 N. Y. 472, 93 N. E. 1104. But see *Converse v.*

§ 1677. (§ 256.) **Same; (2) Rights by Contract.**—Another case in which the receiver maintains the action not on principles of comity, but on grounds of right is where the defendant has by contract assented to the appointment of the receiver, in the event of dissolution of a corporation, *e. g.*, of which he is a stockholder, or the winding up of an insurance company in which he is a policyholder. In such cases the right of the receiver to sue depends upon the promise of the subscriber or policyholder “to pay the sum in question to any receiver properly appointed.” The action is “founded not on the right of a foreign receiver to sue upon demands in favor of the party he may represent, but on the right of a substituted promisee to sue a promisor whose contract provided for such substitution.”<sup>27</sup>

§ 1678. (§ 257.) **Power of Court of Appointment Over Receiver and Other Parties.**—Several cases are reported where a court of equity has appointed a receiver of land situated in a foreign state. There is no doubt in such cases but that the court can enforce its orders against those who are subject to its jurisdiction, either territorially or by having submitted themselves to the court in the proceeding in which the receiver has been appointed. The court, of course, has control of its re-

Hamilton, 136 Wis. 589, 118 N. W. 190. Where a foreign receiver sells property within the state, he may sue on that contract: *Interstate Trust & Banking Co. v. Dierks Lumber & Coal Co.*, 133 Mo. App. 35, 113 S. W. 1. Likewise, he may enforce in another state a contract made by him in his own state: *Ten Broek v. Caldwell*, 95 Neb. 464, *Ann. Cas.* 1916D, 613, 145 N. W. 980.

<sup>27</sup> Baldwin, J., in *Fish v. Smith*, 73 Conn. 377, 84 *Am. St. Rep.* 161, 47 *Atl.* 711, 713; *Wheeler v. Dime Savings Bank*, 116 *Mich.* 271, 72 *Am. St. Rep.* 521, 74 N. W. 496; *Relfe v. Rundle*, 103 U. S. 222, 26 *L. Ed.* 337; *Rundle v. Life Ass'n of America*, 10 *Fed.* 720, 4 *Woods*, 94; *Taylor v. Life Ass'n of America*, 13 *Fed.* 493; *Fry v. Charter Oak L. Ins. Co.*, 31 *Fed.* 197; *Weingartner v. Insurance Co.*, 32 *Fed.* 314; *Hale v. Hardon*, 95 *Fed.* 747, 37 *C. C. A.* 240.

ceiver wherever he may act, and in the same manner it can control the parties to the action and interveners. The court often enjoins parties from proceeding with actions pending in a foreign court. In such case, the foreign state should enforce the injunction issued in the domiciliary state by refusing to proceed with the litigation or ordering proceedings dismissed.<sup>28</sup> In a case in Michigan, the supreme court of that state gave effect to a sale by a receiver appointed in a foreign state of land

<sup>28</sup> In *Schindelholz v. Cullum*, 54 Fed. 885, 5 C. C. A. 293, Thayer, J., says: "Courts which have appointed receivers over property situated in a foreign jurisdiction may either restrain or punish persons who interfere with the receiver's possession of such property; even though the interference consists in attaching it under process obtained from some court in the foreign state. . . . In all these cases, however, the person proceeded against for interfering with the receiver's constructive possession of property located in a foreign jurisdiction was either a party to the litigation in which the receiver had been appointed, or in privity with a party, or was otherwise subject to the jurisdiction of the court by virtue of his residence or citizenship." See, also, *Mercantile Ins. Co. v. River Plate etc. Agency Co.*, [1892] 2 Ch. 303; *Lord Cranstown v. Johnston*, 3 Ves. 170; *Cole v. Cunningham*, 133 U. S. 107, 129, 33 L. Ed. 538, 10 Sup. Ct. 269; *Stewart v. Laberee*, 185 Fed. 471, 109 C. C. A. 351; *Chesapeake etc. R'y Co. v. Swayze*, 60 N. J. Eq. 417, 47 Atl. 28; *Chafee v. Quidnick Co.*, 13 R. I. 442; *Serecomb v. Catlin*, 128 Ill. 556, 15 Am. St. Rep. 147, 21 N. E. 606; *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917, 27 L. R. A. 324, 39 N. E. 1091; *Roberts v. W. H. Hughes Co.*, 86 Vt. 76, 83 Atl. 807. A receiver acting beyond the territorial jurisdiction of the court is still subject to its orders: *Guarantee T. & S. D. Co. v. P. R. & N. E. R. R.*, 69 Conn. 709, 38 L. R. A. 804, 38 Atl. 792. A receiver may be appointed in a creditor's bill or in proceedings supplementary to execution, and the debtor who is within the jurisdiction of the court may be required to convey land outside of the state to such receiver: *Mitchell v. Bunch*, 2 Paige, 606, 22 Am. Dec. 669; *Bailey v. Ryder*, 10 N. Y. 363; *Towne v. Campbell*, 35 Minn. 231, 28 N. W. 254; *Tomlinson etc. Co. v. Shatto*, 34 Fed. 380. In *American Waterworks Co. v. Farmers' L. & T. Co.*, 20 Colo. 203, 46 Am. St. Rep. 285, 25 L. R. A. 338, 37 Pac. 269, a writ of error was dismissed where the corporation prosecuting the writ had been enjoined in a foreign

lying in Michigan.<sup>29</sup> The decision seems conformable with the spirit of comity that prevails among the American states. No rights of creditors or others being involved, the court properly recognized the act of the foreign receiver in selling the land under order of court.

§ 1679. (§ 258.) **Ancillary Receivers; Appointment.** Instead of delivering to the foreign receiver the property or fund, the courts of the state may appoint an ancillary receiver for the purpose of taking charge of such fund or property.<sup>30</sup> This will be done where it is neces-

court appointing a receiver of the corporation, from prosecuting the action.

<sup>29</sup> *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067.

<sup>30</sup> *Williams v. Hintermeister*, 26 Fed. 889; *In re Benedict*, 140 Fed. 55 (bankruptcy receiver); *Mabon v. Ongley Electric Co.*, 156 N. Y. 196, 50 N. E. 805; *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917, 27 L. R. A. 324, 39 N. E. 1091; *Evans v. Pease*, 21 R. I. 187, 42 Atl. 506; *Irwin v. Granite State Prov. Ass'n*, 56 N. J. Eq. 244, 38 Atl. 680; *Lewis v. American Naval Stores Co.*, 119 Fed. 391; *Summit Silk Co. v. Kinston Spinning Co.*, 154 N. C. 421, Ann. Cas. 1912A, 897, 70 S. E. 820. The court of domicile in all such cases is the primary court: *Southern B. & L. Ass'n v. Miller*, 118 Fed. 369, 55 C. C. A. 195; and the ancillary courts must follow the courts of primary jurisdiction, except so far as the purposes of the ancillary receivership are concerned: *Farmers' L. & T. Co. v. Northern Pac. R. R.*, 72 Fed. 26. Where an ancillary receiver is appointed by a federal court, he may maintain a suit to foreclose a mortgage in a state court within the same district: *Scaife v. Scammon Inv. & Sav. Ass'n*, 71 Kan. 402, 80 Pac. 957. It has been held that the rules of the court appointing the primary receiver will be followed in determining who may maintain the suit: *McGraw v. Mott*, 179 Fed. 646, 103 C. C. A. 204. Where a foreign receiver commences suit without right, thereafter is appointed ancillary receiver, and prosecutes the suit to judgment, the judgment may be sustained: *Coal & Iron R'y Co. v. Reherd*, 204 Fed. 859, 123 C. C. A. 155. The jurisdiction of a federal court in such a case does not depend upon diversity of citizenship: *Bluefield S. S. Co. v. Steele*, 184 Fed. 584, 106 C. C. A. 564.

**Receivers for Foreign Corporations.**—A court may appoint a statutory receiver for a foreign corporation, to take charge of



sary to protect the rights of resident creditors, or of non-residents who have attached the property or funds.<sup>31</sup> But it is entirely discretionary with the court whether an ancillary receiver will be appointed or not.<sup>32</sup> Although certain courts have permitted such appointment on an *ex parte* application,<sup>33</sup> the proper practice is to file an independent bill showing grounds for the appointment of such receiver. Where the property is situated in several states, as a railroad, the federal courts have adopted the rule *ex comitate* that the primary receiver will be appointed ancillary receiver in the several districts through which the railroad passes, in this way artificially providing for a harmony which could as well be

domestic assets, where the corporation has violated the laws of the state or a receivership is otherwise proper: *Thornley v. J. C. Walsh Co.*, 200 Mass. 179, 86 N. E. 355; *Pacific Coast Coal Co. v. Esary*, 85 Wash. 448, 148 Pac. 579; *Low v. R. P. K. Pressed Metal Co.*, 91 Conn. 91, 99 Atl. 1; *Palmer v. Texas*, 212 U. S. 118, 53 L. Ed. 435, 29 Sup. Ct. 230; *McKinney v. Kansas Natural Gas Co.*, 206 Fed. 772; *Chicago Title & Trust Co. v. Newman*, 187 Fed. 573, 109 C. C. A. 263. But such an appointment does not affect the right of the corporation to continue its business in other states: *Sims v. United Wireless Tel. Co.*, 179 Fed. 540.

<sup>31</sup> *Mabon v. Ongley Electric Co.*, 156 N. Y. 196, 50 N. E. 805.

<sup>32</sup> See the cases cited in the last two notes.

<sup>33</sup> *Mercantile Trust Co. v. Kanawha etc. R'y Co.*, 39 Fed. 337, to the effect that independent bill should be filed. In *Platt v. Philadelphia etc. R'y Co.*, 54 Fed. 569, the appointment was granted *ex parte*. In *Mabon v. Ongley Electric Co.*, 156 N. Y. 196, 50 N. E. 805, it is held that the court will not appoint an ancillary receiver on the mere petition of the primary receiver. It is said that the receiver himself is not a party in interest, and therefore is not the one to file a petition for an ancillary receivership: In *re Tygarts River Coal Co.*, 203 Fed. 178. But see *State ex rel. American Rankers' Assur. Co. v. McQuillin*, 260 Mo. 164, 168 S. W. 924, where it was said that a foreign receiver of a foreign corporation should be made a party to a bill for an ancillary receivership. Non-resident creditors may bring the suit: *Brunner v. York Bridge Co.*, 78 W. Va. 702, 90 S. E. 233.

preserved on the general principles of comity without the creation of ancillary receivership.<sup>34</sup>

§ 1680. (§ 259.) **Ancillary Receivers; Administration of the Fund.**—A broad distinction exists between the powers of ancillary receivers and those of primary receivers. So far as the court of their appointment is concerned, the latter are absolutely amenable to its process, and, as we have seen, the administration of the entire fund, wherever it may lie, can by means of the injunctive process of the appointing court, aided by the comity of the courts of sister states, be conducted by the primary tribunal. But in the case of an ancillary receiver, *ex vi termini*, there can be no administration of any fund lying outside of the territorial jurisdiction of the appointing court. The very word “ancillary” implies a principal, in whom is vested the general administration. Accordingly, we find it determined that the court of ancillary appointment cannot exercise any control over assets in another state by means of injunction against its citizens or against the parties,<sup>35</sup> and that a judgment rendered against an ancillary receiver binds only property in the jurisdiction of appointment.<sup>36</sup>

<sup>34</sup> *Dillon v. Oregon S. L. etc. Co.*, 66 Fed. 622; *Central Trust Company v. Wabash etc. R’y Co.*, 29 Fed. 620; *Jennings v. Philadelphia etc. R. R. Co.*, 23 Fed. 569; *Young v. Montgomery R. R. Co.*, 2 Woods, 618, Fed. Cas. No. 18,166; *New York P. & O. R. v. New York L. E. etc. R. Co.*, 58 Fed. 268; *Coltrane v. Templeton*, 106 Fed. 370, 45 C. C. A. 328; *Central R. Co. v. Farmers’ L. & T. Co.*, 125 Fed. 1001, 60 C. C. A. 400. In two cases this rule was not followed, by Judge Gresham in *Atkins v. Wabash R’y Co.*, 29 Fed. 162, and by Judge Simonton in *Phinzy v. Augusta R. R. Co.*, 56 Fed. 273. The same rule was followed in *Port Royal etc. R’y Co. v. King*, 93 Ga. 63, 24 L. R. A. 730, 19 S. E. 809, as between state courts.

<sup>35</sup> *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917, 27 L. R. A. 324, 39 N. E. 1091.

<sup>36</sup> *Reynolds v. Stockton*, 140 U. S. 254, 35 L. Ed. 464, 11 Sup. Ct. 773.

So, also, because the entire fund is being administered elsewhere, claims which more properly exist against the general estate have been referred to the original court.<sup>37</sup> Of course, the ancillary receiver in managing the estate in his possession may do acts in other jurisdictions, such as making contracts to carry on the branch of the business under his management, or the carrying of cars belonging to the division of a railroad of which he is receiver, giving rise to jural relations. Where such relations arise they will be respected, and the ancillary receiver may have proper remedies even outside the state of his appointment to protect him in doing said acts, in accordance with the principle that his possession and vested rights will be protected everywhere as property rights, just as any bailee's possession or promisee's right is protected.<sup>38</sup>

§ 1681. (§ 260.) **Ancillary Receivers; Administration of the Fund; How Far Conclusive on Primary Receiver.**—"Where a receiver or administrator or other custodian of an estate is appointed by the courts of one state, the courts of that state reserve to themselves full and exclusive jurisdiction over the assets of the estate within the limits of the state. Whatever orders, judgments or decrees may be rendered by the courts of another state in respect of so much of the estate as is within its limits, must be accepted as conclusive in the courts of primary jurisdiction; and whatever matters are permitted by the courts of primary jurisdiction to be litigated in the courts of another state come within the same rule of conclusiveness. Beyond this, the proceedings of the courts of a state in which ancillary administration is

<sup>37</sup> *Central Trust Co. v. East Tenn. etc. R. Co.*, 30 Fed. 895; *Clyde v. Richmond etc. R. R. Co.*, 56 Fed. 539.

<sup>38</sup> *Guarantee T. & S. D. Co. v. P. R. & N. E. R. R.*, 69 Conn. 709, 38 L. R. A. 804, 38 Atl. 792; and cases cited *supra*, § 255.

held are not conclusive upon the administration in the courts of the state in which primary administration is had."<sup>39</sup> Neither the party whose estate is being administered, nor the primary receiver who submits to the foreign court without leave from the court of appointment, can confer a jurisdiction on the ancillary court, by voluntary appearance, because the jurisdiction over the subject-matter is absent.<sup>40</sup> The determination of the ancillary court on questions of local law, *e. g.*, taxation, are, of course, binding on the primary court.<sup>41</sup>

§ 1682. (§ 261.) **Ancillary Receivers; Surrender of Fund.**—Although it has been held that the court of ancillary administration will provide that the citizens of its state be paid in full, before the balance is transmitted to the primary receiver,<sup>42</sup> it is submitted that no rule can be supported which does not put other persons on an equality in regard to the administration.<sup>43</sup> But the requirement that all shall have the equal protection of the law does not prevent the court of ancillary administration from demanding security from the primary receiver for the equal treatment of its own citizens in the final distribution, as a condition of the surrender of the funds

<sup>39</sup> Brewer, J., in *Reynolds v. Stockton*, 140 U. S. 254, 272, 35 L. Ed. 464, 11 Sup. Ct. 773.

<sup>40</sup> *Reynolds v. Stockton*, *supra*.

<sup>41</sup> *Fletcher v. Harney Peak Tin Min. Co.*, 84 Fed. 555.

<sup>42</sup> *Sands v. Greeley*, 83 Fed. 772. Compare *Thornley v. J. C. Walsh Co.*, 207 Mass. 62, 92 N. E. 1007.

<sup>43</sup> *Blake v. McClung*, 172 U. S. 239, 43 L. Ed. 432, 19 Sup. Ct. 165; *People v. Granite State Provident Ass'n*, 161 N. Y. 492, 55 N. E. 1053. The text is cited to this effect in *Brunner v. York Bridge Co.*, 78 W. Va. 702, 90 S. E. 233. Under a Massachusetts statute providing that the appointment of a receiver within four months after an attachment dissolves the attachment, the appointment of an ancillary receiver has the same effect: *Second National Bank v. J. C. Lappe Tanning Co.*, 198 Mass. 159, 84 N. E. 301.



in its possession.<sup>44</sup> And it is proper that the court of ancillary jurisdiction should provide for the retention of a fund required by the laws of the state as a condition precedent to an insurance company's transacting business in the state, until all domestic creditors and policyholders should be paid in full—the fund being primarily devoted to that purpose.<sup>45</sup> In general, it may be said that the court of ancillary jurisdiction will not surrender possession of the funds in its control to the primary receiver until satisfied that those for whom the ancillary administration was had—the citizens and residents of the state, and creditors invoking its laws—will be fully protected if the fund is surrendered.<sup>46</sup> It may, if it prefers, retain the fund and pay its citizens a proportionate amount of their debts, when such proportion is determined.<sup>47</sup>

<sup>44</sup> *People v. Granite State Provident Ass'n*, 161 N. Y. 492, 55 N. E. 1053; *Baldwin v. Hosmer*, 101 Mich. 119, 25 L. R. A. 739, 59 N. W. 432; *Buswell v. Order of Iron Hall*, 161 Mass. 224, 23 L. R. A. 846, 36 N. E. 1065. After the fund has been turned over to the primary receiver, the court will not reopen the matter on behalf of a subsequent claimant: *Seminole Securities Co. v. Southern Life Ins. Co.*, 182 Fed. 85.

<sup>45</sup> *People v. Granite State Provident Ass'n*, 161 N. Y. 492, 55 N. E. 1053. As to allowance of claims where there is conflict of laws, see *Whelan v. Enterprise Transp. Co.*, 166 Fed. 138.

<sup>46</sup> *Hunt v. Columbian Ins. Co.*, 55 Me. 290, 92 Am. Dec. 592; *Fawcett v. Order of Iron Hall*, 64 Conn. 170, 24 L. R. A. 815, 29 Atl. 614; *Brunner v. York Bridge Co.*, 78 W. Va. 702, 90 S. E. 233; and cases cited in preceding notes.

<sup>47</sup> *Fawcett v. Order of Iron Hall*, *supra*; *Failey v. Fee*, 83 Md. 83, 55 Am. St. Rep. 326, 32 L. Ed. 311, 34 Atl. 839; *Frowert v. Blank*, 205 Pa. St. 299, 54 Atl. 1000.

## CHAPTER XII.

## INJUNCTIONS; GENERAL PRINCIPLES—INJUNCTION TO PROTECT EQUITABLE ESTATES AND INTERESTS.

## ANALYSIS.

- § 262. General nature and object—Abstract of statutes.
- § 263. Fundamental principle.
- § 264. Preliminary or interlocutory injunctions.
- §§ 265–269. Injunctions to protect purely equitable estates or interests, and in aid of purely equitable remedies.
- § 266. Instances; to restrain breaches of trust.
- § 267. To restrain violation of confidence.
- § 268. Same; disclosure of trade secrets.
- § 269. Other instances.

§ 1683. (§ 262.) General Nature and Object—Abstract of Statutes.<sup>1</sup>

<sup>1</sup> Pom. Eq. Jur., § 1337. In the following abstract of statutes the general code provisions are given in full, for the purpose of exhibiting their divergencies in details; and reference is also made to the most important legislation authorizing injunction in special cases. In some states injunctions for an enormous variety of purposes are authorized by statute.

**Alabama.**—Civ. Code, 1896, §§ 784–798. Chiefly matters of practice.

§ 2580: May issue to restrain insolvent insurance companies from doing business.

§ 838: An injunction *pendente lite* may issue to restrain waste of property by intemperate person.

§ 2537: In cases of voluntary separation of husband and wife where application is made for custody of children, court may grant injunction *pendente lite* to insure safety and well-being of wife and children.

**Arizona.**—Rev. Stats. 1901, §§ 2742–2763.

§ 2742: “Judges of the district courts may, either in term time or vacation, grant writs of injunction, returnable to said courts, in the following cases:

“1. Where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant.

“2. Where, pending litigation, it shall be made to appear that a party is doing some act respecting the subject of litigation, or threatens, or is about to do some act, or is procuring or suffering the same to be done in violation of the rights of the applicant, which act would tend to render the judgment ineffectual.

“3. In all other cases where the applicant for such writ may show himself entitled thereto under the principles of equity.”

§ 2743: No injunction against judgments, etc., except to so much as complainant may show himself equitably entitled to be relieved against, and costs.

§ 2744: No injunction to stay execution on valid judgment after one year.

§ 2745: May be granted on complaint or on affidavits.

§ 2746: Notice of application.

§ 2750: To stay proceedings, must be returnable and tried in court where proceedings pending or judgment rendered.

§ 2751: Bond of complainant.

§§ 2755, 2756: Dissolution of injunctions.

§ 2759: “An injunction to suspend the general and ordinary business of a corporation shall not be granted except by the court or judge.”

§ 2763: General principles of equity apply to, except where conflict with statute.

§ 3120: In suit for divorce, wife may obtain injunction restraining husband from disposing of community property, and of her separate property in his possession.

**Arkansas.**—Sandel’s & Hill’s Stats. 1894, §§ 3774–3813.

“§ 3774: The writ of injunction is abolished.”

“§ 3775: An injunction is a command to refrain from a particular act.”

“§ 3776: It may be the final judgment in an action, or may be allowed as a provisional remedy, and where so allowed it shall be by order.”

“§ 3777: Where it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof,

consists in restraining the commission or continuance of some act which could produce great or irreparable injury to the plaintiff, or where, during the litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. It may also be granted in any case where it is specially authorized by statute."

"§ 3778: The judge of the circuit court may grant injunctions and restraining orders in all cases of illegal or unauthorized taxes and assessments by county, city or other local tribunals, boards or officers." . . .

"§ 3798: An injunction to stay proceedings on a judgment or final order of a court shall not be granted in an action brought by a party seeking the injunction in any other court than that in which the judgment or order was rendered or made."

Against illegal municipal taxation and payments:

"§ 5169. Any person owning property and having taxes to pay in any city or town may, upon application to any judge or court having authority to grant injunctions, enjoin the collection of any tax levied in such city or town, without authority of law, and may also enjoin the issue or the payment by such city or town of any warrants, certificates or other form or evidence of indebtedness against such city or town issued or contracted without authority of law."

Injunction suspending proceedings on a judgment or order:

"§ 4202: The party seeking to vacate or modify a judgment or order may obtain an injunction suspending proceedings on the whole or part thereof, which injunction may be granted by the court, or any officer authorized to grant injunctions, upon its being rendered probable, by affidavit or by exhibition of the record, that the party is entitled to have such judgment or order vacated or modified."

§ 4203: Concerns the case where the judgment is rendered prematurely, before the action stood for trial; it may be suspended although no valid defense to the action is shown.

**California.**—Code Civ. Proc., §§ 525-533.

§ 525: "An injunction is a writ or order requiring a person to refrain from a particular act."

§ 526: "An injunction may be granted in the following cases:

"1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.



"2. When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, great or irreparable injury to the plaintiff.

"3. When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual."

Nuisance may be enjoined, Code Civ. Proc., § 731: "Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment, the nuisance may be enjoined or abated, as well as damages recovered."

Waste during foreclosure or after execution sale, Code Civ. Proc., § 745: "The court may by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon; or, after a sale on execution, before a conveyance."

No injunction to enforce a penal law, a penalty or a forfeiture, Civ. Code, § 3369: "Neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, nor to enforce a penalty or forfeiture in any case."

"Preventive relief," Civ. Code, §§ 3420-3423.

§ 3420: "Preventive relief is granted by injunction, provisional or final."

§ 3421: "Provisional injunctions are regulated by the Code of Civil Procedure."

§ 3422: "Except where otherwise provided by this title, a final injunction may be granted to prevent the breach of an obligation\* existing in favor of the applicant:

"1. Where pecuniary compensation would not afford adequate relief;

"2. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;

"3. Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or,

"4. Where the obligation arises from a trust."

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\*"Obligation" is elsewhere defined as a "legal duty": Civ. Code, § 1427.

§ 3423: "An injunction cannot be granted:

"1. To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings;

"2. To stay proceedings in a court of the United States;

"3. To stay proceedings in another state upon a judgment of a court of that state;

"4. To prevent the execution of a public statute, by officers of the law, for the public benefit;

"5. To prevent a breach of a contract, the performance of which would not be specifically enforced;

"6. To prevent the exercise of a public or private office, in a lawful manner, by the person in possession;

"7. To prevent a legislative act by a municipal corporation."

Injunction against the infringement of trade-marks is provided for in Political Code, § 3199.

**Colorado.**—Rice's Code of Procedure (1890), §§ 142-161.

§ 142: "An injunction is generally an order requiring a person to refrain from doing a particular act, but where simply refraining from doing a particular act will not effectuate the relief to which the plaintiff is entitled, the injunction may be made mandatory, and require such acts to be done as will give the plaintiff the full protection which he may be entitled to."

§ 143: When an injunction may be granted: substantially the same grounds as in California Code of Civil Procedure (*supra*), § 526, with the addition, "and in such other cases as courts of equity have hitherto granted relief by injunction, or which may be specially provided for in this act."

§ 145: Venue of injunctions to stay proceedings at law.

§ 158: Injunction for defendant on his cross-complaint or affidavit.

§ 159: Injunction having effect of writ of restitution of mining property. See, also, as to injunctions relating to mines and mining, Mills' Statutes (1891), §§ 1057, 3159, 3191, 3214, 3238-3241.

**Connecticut.**—Gen. Stats. (1888), §§ 1273-1293.

§ 1273: May be granted "according to the course of proceedings in equity, in all actions for equitable relief where such relief is properly demandable."

§ 1277: Injunction may be granted "against the malicious erection . . . of any structure upon 'land' intended to annoy and injure any owner or lessee of adjacent land in respect to his use or disposition of the same."

§§ 1278-1282: Public or private nuisance by a manufacturer; any persons aggrieved may unite in a complaint for its abatement or discontinuance.

See, also, § 525 (against insolvent debtor's disposing of his property); § 1830 (against bank, savings bank, or trust company when its charter is forfeited); § 2656 (against building injuring source of municipal water supply); § 2668 (against bridges obstructing navigable streams); § 2811 (concerning custody of minor children in divorce proceedings); §§ 2822, 2823, 2836 (concerning the business of insurance companies); § 3429 (on application of railroad commissioners, to restrain any person from exercising the duties of any officer in such company).

**Delaware.**—Rev. Stats. 1852, as am. 1893, p. 666, c. 88, § 11.

"Upon the petition of a person holding any lien upon real estate, whether by judgment, recognizance, mortgage, or otherwise, the chancellor may, in a proper case, award an injunction, or the Superior Court of the county, wherein such real estate is, may award a writ of estrepement, for the purpose of restraining waste upon the premises subject to the lien."

**Florida.**—Rev. Stats. 1892, §§ 1463-1472.

§ 1468: Injunction may issue against sale of real property of third person under a writ of *fiery facias*.

§ 1469: Injunctions may issue to restrain trespasses on timber lands, by cutting trees, etc.

§ 1472: Injunction may issue to restrain the removal of mortgaged personal property from the state.

§ 800: Injunction may issue at suit of a board of health to restrain the violation of rules adopted by it for the protection of the public health.

§ 2006: "The circuit courts shall have equity jurisdiction to enjoin the sale of all property, real and personal, that is exempt from forced sale."

§ 2007: Injunction may issue to restrain officer from setting apart nonexempt property as exempt.

**Georgia.**—Code, 1895, §§ 4913-4928.

"§ 4913 (3210): *For what purpose granted.*—Equity, by a writ of injunction, may restrain proceedings in another or the same court, or a threatened or existing tort, or any other act of a private individual or corporation which is illegal or contrary to equity and good conscience, and for which no adequate remedy is provided at law."

§ 4914: *Administration of criminal laws, no interference by equity.*—A court of equity will take no part in the administration of the criminal law. It will neither aid criminal courts in the exercise of their jurisdiction, nor will it restrain or obstruct them."

"§ 4915 (3218): *Enjoining a court of law.*—Equity will not enjoin the proceedings and processes of a court of law, unless there is some intervening equity, or other proper defense, of which the party, without fault on his part, cannot avail himself at law. Writs of injunction may be issued by judges of the superior court to enjoin sales by sheriffs, at any time before the sale takes place, in any proper case made by the bill or application for injunction." (As to setting aside judgments, see §§ 3987, 3988.)

§ 4916 (3219): *To restrain a trespass.*—Equity will not interfere to restrain a trespass, unless the injury is irreparable in damages, or the trespasser is insolvent, or there exist other circumstances which, in the discretion of court, render the interposition of this writ necessary and proper, among which shall be the avoidance of circuitry and multiplicity of actions.

§ 4917: *Waste not enjoined when title in dispute.*—Equity will not interfere by injunction to restrain waste when petitioner's title is not clear. Such relief is granted only when the title is free from dispute.

§ 4918: *Creditors without lien.*—Creditors without lien cannot, as a general rule, enjoin their debtors from disposing of property, nor obtain injunction or other extraordinary relief in equity.

§ 4919: *Injunction to restrain breach of contract for personal services.*—Generally, an injunction will not issue to restrain the breach of a contract for personal services, unless they are of a peculiar merit or character, and cannot be performed by others.

§ 4920 (3220): *In sound discretion of judge.*—The granting and continuing of injunctions must always rest in the sound discretion of the judge, according to the circumstances of each case.

See, also, the following sections:

§ 3863 (3002): *Nuisance.*—Where the consequences of a nuisance about to be erected or commenced will be irreparable in damages, and such consequences are not merely possible, but to a reasonable degree certain, a court of equity may interfere to arrest a nuisance before it is completed.

§ 4902: "The power of appointing receivers and ordering injunctions should be prudently and cautiously exercised, and except in clear and urgent cases should not be resorted to."



**Idaho.**—Code Civ. Proc., §§ 3283–3293, 3373.

Same as California, with some additions. § 3284 (6) provides for injunction having force and effect of a writ of restitution, in case of ouster by force, etc.

**Illinois.**—Hurd's Rev. Stats. (1889), c. 69. Concerns chiefly matters of practice. § 1: *What part of judgment may be enjoined.*—"Only so much of any judgment at law shall be enjoined as the complainant shall show himself equitably not bound to pay, and so much as shall be sufficient to cover costs."

**Indiana.**—Burns' Rev. Stats. 1894, §§ 1161–1180 (1147–1166); Code Civ. Proc., §§ 177–196.

§ 1162 (1148). *Proceedings to obtain.*—178. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce great injury to the plaintiff, or when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering some act to be done, in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual; or when such relief, or any part of it, consists in restraining proceedings upon any order or judgment,—an injunction may be granted to restrain such act or proceedings until the further order of the court; which may, afterward, be modified upon motion. And when it appears in the complaint at the commencement of the action, or during the pendency thereof by affidavit, that the defendant threatens or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain the removal or disposition of his property."

"§ 292 (291). *Nuisance—Remedy.*—711. Where a proper case is made, the nuisance may be enjoined or abated, and damages recovered therefor."

**Iowa.**—McClain's Code (1888), §§ 4622–4643 (3386–3407).

"§ 4622. *Grounds for.*—3386. An injunction may be obtained as an independent remedy in an action by equitable proceedings, in all cases where such relief would have been granted in equity previous to the adoption of this code; and in all cases of breach of contract or other injury, where the party injured is entitled to maintain, and has brought an action by ordinary proceedings, he may, in the same cause, pray and have a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of

any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right, and he may also, in the same action, include a claim for damages or other redress.

"§ 4623. *Temporary or permanent.*—3387. In any of the cases mentioned in the preceding section, the injunction may either be a part of the judgment rendered in the action or it may, if proper grounds therefor are shown, be granted by order at any stage of the case before judgment, and shall then be known as a temporary injunction."

§ 4624. *Temporary, when allowed.*—Similar to first two clauses of the Indiana section, *supra*.

See, also, § 1746 (against insolvent life insurance companies); § 2047 (to enforce rulings, orders and regulations of the board of railroad commissioners); § 2384 (to enjoin nuisance committed by the sale, etc., of intoxicating liquors; at the suit of any citizen of the county. See, also, §§ 2386, 2387, 2397); § 4390 (suspending proceedings on a judgment sought to be vacated or modified); § 4553 (to procure transfer of proceeding for foreclosure of chattel mortgage); § 4567 (nuisance defined; same as California Code).

**Kansas.**—Gen. Stats. 1901, §§ 4684-4700; Code, §§ 237-253.

Code, § 237: "The injunction provided by this code is a command to refrain from a particular act. It may be the final judgment in an action, or may be allowed as a provisional remedy, and, when so allowed, it shall be by order. The writ of injunction is abolished."

Code, § 238: *Grounds for injunction.*—Similar to Arkansas, although wording varies slightly, and adding the following: "And when, during the pendency of an action, it shall appear, by affidavit, that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, or to render the judgment ineffectual, a temporary injunction may be granted to restrain such removal or disposition. It may also be granted in any case where it is specially authorized by statute."

Code, § 239: May be granted at time of commencement of action, or afterward, upon affidavit.

Code, § 240: Court may direct reasonable notice to be given, but may restrain action until hearing.

Code, § 241: "An injunction shall not be granted against a party who has answered, unless upon notice; but such party may be restrained until the decision of the application for an injunction."

Code, § 242: **Bond.**

Code, § 252: "A defendant may obtain an injunction upon an answer in the nature of a counterclaim. He shall proceed in the manner hereinbefore described."

Code, § 253: "An injunction may be granted to enjoin the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same; and any number of persons whose property is affected by a tax or assessment so levied may unite in the petition filed to obtain such injunction. An injunction may be granted in the name of the state to enjoin and suppress the keeping and maintaining of a common nuisance. The petition therefor shall be verified by the county attorney of the proper county, or by the attorney-general, upon information and belief, and no bond shall be required."

Gen. Stats. 1901, §§ 7656, 7658: Duty of treasurer upon dissolution of injunction restraining collection of tax.

§ 3176: Injunction may issue against collection of special assessment when officers are interested in contract.

§ 2450: Declares places used for unlawful purposes, such as for bucket shops, to be nuisances. "The attorney-general, county attorney or any citizen of the county where such nuisance exists or is kept and maintained may maintain an action in the name of the state to abate and perpetually enjoin the same. The injunction may be granted at the commencement of the action, and no bond shall be required."

§ 2231: Declares places where gaming, etc., is carried on to be nuisances, and authorizes injunction as in § 2450.

§ 2686: Electors may maintain action for injunction to restrain removal of county offices and to determine validity of county seat election.

§ 7855: Injunction may issue to restrain wrongful use of labels, trade-marks, etc., of any association or union of workingmen.

**Kentucky.**—Code (1888), §§ 271-297.

§ 272: Defines causes for temporary injunction in language similar to that of the Iowa Code, § 4624.

§ 285: Judgment can be enjoined only in the court rendering it.

§ 17: "A judgment obtained in an ordinary action shall not be annulled nor modified by any order in an equitable action, except for a defense which arises or is discovered after rendition of the judgment."

§ 523 [584]: Injunction suspending proceedings on a judgment may be obtained by a party seeking to vacate or modify it.

§ 436: Injunction, in action in equity for settlement of decedent's estate, against prosecution of actions by creditors against the representatives of the decedent.

§ 467: In forcible entry and detainer proceedings, to restrain waste and destruction of the premises.

§ 476: In *mandamus* or prohibition proceedings, to prevent damage or injury to the applicant.

"§ 378: *When Collection of Judgment may be Enjoined.*—During the pendency of an action, the judgment in which when recovered could be used as a set-off against a judgment in favor of the defendants or either of them, the court, to prevent loss by insolvency, non-residence, or otherwise, may enjoin the collection of the judgment in favor of such defendants."

**Maine.**—Rev. Stats. 1903.

Page 447: Upon dissolution of corporation, injunction may be granted.

Page 396: Injunction may issue to restrain infringement of trademarks.

Page 952: The attorney-general may have an injunction to restrain a lottery.

Page 76: Injunction may issue at suit of ten or more taxable citizens to restrain any action in which municipal officers are privately interested.

Page 678: "When counties, cities, towns, school districts, village or other public corporations, for a purpose not authorized by law, vote to pledge their credit or to raise money by taxation or to exempt property therefrom, or to pay money from their treasury, or if any of their officers or agents attempt to pay out such money for such purpose, the court shall have equity jurisdiction on petition or application of not less than ten taxable inhabitants thereof, briefly setting forth the cause of complaint."

Page 269: "All places used as houses of ill-fame, or for the illegal sale or keeping of intoxicating liquors, or resorted to for lewdness or gambling; all houses, shops or places where intoxicating liquors are sold for tippling purposes, and all places of resort where intoxicating liquors are kept, sold, given away, drank or dispensed in any manner not provided for by law, are common nuisances. The supreme judicial court shall have jurisdiction in equity, upon information filed by the county attorney or upon petition of not less than twenty legal voters of such town or city, setting forth any of the facts contained herein, to restrain, enjoin or abate the same, and an injunction for such purpose may be issued by said court or any justice thereof."

Pages 517, 518: Injunction to prevent taking of property by eminent domain until compensation made.



Page 827. Injunction against waste by defendant in action to recover possession of land.

Maryland.—Pub. Gen. Laws, 1904.

Page 400, art. 16, § 80: "No court shall refuse to issue a *mandamus* or injunction on the mere ground that the party asking for the same has an adequate remedy in damages, unless the party against whom the same is asked shall show to the court's satisfaction that he has property from which the damages can be made, or shall give a bond in a penalty to be fixed by the court, and with a surety or sureties approved by the court, to answer all damages and costs that he may be adjudged by any court of competent jurisdiction to pay to the party asking such *mandamus* or injunction by reason of his not doing the act or acts sought to be commanded, or by reason of his doing the act or acts sought to be enjoined, as the case may be."

Page 437, art. 16, § 190: Court has power to issue mandatory injunctions.

Page 1548, art. 66, § 16: No injunction to stay sale or proceedings after mortgage sale, except at suit of party to mortgage, or of one claiming under him, and upon oath that debt has been fully paid, or that mortgagee refuses to give credit for part paid, or that there has been fraud.

Massachusetts.—Pub. Stats. 1882. Among other provisions, see

Chapter 27, § 129: *Abuse of corporate power by towns*, providing for suit by not less than ten taxable inhabitants, and injunction therein, "when a town votes to raise by taxation or pledge of its credit, or to pay from its treasury, any money for a purpose other than those for which it has the legal right and power." On the subject of this section, see *Babbitt v. Selectmen of Savoy*, 3 Cush. 530; *Tash v. Adams*, 10 Cush. 252; *Hood v. Lynn*, 1 Allen, 103; *Fuller v. Melrose*, 1 Allen, 166; *Frost v. Belmont*, 6 Allen, 152; *Allen v. Marion*, 11 Allen, 108; *Copeland v. Huntington*, 99 Mass. 525; *Carlton v. Salem*, 103 Mass. 141; *Fisk v. Springfield*, 116 Mass. 88, 89; *Mead v. Acton*, 139 Mass. 341, 345, 1 N. E. 413; *Prince v. Boston*, 148 Mass. 285, 19 N. E. 218.

Chapter 76, § 7: To restrain the illegal use of trade-marks or names: See *Ames v. King*, 2 Gray, 379; *Bowman v. Floyd*, 3 Allen, 76, 80 Am. Dec. 55; *Magee Furnace Co. v. Le Barron*, 127 Mass. 115; *Connell v. Reed*, 128 Mass. 477, 35 Am. Rep. 397; *Lawrence Mfg. Co. v. Lowell etc. Mills*, 129 Mass. 325, 37 Am. Rep. 362; *Russia Cement Co. v. Le Page*, 147 Mass. 206, 9 Am. St. Rep. 685, 17 N. E. 304.

Chapter 80, § 26: To restrain a nuisance affecting the public health.

§ 26: To prevent offensive trades: See *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694.

§§ 98, 99: To prevent pollution of sources of water supply. See *Harris v. Mackintosh*, 133 Mass. 228, 230.

Chapter 112, § 104: Against taking of land by railroad.

Chapter 179, §§ 12-14: To stay waste by person whose land is attached, etc.

Chapter 180, §§ 5, 6, 7: Nuisance; injunction either in a suit in equity or in an action of tort.

Provisions in the statutes since 1882 for injunctions in special cases are exceedingly numerous.

**Michigan.**—Comp. Laws, 1897.

§§ 502-514: Courts have jurisdiction to stay proceedings at law, but security must be given.

§ 3937: "No injunction shall issue to stay proceedings for the assessment or collection of taxes under this act."

§ 3938: Holder of certificate of tax sale is entitled to injunction to restrain waste on timber land.

§§ 4363, 4364: No injunction against collection of drain taxes.

§ 8687: Husband may be enjoined from disposing of property pending suit by wife for maintenance.

§ 11132: "The circuit court for each county shall have equity jurisdiction of all matters concerning waste, in which there is not a plain, adequate and complete remedy at law; and may grant injunctions to stay or prevent waste; and whenever it shall be necessary or proper to have any fact tried by a jury, such court may award a feigned issue for that purpose, as in other cases."

**Minnesota.**—Stats. (1894), §§ 5343-5350.

§ 5344: Relating to the granting of temporary injunctions, resembles, in general, the first two clauses and the last clause of the Indiana statutes, § 1162.

See, also, §§ 393 (c), 399 (injunction to enforce order of railroad and warehouse commission); §§ 432, 1496 (to enforce orders of state board of health relating to pollution of water supply, or to noxious trades); § 2261 (against orders of factory inspectors); § 2911 (by judgment creditor of co-operative association to restrain alienation of property and doing business).

§ 5434 (Acts of 1877, c. 131, § 1): *Actions to set aside judgment for fraud*, etc.—"That in all cases where judgment heretofore has been or hereafter may be obtained in any court of record by means of the perjury, subornation of perjury, or any fraudulent act, practice or representation of the prevailing party, an action may be brought by the party aggrieved to set aside said judgment, at any time within

three years after the discovery by him of such perjury, etc. . . . In such action the court shall have and possess the same powers heretofore exercised by courts of equity in like proceedings, and may perpetually enjoin the enforcement of such judgment, or command the satisfaction thereof, and may also compel the prevailing party to make restitution of any money or other property received by virtue thereof, and may also make such other or further order or judgment as may be just or equitable, provided" that rights of innocent third parties under the judgment shall not be affected. See this statute interpreted in *Wieland v. Shillock*, 24 Minn. 345; *Baker v. Sheehan*, 29 Minn. 235, 12 N. W. 704; *Spooner v. Spooner*, 26 Minn. 138, 1 N. W. 838; *Bornsta v. Johnson*, 38 Minn. 230, 36 N. W. 341; *Stewart v. Duncan*, 40 Minn. 410, 42 N. W. 89; *Hass v. Billings*, 42 Minn. 63, 43 N. W. 797; *Wilkins v. Sherwood*, 55 Minn. 154, 56 N. W. 591; *Clark v. Lee*, 58 Minn. 410, 59 N. W. 970.

See, also, § 5893 (injunction, at suit of attorney-general, against usurpation of corporate powers); §§ 5900, 5901 (against insolvent banking and insurance companies); § 5972 (against corporation, after judgment of exclusion from corporate rights); §§ 6921, 6922 (against counterfeiting the labels, trade-marks, etc., of labor unions); § 6928 (against counterfeiting of trade-marks in general); § 7715 (against operating warehouses without a license).

**Mississippi.**—Annotated Code, 1892.

§ 558: An injunction to stay proceedings at law shall not be issued until the party shall enter into a bond conditioned to pay the judgment at law in case the injunction is dissolved.

§ 559: Bond in other cases.

§ 561: No injunction shall issue to restrain collection of taxes unless bond is filed conditioned for payment of tax if injunction dissolved.

§ 483: "The chancery court shall have jurisdiction of suits by one or more tax-payers of any county, city, town, or village, to restrain the collection of any taxes levied or attempted to be collected without authority of law."

§ 484: If such an injunction is dissolved, the court shall enter decree against the complainant and his sureties for the amount of taxes enjoined and ten per cent thereon, and costs of suit.

**Missouri.**—Rev. Stats. 1889, §§ 3627-3649.

§ 3630: Granting of temporary injunction; same as Indiana, first two clauses.

"§ 3635: *Extent of judgment to stay proceedings.*—No injunction shall be granted to stay any judgment or proceeding, except so much

of the recovery or cause of action as the plaintiff shall show himself equitably entitled to be relieved against, and so much as will cover costs."

§ 3648: To protect property of married woman from waste by husband.

"§ 3649: The remedy by writ of injunction or prohibition shall exist in all cases where a cloud would be put on the title of real estate being sold under an execution against a person, partnership or corporation having no interest in such real estate subject to execution at the time of sale, or an irreparable injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages."

See, also, § 1023 (injunction against corporation for failure to maintain a general office within the state); § 1031 (against corporation failing to restore grants in certain cases); § 1043 (railroad may be enjoined from running trains in certain cases); § 1150 (against common carriers); § 1059 (against consolidation of railroads); § 1306 (against bank or trust company, when not to issue); § 1421 (fraternal beneficiary association enjoined from doing business, when); § 3074 (to stay plaintiff in ejectment from taking possession of the land until the value of improvements is ascertained); § 8025 (against insolvent insurance company).

**Montana.**—Code Civ. Proc., §§ 870–881.

§ 871: When injunction may be granted; substantially the same as California Code Civ. Proc., § 526, with this addition: "4. When it appears, by affidavit, that the defendant, during the pendency of the action, threatens, or is about to remove, or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted, to restrain the removal or disposition."

Civ. Code, §§ 4460–4463: Same as California Civ. Code, §§ 3420–3423.

**Nebraska.**—Code Civ. Proc., §§ 250–265.

§ 251: Cause for allowance of temporary injunction; the usual code provision.

**Taxation.**—Comp. Stats. 1899, c. 77, § 144: "No injunction shall be granted by any court or judge in this state, to restrain the collection of any tax, or any part thereof, hereafter levied, nor to restrain the sale of any property for the non-payment of any such tax, except such tax, or the part thereof enjoined, be levied or assessed for an illegal



or unauthorized purpose." See, also, as to drainage assessments, c. 89, art. 1, § 28.

Against common carrier disobeying order of board of transportation, c. 72, art. 8, § 16.

Suspending proceedings on judgment; injunction allowed in favor of party seeking to vacate or modify a judgment or order: Code Civ. Proc., §§ 607, 608.

**New Hampshire.**—Pub. Stats. (1891), c. 205, § 1.

"The supreme court . . . may grant writs of injunction whenever the same are necessary to prevent fraud or injustice." See, also, c. 162, § 13 (prohibiting transaction by bank, on application of bank commissioners); § 19 (restraining proceedings at law by creditors of insolvent bank); c. 171, § 10 (against life insurance companies, etc., failing to make statements to insurance commission); c. 175, § 12 (in divorce proceedings, prohibiting the husband from imposing any restraint upon the personal liberty of the wife, or from entering the tenement where she resides during the pendency of the libel); c. 176, § 12 (to protect divorced wife's custody of minor child); c. 205, § 5 (enjoining certain nuisances).

**New Jersey.**—Gen. Stats. 1895.

Pages 387, 388: No injunction against proceedings at law after verdict or judgment, unless bond filed conditioned to abide such order as the chancellor may make.

**New York.**—Code Civ. Proc. (1896), §§ 602-630.

§ 602 (being part of Code of Procedure, § 218): "*Writ of injunction abolished and order substituted.*—The writ of injunction has been abolished. A temporary injunction may be granted by order, as prescribed in this article."

§ 603 (Code Proc., § 219, first clause): *Injunction, when the right thereto depends upon the nature of the action.*—"Where it appears, from the complaint, that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuance of an act, the commission or continuance of which, during the pendency of the action, would produce injury to the plaintiff, an injunction order may be granted to restrain it."

§ 604 (amended, 1877; Code Civ. Proc., § 219): *Injunction, when the right thereto depends upon extrinsic facts.*—"In either of the following cases, an injunction order may also be granted in an action.

"1. Where it appears, by affidavit, that the defendant, during the pendency of the action, is doing, or procuring, or suffering to be done,

or threatened, or is about to do, or to procure, or suffer to be done, an act, in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, an injunction order may be granted to restrain him therefrom.

"2. Where it appears, by affidavit, that the defendant, during the pendency of the action, threatens, or is about to remove, or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted, to restrain the removal or disposition."

See, also, § 719 (Code Proc., § 401), plaintiff asking for order of arrest, injunction, and warrant of attachment, or two of them, may be required to elect between them.

§ 1806 (2 Rev. Stats., 466, § 56): In certain actions prescribed by the title on "Actions Relating to Corporations," creditors may be enjoined from bringing or prosecuting actions against the defendants.

**North Carolina.**—Clark's Code of Civ. Proc.

§ 334. Injunction as a provisional remedy is abolished, and temporary injunction by order is substituted therefor.

Page 285: "No injunction shall be granted by any court or judge in this state to restrain the collection of any tax, or any part thereof, hereafter levied, nor to restrain the sale of any property for the non-payment of any such tax, except such tax, or the part thereof enjoined, be levied or assessed for an illegal or unauthorized purpose, or be illegal or invalid, or the assessment be illegal or invalid."

§ 338: "(1) When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

("In an application for an injunction to enjoin a trespass on land, it shall not be necessary to allege the insolvency of the defendant when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees";)

"(2) When, during the litigation, it shall appear by affidavit of plaintiff, or any other person, that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain him therefrom;

"(3) And where, during the pendency of the action, it shall appear by affidavit of plaintiff or any other person, that the defendant threatens, or is about to remove or dispose of his property, with

intent to defraud the plaintiff, a temporary injunction may be granted to restrain such removal or disposition."

§ 339: May be granted at time of commencement of action, or at any time afterwards, before judgment.

§ 341: Undertaking on injunction.

**North Dakota.**—Revised Code, 1899.

§ 5343: "The writ of injunction as a provisional remedy is abolished, and an injunction by order is substituted therefor."

§ 5344: When temporary injunctions issued.—Practically the same as North Carolina.

§ 5045: "Except when otherwise provided by this chapter, a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant:

"1. When pecuniary compensation would not afford adequate relief.

"2. When it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief.

"3. When the restraint is necessary to prevent a multiplicity of judicial proceedings; or,

"4. When the obligation arises from a trust."

§ 5046: "An injunction cannot be granted:

"1. To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings.

"2. To stay proceedings in a court of the United States.

"3. To stay proceedings in a state upon a judgment of a court of that state.

"4. To prevent the execution of a public statute by officers of the law for the public benefit.

"5. To prevent the breach of a contract, the performance of which would not be specifically enforced.

"6. To prevent the exercise of a public or private office in a lawful manner by the person in possession.

"7. To prevent a legislative act by a municipal corporation."

§ 5347: Undertaking on injunction.

§ 5349: Not issued to suspend business of corporation, without notice, unless state is a party.

**Ohio.**—Rev. Stats. (1897), §§ 5571–5586.

§ 5572: *Causes for an injunction* (the usual code provisions).

§ 1277: "The prosecuting attorneys of the several counties of the state, upon being satisfied that the funds of the county, or any public moneys in the hands of the county treasurer are about to be misapplied,

or that a contract in contravention of the laws of this state is about to be entered into, or is being executed, or that a contract was procured by fraud or corruption, shall apply by civil action in the name of the state to a court of competent jurisdiction, to restrain such contemplated misapplication of funds, and to restrain the completion or execution of such contract."

§ 1278: "In case the prosecuting attorney fails, upon the written request of any of the tax-payers of the county, to make the application contemplated in the preceding section, such tax-payer may institute such civil action in the name of the state," etc.

§§ 1777, 1778: Similar provisions as to the duty of corporation counsel of cities to apply for injunction, and right of tax-payers to sue on his refusal.

§§ 3231-3233: To enforce labor liens on railroads, public structures, etc.

§ 3371: To prevent discrimination, etc., by railroads.

§ 4490: Assessments for county ditches not to be enjoined for error.

§ 5361: Suspending proceedings on judgment or order, in favor of party seeking to vacate or modify the same (usual provision).

§ 5701: In divorce proceedings, to prevent disposal or incumbrance of property to defeat right of alimony.

§ 5705: To protect married woman's property from conversion or waste by husband.

§§ 5848-5851: Provides for actions to enjoin the illegal levy of taxes and assessments, or the collection of either; parties to such actions; plaintiff in action to enjoin collection, who admits a part to have been legally levied, must first pay or tender the sum admitted to be due.

§§ 6786-6788: Injunction ancillary to proceedings in *quo warranto* against banking association.

Oklahoma.—Rev. Stats. 1903.

§ 4424: "The injunction provided by this code is a command to refrain from a particular act. It may be the final judgment in an action, or may be allowed as a provisional remedy. The writ of injunction is abolished."

§ 4425: Temporary injunctions. Same as North Carolina, adding: "It may, also, be granted in any case where it is specially authorized by statute."

§ 4427: "If the court or judge deem it proper that the defendant, or any party to the suit, should be heard before granting the injunction, it may direct a reasonable notice to be given to such party to



attend for such purpose, at a specified time and place, and may, in the meantime, restrain such party."

§§ 4429, 4435: Bond for injunction.

§ 4440: "An injunction may be granted to enjoin the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same; and any number of persons whose property is affected by a tax or assessment so levied may unite in the petition filed to obtain such injunction. An injunction may be granted in the name of the territory to enjoin and suppress the keeping and maintaining of a common nuisance. The petition therefor shall be verified by the county attorney of the proper county, or by the attorney general, upon information and belief, and no bond shall be required."

**Oregon.**—Bellinger & Cotton's Codes and Stats.

§ 417: "An injunction is an order requiring a defendant in a suit to refrain from a particular act; it is only allowed as a provisional remedy, and when a decree is given enjoining a defendant, such decree shall be effectual and binding on such defendant without other proceeding or process, and may be enforced if necessary as provided in section 415."

§ 418: Undertaking on injunction.

§ 343: Individual may enjoin private nuisance when legal remedy inadequate.

**Pennsylvania.**—Pepper & Lewis' Digest (1894).

Page 3887, § 14: Judgment of ouster and exclusion in *quo warranto* proceedings to be enforced by injunction.

Supplement, 1894-97.

Page 614, § 4: Injunction to prevent counterfeiting of trades union labels.

**Rhode Island.**—Gen. Laws, 1896.

Chapter 161, § 2: To prevent discrimination by common carriers.

Chapter 178, §§ 42, 43, 46, 47, 49, 67, 70, 73: Against banks and institutions for savings.

Chapter 181, §§ 5-9: Against domestic insurance companies.

Chapter 195, § 16: Temporary injunctions in divorce proceedings.

Chapter 274, §§ 19, 20: To restrain insolvents from leaving the state, etc.

**South Carolina.**—Code Civ. Proc., § 240 (usual threefold code provision).

**South Dakota.**—Civ. Code, §§ 5850-5853 (same as California Civil Code).

Code Civ. Proc., §§ 6190-6198.

§ 6191 (usual threefold code provision).

In aid of mortgagees—§ 6679: "The court may, by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the existence of the lien or foreclosure of a mortgage thereon and until the expiration of the time allowed for redemption."

Pol. Code, § 2673: Injunction to restore possession of mining property taken by force, fraud or threats.

**Tennessee.**—Code, 1896.

§ 5161: Injunction against waste.

§ 1004: "No injunction or petition for *mandamus* shall be granted by any judge or court in this state, or any bill or petition for *mandamus*, alleging the illegality or unconstitutionality of any of the revenue laws of this state, restraining any officer or officers charged with the collection of the public taxes of this state, except upon a final hearing of any cause in the court of last resort, if an appeal should be taken to that court."

§ 6256: Bond for injunction.

**Texas.**—Sayles' Rev. Stats. (1888), arts. 2873-2898.

"Art. 2873. *Writs of, granted, when.*—Judges of the district and county courts may, either in term time or vacation, grant writs of injunction, returnable to said courts, in the following cases:

"1. Where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant.

"2. Where, pending litigation, it shall be made to appear that a party is doing some act respecting the subject of litigation, or threatens, or is about to do some act, or is procuring or suffering the same to be done in violation of the rights of the applicant, which act would tend to render judgment ineffectual.

"3. In all other cases where the applicant for such writ may show himself entitled thereto under the principles of equity."

"Art. 2874. *None, against a judgment, except, etc.*—No injunction shall be granted to stay any judgment or proceedings at law, except so much of the recovery or cause of action as the complainant shall in his petition show himself equitably entitled to be relieved against, and so much as will cover the costs."

"Art. 2875. *Injunction to stay execution within twelve months, unless, etc.*—No injunction to stay an execution upon any valid and subsisting judgment shall be granted after the expiration of one year from the rendition of such judgment, unless it be made to appear that an application for such injunction has been delayed in consequence of the fraud or false promises of the plaintiff in the judgment, or unless for some equitable matter or defense arising after the rendition of such judgment. If it be made to appear that the applicant was absent from the state at the time such judgment was rendered, and was unable to apply for such writ within the time aforesaid, such injunction may be granted at any time within two years from the date of the rendition of the judgment."

"Art. 2898. *Principles of equity applicable.*—The principles, practice and procedure governing courts of equity shall govern proceedings in injunctions when the same are not in conflict with the provisions of this title or other law."

See, also, art. 2868 (injunction pending divorce suit, restraining husband from disposing of property).

Act of May 12, Aug. 14, 1888 (Supplement to Sayles' Civ. Stat., art. 2873a), is important. "The full right, power, and remedy of injunction may be resorted to and invoked by the state at the instance of the county or district attorney or attorney-general, to prevent, prohibit, or restrain the violation of any revenue or penal law of this state."

**Utah.**—Rev. Stats. (1888), §§ 3057–3063: Taken from the California Code of Civil Procedure, §§ 525–533, with some changes.

See, also, § 153 (taken from North Dakota (1895), § 5584) as to restraining foreclosure by advertisement of chattel mortgage, when the mortgagor "has a legal counterclaim or any other valid defense against the collection of the whole or any part of the amount claimed to be due on such mortgage."

§ 1219: Injunction in statutory action by wife for separate maintenance restraining husband from disposing of or incumbering real estate.

§ 2683. "*Injunction to restrain collection of tax.*—No injunction shall be granted by any court or judge to restrain the collection of any tax or any part thereof, nor to restrain the sale of any property for the non-payment of the tax, except where the tax, or some part thereof sought to be enjoined, is illegal, or is not authorized by law, or the property is exempt from taxation. If the payment of a part of a tax is sought to be enjoined, the other part must be paid or tendered before action can be commenced."

§ 3266 (Cal. Code Civ. Proc., § 706): To restrain waste during period of redemption from execution.

§ 3281: Injunction in connection with receiver, in proceedings supplementary to execution.

§ 3518 (Cal. Code Civ. Proc., § 745): Injunction to restrain waste pending foreclosure of a mortgage, or after a sale on execution, before a conveyance.

**Vermont.**—Stats. (1894), §§ 954–961 (relating to injunction bonds): § 2688 (in suits for divorce, restraining husband from conveying such portion of his property as is necessary to secure the alimony. See *Foster v. Foster*, 56 Vt. 540; *Curtis v. Gordon*, 62 Vt. 340, 495, 20 Atl. 820; *Noyes v. Hubbard*, 64 Vt. 302, 35 Am. St. Rep. 928, 15 L. R. A. 394, 23 Atl. 727; *Stearns v. Stearns*, 66 Vt. 187, 44 Am. St. Rep. 836, 28 Atl. 875); § 3892 (against abandoning or discontinuing railroad stations); §§ 4208, 4209 (on application of insurance commissioners); §§ 4522 *et seq.* (to abate liquor nuisances).

**Virginia.**—Code (1887), §§ 3434–3446; Supplement (1898), § 3438a. “§ 3434. *Injunction to protect plaintiff in suit for specific property.* An injunction may be awarded to protect any plaintiff in a suit for specific property, pending either at law or in equity, against injury from the sale, removal, or concealment of such property.”

See, also, § 1081 (to stay proceedings in condemnation of land for internal improvements); § 2495 (to protect lien for advance on crops); § 3656 (to restrain sale of exempt property, or garnishment of wages, of a “householder”).

**Washington.**—Ballinger’s Codes and Statutes (1897), §§ 5431–5452.

§ 5432: Injunction, when granted. Taken from Indiana, § 1148.

“§ 5433. Injunction for malicious erection of structures. An injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure or annoy an adjoining proprietor. And where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal.”

§ 5661: Injunction in action for nuisance, when the remedy of warrant to abate the nuisance is inadequate.

“§ 5658. Injunction to prevent waste. When any two or more persons are opposing claimants under the laws of the United States to any land in this state, and one is threatening to commit upon such land waste which tends materially to lessen the value of the inheritance, and which cannot be compensated by damages, and there is immi-



ment danger that unless restrained such waste will be committed, the party, on filing his complaint and satisfying the court or judge of the existence of the facts, may have an injunction to restrain the adverse party." See *Arment v. Hensel*, 5 Wash. 152, 154, 31 Pac. 464; *McBride v. Board of Comm'rs*, 44 Fed. 17.

Injunction in proceedings supplemental to execution: See § 5323.

Injunction in favor of party seeking to vacate or modify a judgment or order, suspending proceedings or the whole or part thereof: See § 5160.

§ 6119: Restraining order against executor or administrator, pending application to prove a lost or destroyed will.

"§ 5678. Tender condition precedent to action to enjoin tax collection. Hereafter no action or proceeding shall be commenced or instituted in any court of this state to enjoin the sale of any property for taxes, or to enjoin the collection of any taxes, or for the recovery of any property sold for taxes, unless the person or corporation desiring to commence or institute such action or proceeding shall first pay, or cause to be paid, or shall tender to the officer entitled under the law to receive the same, all taxes, penalties, interest and costs justly due and unpaid from such person or corporation on the property sought to be sold or recovered."

"§ 5679: What complaint must state. In all actions to enjoin the collection of any tax, and in all actions for the recovery of any property sold for taxes, the complainant must state and set forth specially in his complaint the tax that is justly due, with penalties, interest and costs, the tax alleged to be illegal, and point out the illegality thereof; that the taxes for that and previous years have been paid." . . .

"§ 5680. Construction. The provisions of sections 5678 and 5679 shall be construed as imposing additional conditions upon the power of the court or judge in granting injunctions to those already imposed."

§ 3714: Mandatory injunction authorized in proceedings to establish diking districts; § 3754, in proceedings to establish drainage districts.

**West Virginia.**—Code, 1899, c. CXXXIII.

Page 889: "An injunction may be awarded to enjoin the sale of property set apart as exempt in the case of a husband or parent, under chapter forty-one, or to protect any plaintiff in a suit for specific property, pending either at law or in equity, against injury from the sale, removal or concealment of such property."

Page 890: Injunction bond.

Chapter XCVI, p. 762: Injunction may issue to prevent sale of property for usurious debt.

Page 1134: Injunctions against waste of natural gas.

Wisconsin.—Stats. 1898.

§ 2773: Writ of injunction is abolished. "The injunction provided by law is a command to refrain from a particular act."

§ 2774: "Where it shall appear by the complaint that the plaintiff is entitled to the judgment demanded and such judgment, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or is procuring or suffering some act to be done in violation of plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And when, during the pendency of an action, it shall appear by affidavit that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition."

§ 2775: When granted to defendant.

§ 2778: Bond for injunction.

§ 2780: Not granted to suspend ordinary business of corporation without notice.

§ 3170: "The circuit courts have jurisdiction of actions for waste and may grant injunctions to stay or prevent waste."

§ 3180: "The circuit courts shall have jurisdiction of actions to recover damages for and to abate private nuisances or a public nuisance from which any person suffers a private or special injury peculiar to himself, so far as necessary to protect the rights of such person, and to grant injunctions to prevent the same; and in case such nuisance may work an irreparable injury, interminable litigation, a multiplicity of actions, or either, or the injury is continuous or constantly recurring, or there is not an adequate remedy at law, or the injury is not susceptible of adequate compensation in damages at law, then an action in equity may be maintained and an injunction issued therein, and an equitable action may be brought before the nuisance or the infringement of plaintiff's right is established at law."

Wyoming.—Rev. Stats. 1899.

§ 4038: "The injunction provided by this chapter is a command to refrain from a particular act; it may be the final judgment in an action or may be allowed as a provisional remedy; and when so allowed it shall be by order."

§ 4039: "When it appears by the petition that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof,

§ 1684. (§ 263.) Fundamental Principle.<sup>2</sup>

consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce great or irreparable injury to the plaintiff, or when, during the litigation, it appears that the defendant is doing, or threatens or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, a temporary order may be granted restraining such act; and such order may also be granted in any case where it is specially authorized by statute."

§ 4041: Court may require notice of application.

§ 4043: Undertaking on injunction.

§ 4053: "A defendant may obtain an injunction upon an answer in the nature of a counterclaim, and he shall proceed in the manner prescribed in this chapter."

§ 4172: "District courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof; but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

§ 4175: "If the plaintiff, in an action to enjoin the collection of taxes or assessments admit a part thereof to have been legally levied, he must first pay or tender the sum admitted to be due; if an order of injunction be allowed, an undertaking must be given as in other cases; and the injunction shall be a justification of the officer charged with the collection of such taxes or assessments for not collecting the same."

§ 3802: "The party seeking to vacate or modify a judgment or order may obtain an injunction suspending proceedings on the whole or a part thereof, which injunction may be granted by the court or any judge thereof when it is rendered probable by affidavit or by exhibition of the record that the party is entitled to have such judgment or order vacated or modified."

<sup>2</sup> See Pom. Eq. Jur., § 1338, and notes to the effect that "the restraining power of equity extends through the whole range of rights and duties which are recognized by the law," but, in practice, is limited to cases in which the legal remedy is not full and adequate: Portions of this paragraph are quoted in *Tuchman v. Welch*, 42 Fed. 548, 559; *City of Louisville v. Louisville Home Telephone Co.*, 149 Ky. 234, *Ann. Cas.* 1914A, 1240, 148 S. W. 13; *Traverse City v. Citi-*

§ 1685. (§ 264.) **Preliminary or Interlocutory Injunctions.**<sup>3</sup>—Preliminary or interlocutory injunctions are granted to preserve the property *in statu quo* pending the determination of the suit.<sup>4</sup> The right to such relief depends upon a showing of irreparable injury, and rests within the sound discretion of the court.<sup>5</sup> It is not

zens' Telephone Co., 195 Mich. 373, 161 N. W. 983; State v. Louisville & N. R. Co., 97 Miss. 35, **Ann. Cas.** 1912C, 1150, 51 South. 918, 53 South. 454. This paragraph is cited in Lucas v. Futrall, 84 Ark. 540, 106 S. W. 667; Union Sawmill Co. v. Summit Lumber Co., 119 La. 313, 44 South. 28.

<sup>3</sup> This paragraph is cited in Spring Valley Water Co. v. San Francisco, 165 Fed. 667.

<sup>4</sup> "The controlling reason for the existence of the right to issue a preliminary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated": City of Newton v. Levis, 79 Fed. 715, 25 C. C. A. 561, 49 U. S. App. 266, per Sanborn, Cir. J. See, also, Blount v. Societe Anonyme du Filtre, 53 Fed. 98, 6 U. S. App. 335, 3 C. C. A. 455; Rice v. H. L. Doherty & Co., 184 Fed. 878, 107 C. C. A. 202; Thompson v. Paek, 219 Fed. 624 (restraining the recording of an instrument which would create a cloud on title); Knight v. Cohen, 5 Cal. App. 296, 90 Pac. 145; City of Pasadena v. Superior Court of Los Angeles County, 157 Cal. 781, 21 **Ann. Cas.** 1355, 109 Pac. 620 (injunction continued pending appeal, although permanent injunction denied); Giliman v. Talley, 140 Iowa, 718, 119 N. W. 144; Gobbi v. Dileo, 58 Or. 14, 34 L. R. A. (N. S.) 951, 111 Pac. 49, 113 Pac. 57; Galveston & W. R'y Co. v. City of Galveston (Tex. Civ. App.), 137 S. W. 724; St. Hyacinth Congregation v. Borucki, 141 Wis. 205, 124 N. W. 284.

<sup>5</sup> Southern Pac. Co. v. Earl, 82 Fed. 691, 27 C. C. A. 185; Sanitary Reduction Works v. California Reduction Co., 94 Fed. 693; Strasser v. Moonelis, 108 N. Y. 611, 15 N. E. 730 (not reviewable unless complaint fails to state grounds for final relief); Ward v. Sweeney, 106 Wis. 44, 82 N. W. 169 ("That discretion is of the broadest, and is seldom interfered with"); Reddall v. Bryan, 14 Md. 444, 74 **Am. Dec.** 550; North Carolina R. Co. v. Drew, 3 Woods, 674, Fed. Cas. No. 17,433. See, further, Railroad Commission of Louisiana v. Texas &



necessary that the court be satisfied that the plaintiff will certainly prevail on the final hearing; "a probable right, and a probable danger that such right will be defeated, without the special interposition of the court," is all that need be shown.<sup>6</sup> When there is grave doubt,

P. R'y Co., 144 Fed. 68, 75 C. C. A. 226; Winchester Repeating Arms Co. v. Olmsted, 203 Fed. 493, 121 C. C. A. 615 (discretion does not extend to a refusal to apply well-settled principles of law to conceded or indisputable state of facts); South & North Alabama R. Co. v. Railroad Comm'rs of Alabama, 210 Fed. 465; Williams v. Los Angeles R'y Co., 150 Cal. 592, 89 Pac. 330 (may be refused where damage threatened may be easily remedied); Flood v. E. L. Goldstein Co., 158 Cal. 247, 110 Pac. 916; Angell v. Continental Oil Co., 19 Idaho, 746, 115 Pac. 692; Grand Rapids Elec. R'y Co. v. Calhoun Circuit Judge, 156 Mich. 419, 120 N. W. 1004; Wyoming Tp. v. Judge of Superior Court (Stuart), 158 Mich. 60, 122 N. W. 214; Minneapolis Gaslight Co. v. City of Minneapolis, 123 Minn. 231, 143 N. W. 728; Becker v. Gilbert (N. J. Eq.), 60 Atl. 29; Meyer v. Somerville, Water Co., 79 N. J. Eq. 613, 82 Atl. 915; Hutchison v. York County, 86 S. C. 396, 68 S. E. 577; Alston v. Board of Health (Ball), 93 S. C. 553, 77 S. E. 727.

"The final injunction is in many cases matter of strict right, and granted as a necessary consequence of the decree made in the cause. On the contrary, the preliminary injunction, before answer, is a matter resting altogether in the discretion of the court, and ought not to be granted unless the injury is pressing and the delay dangerous": *New York Printing & Dyeing Establishment v. Fitch*, 1 Paige, 97.

<sup>6</sup> The text is quoted in *Profile Cotton Mills v. Calhoun Water Co.*, 189 Ala. 181, 66 South. 50; *Union Sawmill Co. v. Summit Lumber Co.*, 119 La. 313, 44 South. 28. See, also, *Georgia v. Brailsford*, 2 Dall. 402, 1 L. Ed. 433; *Southern Pac. Co. v. Earl*, 82 Fed. 691, 27 C. C. A. 185; *Sanitary Reduction Works v. California Reduction Co.*, 94 Fed. 693; *Great Western R'y Co. v. Birmingham R'y Co.*, 2 Phill. Ch. 602. See, further, *Ford v. Taylor (Nev.)*, 140 Fed. 356; *Colorado Eastern R. Co. v. Chicago, B. & Q. R'y Co.*, 141 Fed. 898, 73 C. C. A. 132; *Postal Telegraph-Cable Co. v. City of Mobile*, 179 Fed. 955. "The rule is well settled that evidence sufficient to authorize a granting of a preliminary injunction or to warrant the refusal thereof may not be sufficient to maintain a like decision upon a final trial of the action on its merits": *Colusa Parrot Min. & S.*

however, as to the complainant's right, preliminary relief will generally be denied.<sup>7</sup> It should not, save in exceptional circumstances, be used for the purpose of taking property out of the possession of one party and giving it to another.<sup>8</sup> In the exercise of its discretion,

Co. v. Barnard, 28 Mont. 11, 72 Pac. 45; and see City of Laporte v. Scott, 166 Ind. 78, 76 N. E. 878. Of course a preliminary injunction should be denied when the bill or complaint states no ground for final relief: McHenry v. Jewett, 90 N. Y. 58.

<sup>7</sup> The text is quoted in Profile Cotton Mills v. Calhoun Water Co., 189 Ala. 181, 66 South. 50. See, also, Home Ins. Co. v. Nobles, 63 Fed. 642; Mitchell v. Colorado Fuel & Iron Co., 117 Fed. 723; Huntington v. City of New York, 118 Fed. 683 (complainant must show reasonable probability of ultimate success); Newark Aqueduct Board v. Passaic, 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55 (doubtful whether nuisance existed); Atlantic C. W. W. Co. v. Consumers' W. Co., 44 N. J. Eq. 527, 15 Atl. 581; Roberts v. Scull, 58 N. J. Eq. 396, 43 Atl. 583; Hicks v. American Natural Gas Co., 207 Pa. St. 570, 57 Atl. 55. See, also, Connolly v. Van Wyck, 35 Misc. Rep. 746, 72 N. Y. Supp. 382; McHenry v. Jewett, 90 N. Y. 58. See, further, Stationary Engineer Pub. Co. v. Comerford, 155 Fed. 667; F. W. Cook Brewing Co. v. Garber, 168 Fed. 942; Carlisle v. Smith, 200 Fed. 268; Allman v. United Brotherhood of Carpenters, etc., 79 N. J. Eq. 150, 81 Atl. 116; Blanchard v. Eastern Pennsylvania Power Co., 80 N. J. Eq. 10, 83 Atl. 505; but see Hoy v. Altoona Midway Oil Co., 136 Fed. 483; Eberhardt v. Christiana Window Glass Co. (Del. Ch.), 74 Atl. 33.

**A Mere Apprehension of Danger** is not sufficient to warrant the preliminary injunction; there must be a reasonable probability that the act sought to be enjoined will actually be committed: Selma Water Co. v. City of Selma, 154 Fed. 138 (apprehension of breach of contract); Hurd v. Atchison, T. & S. F. R'y Co., 73 Kan. 83, 84 Pac. 553 (mere apprehension that railroad would take land without condemnation); Meyer v. Somerville Water Co., 79 N. J. Eq. 613, 82 Atl. 915 (diversion of water); Hodgins v. Hodgins, 23 Okl. 625, 103 Pac. 711; City of Woodward v. Raynor, 29 Okl. 493, 119 Pac. 964.

<sup>8</sup> "Possession is *prima facie* evidence of rightful title, because it is one of the elements of title, is sacred, and no court can in any form of proceeding take it from a man without a hearing, without overthrowing the maxim that no man shall be condemned in person or deprived of property without a day in court and due process":

the court may consider the injury to be done the adverse parties by its action; and if the questions involved are grave and difficult, and the injury to the moving party will be immediate, certain, and great if relief is denied, while the loss or inconvenience to the opposing party will be comparatively small if it is granted, a preliminary injunction may issue.<sup>9</sup> On the other hand, where the injury to the complainant will not be irreparable from a refusal, while the defendants might suffer great injury for which they will be without adequate remedy from the granting of the writ, it will be refused.<sup>10</sup>

*Bettman v. Harness*, 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271, per Brannon, J. See, also, *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 104 Fed. 20; *State v. Graves*, 66 Neb. 17, 92 N. W. 144; *Forman v. Healey*, 11 N. D. 563, 93 N. W. 866; *Farmers' R. Co. v. Reno O. C. & P. R'y Co.*, 53 Pa. St. 224. See, further, *Flood v. E. L. Goldstein Co.*, 158 Cal. 247, 110 Pac. 916; *Rudolph Wurlitzer Co. v. Jackson*, 134 Ga. 333, 67 S. E. 879 (specific performance to compel delivery of personal property); *Glover v. Newsome*, 134 Ga. 375, 67 S. E. 935; *Snodgrass v. McDaniel*, 144 Iowa, 674, 123 N. W. 336; *State Road Bridge Co. v. Saginaw Circuit Judge (Gage)*, 143 Mich. 337, 106 N. W. 394; *Gobbi v. Dileo*, 58 Or. 14, 34 L. R. A. (N. S.) 951, 111 Pac. 49, 113 Pac. 57; *Northwestern R. Co. v. Colclough*, 84 S. C. 37, 65 S. E. 950; *Atlantic Coast Line R. Co. v. Seaboard Air Line R'y*, 88 S. C. 464, 71 S. E. 34; *Atlantic Coast Lumber Corp. v. E. P. Burton Lumber Co.*, 89 S. C. 143, 71 S. E. 820.

<sup>9</sup> *Allison v. Corson*, 88 Fed. 581, 32 C. C. A. 12; *City of Newton v. Levis*, 79 Fed. 715, 49 U. S. App. 266, 25 C. C. A. 161; *Cohen v. Delavina*, 104 Fed. 946; *Denver & R. G. R. Co. v. United States*, 124 Fed. 156, 59 C. C. A. 579; *Paekard v. Thiel College (Pa.)*, 56 Atl. 869. See, also, *Colorado Eastern R. Co. v. Chicago, B. & Q. R'y Co.*, 141 Fed. 898, 73 C. C. A. 132; *In re Arkansas R. R. Rates*, 168 Fed. 720; *Pyle v. Texas Transport & Terminal Co.*, 185 Fed. 309; *Magruder v. Belle Fourche Valley Water Users' Ass'n*, 219 Fed. 72, 133 C. C. A. 524; *Marino v. Williams*, 30 Nev. 360, 96 Pac. 1073; *Ring v. Mayberry*, 168 N. C. 563, 84 S. E. 846.

<sup>10</sup> *New York Printing & Dyeing Establishment v. Fitch*, 1 Paige, 97; *Ogden v. Kip*, 6 Johns. Ch. 160. See, also, *Booraem v. North Hudson Co. R. Co.*, 40 N. J. Eq. 557, 5 Atl. 106 (no urgent necessity); *Shubert v. Woodward*, 167 Fed. 47, 92 C. C. A. 509 (injunction against breach of contract); *Carlisle v. Smith*, 200 Fed. 268;

A distinction is made in some jurisdictions between a restraining order issued on *ex parte* application, and a preliminary injunction issued upon an order to show cause. It is said that the former should not issue "except on a moral certainty of an irreparable injury if it be refused."<sup>11</sup> In many of the states the right to preliminary relief is governed by statute.

**§ 1686. (§ 265.) Injunctions to Protect Purely Equitable Estates or Interests, and in Aid of Purely Equitable Remedies.<sup>12</sup>**

Wyoming Tp. v. Judge of Superior Court (Stuart), 158 Mich. 60, 122 N. W. 214; Cohen v. City of Houston (Tex. Civ. App.), 176 S. W. 809.

For specific rules as to the use of preliminary injunctions, see the chapters following, *passim*; especially the chapters on Trespass, Nuisance, Patent Rights, Mandatory Injunctions, etc.

<sup>11</sup> Ryan v. Seaboard & R. R. Co., 89 Fed. 385 ("a restraining order in anticipation of the hearing on a motion for an injunction is a serious exercise of power. It should not be granted except upon the moral certainty of an irreparable injury, if it be refused. It should not be continued when it be made to appear that such a result is not imminent.") For a statement of the distinction, see Wetzstein v. Boston & M. Consol. C. & S. M. Co., 25 Mont. 135, 63 Pac. 1043, 1044. See, further, on the subject of restraining orders and *ex parte* injunctions, Cumberland Tel. & Tel. Co. v. Railroad Commission, 156 Fed. 834; McLean v. Farmers' High Line Canal & Reservoir Co., 44 Colo. 184, 98 Pac. 16; Suwannee & S. P. R. Co. v. West Coast R'y Co., 50 Fla. 609, 612, 39 South. 538 (dissolved where complainant himself violates its spirit); Godwin v. Phifer, 51 Fla. 441, 41 South. 597; Savage v. Parker, 53 Fla. 1002, 43 South. 507 (plaintiff should show that the giving of notice would defeat the purpose of the injunction); Roberts v. Kartzke, 18 Idaho, 552, 111 Pac. 1; State v. Johnston, 78 Kan. 615, 97 Pac. 790 (distinction between restraining order and temporary injunction); Castleman v. State, 94 Miss. 609, 47 South. 647; Lowery v. Cole, 47 Mont. 64, 130 Pac. 410; State v. Graves, 82 Neb. 282, 117 N. W. 717; State v. Dungan, 89 Neb. 738, 132 N. W. 305; Holbein v. De La Garza, 59 Tex. Civ. App. 125, 126 S. W. 42.

<sup>12</sup> See Pom. Eq. Jur., § 1339, and note, to the effect that where the aid of injunctions is required to protect equitable estates or in-



§ 1687. (§ 266.) **Instances; to Restrain Breaches of Trust.**—In suits by a beneficiary against his trustee, an injunction, if needed, will be granted as a matter of course.<sup>13</sup> Thus, a wrongful alienation or encumbrance of land which is the subject-matter of the trust,<sup>14</sup> or a payment of money in violation of the trust,<sup>15</sup> or a sale in violation of conditions imposed by the instrument creating the trust,<sup>16</sup> or a sale with conditions attached by the trustee which are unreasonable and tend to depreciate the property,<sup>17</sup> or waste and mismanagement,<sup>18</sup>

terests, or ancillary to other equitable remedies, questions of the inadequacy of legal remedies cannot arise; jurisdiction to grant the injunction exists and will be exercised. Portions of this paragraph are quoted in *McGraw v. Little* (Ala.), 73 South. 915; *Carmine v. Bowen*, 104 Md. 198, 9 Ann. Cas. 1135, 64 Atl. 932; *Yount v. Setzer*, 155 N. C. 213, 71 S. E. 209; *Watts v. Spencer*, 51 Or. 262, 94 Pac. 39. This paragraph is cited in *Raisch v. Warren*, 18 Cal. App. 655, 124 Pac. 95 (injunction to preserve property to await partnership accounting).

<sup>13</sup> Pom. Eq. Jur., § 1340, and note. See *Williams v. Tozer*, 64 Am. St. Rep. 650, 185 Pa. St. 302 (restraining acts in excess of his powers).

<sup>14</sup> *McCreary v. Gewinner*, 103 Ga. 528, 29 S. E. 960; *Lee v. Simpson*, 37 Fed. 12, 2 L. R. A. 659 (threatened conveyance to state; preliminary injunction). To restrain sale of trust property on execution against the trustee: *Hawkins v. Willard* (Tex. Civ. App.), 38 S. W. 365, citing Pom. Eq. Jur., §§ 1339, 1340.

<sup>15</sup> *Reeve v. Perkins*, 2 Jacob & W. 390; *State v. Maury*, 2 Del. Ch. 141; *Drake v. Wild*, 65 Vt. 611, 27 Atl. 427 (against payment of legacies to the detriment of the trust estate commingled by the executor with other moneys); *Coleman v. McGrew* (Neb.), 99 N. W. 663. But when the defendants, to whom money has been paid in alleged breach of trust, do not admit the trust, and its existence is the question to be decided at the hearing, an interlocutory injunction is not proper: *Bank of Turkey v. Ottoman Co.*, L. R. 2 Eq. 366.

<sup>16</sup> *Pool v. Potter*, 63 Ill. 533 (sale without giving the bond required by the deed of trust).

<sup>17</sup> *Dance v. Goldingham*, L. R. 8 Ch. 902 (whether such effect is actually produced or not).

<sup>18</sup> *Cohn v. Morris*, 70 Ga. 313 (assignee for benefit of creditors). In such cases a receiver is often appointed: *Id.*; *ante*, §§ 89, 90. An

may be enjoined. The creator of the trust, at least of a charitable trust, may sometimes be entitled to the relief; thus, it is held that the founder of a charity may restrain the diversion of the property donated from the charitable uses for which it was given.<sup>19</sup>

§ 1688. (267.) **To Restrain Violations of Confidence.**<sup>20</sup>—Analogous to the jurisdiction to restrain breaches of trust is the jurisdiction, well established but somewhat undetermined in its limits, to restrain a person from the disclosure or unfair use of knowledge which has come to him in the course of a confidential employment by another. A common instance in England is where a solicitor is restrained from communicating to a party who is suing a former client, documents or matters of evidence which have come to his possession or knowledge in the course of his employment for such client.<sup>21</sup> So, a confidential clerk or agent, who uses

injunction will be continued until the hearing to retain control of a trust fund in dispute, where the plaintiff in the action seeks to have a judgment reformed and the validity of an assignment determined, alleging that the same was procured by fraud which was denied in the answer, and where the testimony bearing upon the question is conflicting: *Morris v. Willard*, 84 N. C. 293.

<sup>19</sup> *Mills v. Davison*, 54 N. J. Eq. 659, 55 *Am. St. Rep.* 594, 35 *L. R. A.* 113, 35 *Atl.* 1072.

<sup>20</sup> This paragraph is cited in *Stevens & Co. v. Stiles*, 29 R. I. 399, 17 *Ann. Cas.* 140, 20 *L. R. A. (N. S.)* 933, 71 *Atl.* 802.

<sup>21</sup> *Lewis v. Smith*, 1 *Macn. & G.* 417 (the subsequent client also restrained from making use of such documents or evidence); *Davis v. Clough*, 8 *Sim.* 262; *Little v. Kingswood Colliery Co.*, *L. R.* 20 *Ch. D.* 733 (the jurisdiction "is founded upon the principle that a man ought to be restrained from doing any act contrary to the duty which he owes to another"; and "will be exercised at the instance of the former client irrespective of the question whether the solicitor was discharged by him or discharged himself, whenever the transaction in reference to which the injunction is sought so flows out of or is connected with that in which the solicitor was formerly

the information which he obtained in the course of his employment for the purpose of securing, for himself, without his employer's knowledge, the renewal of the lease of his employer's business premises, which is about to expire, and for which his employer is negotiating, may be enjoined from proceeding to recover the premises.<sup>22</sup> Partly on the ground of breach of confidence was rested the decision in a striking recent English case, where a photographer was restrained from exhibiting and selling to the public copies of the photographs of a woman which he had taken for her own use.<sup>23</sup>

§ 1689. (§ 268.) **Same; Disclosure of Trade Secrets.** An important application of the principle of the last section is seen in the well-established jurisdiction<sup>24</sup> to en-

retained that the same matter of dispute will probably arise"). On the same principle, it was held that a plaintiff who obtained information from the production of documents by his adversary was not at liberty to make it public, and an injunction would, if necessary, be granted to restrain him: *Williams v. Prince of Wales Life etc. Co.*, 23 Beav. 340.

<sup>22</sup> *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242. On a familiar principle, the agent is a constructive trustee for the principal in such a case, and may be ordered to convey: See Pom. Eq. Jur., § 1050.

<sup>23</sup> *Pollard v. Photographic Co.*, 40 Ch. D. 345. The decision was based partly on the ground of breach of an implied contract not to use the photographic negative for such purposes. There is nothing in the case to support the so-called "right of privacy"; as to which see *post*, c. 29.

<sup>24</sup> In the earliest reported case on the subject, *Newbery v. James*, 2 Mer. 446, Lord Eldon refused to enjoin a breach of an agreement not to impart a secret, unpatented process of manufacture, on the ground that the court could not, without having it disclosed, ascertain whether it had been infringed; but the same chancellor in a later case unhesitatingly granted an injunction against one who had obtained a knowledge of such a secret by a breach of trust: *Yovatt v. Winyard*, 1 Jacob & W. 394; and see *Williams v. Williams*, 3 Mer. 157; and the jurisdiction has since been undoubted in England,

join the disclosure or use of secrets of trade, such as secret processes of manufacture, communicated to one in the course of a confidential employment. Different grounds have, indeed, been assigned for the exercise of the jurisdiction;<sup>25</sup> in some cases it has been referred to a right of property in the secret unpatented process—not an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it, but a property “which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third parties.”<sup>26</sup> In other cases the jurisdiction has been referred to breach of an implied contract inferred from the nature of the employment;<sup>27</sup> in others it has been treated as founded upon trust or confidence;<sup>28</sup> more often it is spoken of as resting on

and in the United States, save for the case of *Denning v. Chapman*, 11 How. Pr. (N. Y.) 383. As to the practice relating to the safeguarding of the secret during the trial, see *Amber Size & Chemical Co., Ltd., v. Menzel*, [1913] 2 Ch. 239; *E. I. Dupont De Nemours Powder Co. v. Masland*, 244 U. S. 100, 61 L. Ed. 1016, 37 Sup. Ct. 575; *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, 133 Am. St. Rep. 753, 24 L. R. A. (N. S.) 933, 69 Atl. 186, reversing (N. J. Eq.) 65 Atl. 695.

<sup>25</sup> *Morrison v. Moet*, 9 Hare, 241.

<sup>26</sup> *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664. See, also, *Tabor v. Hoffman*, 118 N. Y. 30, 16 Am. St. Rep. 740, 23 N. E. 12; *Pomeroy Ink Co. v. Pomeroy*, 77 N. J. Eq. 293, 78 Atl. 698.

<sup>27</sup> *Macbeth-Evans Glass Co. v. Schnellbach*, 239 Pa. St. 76, 86 Atl. 688. The following *dictum* of Wigram, V. C., in *Tipping v. Clarke*, 2 Hare, 393, has often been referred to with approval: “It is clear, that every clerk employed in a merchant’s counting house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk.” The secret may, of course, be protected by express agreement; such an agreement is not in general restraint of trade: See *post*, § 297.

<sup>28</sup> *Yovatt v. Wingard*, 1 Jacob & W. 394; *Pomeroy Ink Co. v. Pomeroy*, 77 N. J. Eq. 293, 78 Atl. 698. See a clever argument in favor of this theory in 11 Harvard Law Review, 262.



both of the last two grounds combined.<sup>29</sup> Not only the

29 "Perhaps the real solution is that the confidence postulates an implied contract; that, when the court is satisfied of the existence of the confidential relation, then it at once infers or implies the contract arising from that confidential relation": *Merryweather v. Moore*, [1892] 2 Ch. 518, 522, *per Kekewich, J.* In addition to the cases already cited, see the following recent cases, all concerning the disclosure or unfair use of secret processes: *Amber Size & Chemical Co., Ltd., v. Menzel*, [1913] 2 Ch. 239; *E. I. Dupont De Nemours Powder Co. v. Masland*, 244 U. S. 100, 61 L. Ed. 1016, 37 Sup. Ct. 575; *C. F. Simmons Medicine Co. v. Simmons*, 81 Fed. 163; *International Register Co. v. Recording Fare Register Co.*, 151 Fed. 199, 80 C. C. A. 475, modifying 139 Fed. 785; *H. B. Wiggins Sons' Co. v. Cott-A-Lap Co.*, 169 Fed. 150; *American Lead Pencil Co. v. Schneegass*, 178 Fed. 735; *S. S. White Dental Mfg. Co. v. Mitchell*, 188 Fed. 1017; *Hamilton Mfg. Co. v. Tubbs Mfg. Co.*, 216 Fed. 401; *Nulomoline Co. v. Stromeyer*, 245 Fed. 195; *Stewart v. Hook*, 118 Ga. 445, 45 S. E. 369; *Westervelt v. National Paper etc. Co.*, 154 Ind. 673, 57 N. E. 552 (reviewing many cases); *American Stay Co. v. Delaney*, 211 Mass. 229, *Ann. Cas.* 1913B, 509, 97 N. E. 911; *Aronson v. Orlov*, 228 Mass. 1, 116 N. E. 951; *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 149, 68 *Am. St. Rep.* 469, 38 L. R. A. 200, 72 N. W. 140, 45 Cent. L. J. 348 (reviewing many cases); *Elaterite Paint & Mfg. Co. v. S. E. Frost Co.*, 105 Minn. 239, 117 N. W. 388; *Salomon v. Hertz*, 40 N. J. Eq. 400, 2 Atl. 379; *Stone v. Goss*, 65 N. J. Eq. 756, 55 Atl. 736; *Vulcan Detinning Co. v. American Can Co.*, 72 N. J. Eq. 387, 12 L. R. A. (N. S.) 102, 67 Atl. 339, reversing 70 N. J. Eq. 588, 62 Atl. 881; *S. C.*, (N. J. Eq.) 69 Atl. 1103; 75 N. J. Eq. 542, 73 Atl. 603; 80 N. J. Eq. 443, 85 Atl. 318; *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, 133 *Am. St. Rep.* 753, 24 L. R. A. (N. S.) 933, 69 Atl. 186, reversing (N. J. Eq.) 65 Atl. 695; *Pomeroy Ink Co. v. Pomeroy*, 77 N. J. Eq. 293, 78 Atl. 698; *Chaplin v. Stoddart*, 30 Hun, 300; *Eastman Co. v. Reichenbach*, 20 N. Y. Supp. 110, 36 Cent. L. J. 433, 47 N. Y. St. Rep. 435; *Little v. Gallus*, 38 N. Y. Supp. 487, dissenting opinion, *Id.* 1014, 4 App. Div. 569; *Macbeth-Evans Glass Co. v. Schnelbach*, 239 Pa. St. 76, 86 Atl. 688. See, also, *Simmons Hardware Co. v. Waibel*, 1 S. D. 488, 36 *Am. St. Rep.* 755, 11 L. R. A. 267, 47 N. W. 814 (receiver appointed of a secret code). The jurisdiction is thus described in *Westervelt v. National Paper etc. Co.*, *supra*: "It is evident from the authorities cited that if a person employs another to work for him in a business in which

person acquiring the knowledge by breach of contract or of confidence will be enjoined, but also all persons

he makes use of a secret process or of machinery invented by himself, or by others for him, but the nature and particulars of which he desires to keep a secret, and of which desire on the part of the employer the employee has notice at the time of his employment, even if there is no express contract on the part of the employee not to divulge said secret process or machinery, the law will imply a promise to keep the employer's secret thus intrusted to him; and any attempt on his part to use the secret process or machinery, or to construct the machinery for his own use, as against the master, or to communicate said secret to others, or in any manner to aid others in using the same or in constructing the machinery, will not only be a breach of his contract with his employer, but a breach of confidence and violation of duty which will be enjoined by a court of equity." It would seem to follow, and has been held, that the employee must have been informed or must know that the process was a secret, in order to give rise to liability on the part of the rival: *Hamilton Mfg. Co. v. Tubbs Mfg. Co.*, 216 Fed. 401.

A secret process may be protected although the plaintiff does not and cannot use it: *S. S. White Dental Mfg. Co. v. Mitchell*, 188 Fed. 1017.

To the effect that an assignee of the secret may enjoin former employees of the assignor, see *Vulcan Detinning Co. v. American Can Co.* (N. J. Eq.), 58 Atl. 290. See, also, *Pomeroy Ink Co. v. Pomeroy*, 77 N. J. Eq. 293, 78 Atl. 698 (assignee protected against disclosure by original discoverer of the formula). In *Pressed Steel Car Co. v. Standard Steel Car Co.* (Pa.), 60 Atl. 4, blue-prints were delivered by the complainant to certain railroad companies, to be used in ordering parts of cars, etc., from complainant. One company delivered the prints to a rival. It was held that this was a breach of confidence, and that an injunction should issue.

As to preliminary injunction in these suits, see *H. B. Wiggins Sons' Co. v. Cott-A.-Lap Co.*, 169 Fed. 150 (not on mere suspicion that former employee intends to disclose); *American Lead Pencil Co. v. Schneegass*, 178 Fed. 735; *S. S. White Dental Mfg. Co. v. Mitchell*, 188 Fed. 1017 (preliminary injunction refused); *Pomeroy Ink Co. v. Pomeroy*, 77 N. J. Eq. 293, 78 Atl. 698 (form of preliminary injunction). As to pleading and proof by plaintiff, see *S. S. White Dental Mfg. Co. v. Mitchell*, 188 Fed. 1017; *American Stay Co. v. Delaney*, 211 Mass. 229, *Ann. Cas.* 1913B, 509, 97 N. E. 911;

to whom he has disclosed the secret.<sup>30</sup> The protection of an injunction is, of course, extended only to that which is really the plaintiff's secret, and not to knowledge or information which is accessible to all the world.<sup>31</sup>

§ 1690. (§ 269.) **Other Instances.**—Among other instances in which equity will grant an injunction, preliminary or final, to protect purely equitable estates or interests, or in aid of purely equitable remedies, the fol-

*Macbeth-Evans Glass Co. v. Schnellbach*, 239 Pa. St. 76, 86 Atl. 688. As to accounting of profits, the remedies appropriate in trade-mark, patent and copyright cases are appropriate here; *Vulcan Detinning Co. v. American Can Co.* (N. J. Eq.), 69 Atl. 1103, 75 N. J. Eq. 542, 73 Atl. 603, 80 N. J. Eq. 443, 85 Atl. 318.

<sup>30</sup> See nearly all the cases cited in the preceding notes.

<sup>31</sup> See *Reuter's Telegram Co. v. Byron*, 43 L. J. (Ch.) 661, opinion of Jessel, M. R.; *Williams v. Williams*, 3 Mer. 15. See, also, *International Register Co. v. Recording Fare Register Co.*, 151 Fed. 199, 80 C. C. A. 475, modifying 139 Fed. 785 (injunction against making use of any information obtained while in plaintiff's employ, too broad); *Macbeth-Evans Glass Co. v. Schnellbach*, 239 Pa. St. 76, 86 Atl. 688. And the injunction, of course, does not extend to knowledge of the plaintiff's secret honestly and fairly acquired by the rival, by independent discovery or otherwise: *American Stay Co. v. Delaney*, 211 Mass. 229, *Ann. Cas.* 1913B, 509, 97 N. E. 911; *Elaterite Paint & Mfg. Co. v. S. E. Frost Co.*, 105 Minn. 239, 117 N. W. 388; *Pomeroy Ink Co. v. Pomeroy*, 77 N. J. Eq. 293, 78 Atl. 698.

The jurisdiction has been exercised, in a number of recent cases, to prevent the use by the rival of private business methods, or of private business information, imparted by the former employee of the plaintiff: *Empire Steam Laundry v. Lozier*, 165 Cal. 95, *Ann. Cas.* 1914C, 628, 44 L. R. A. (N. S.) 1159, 130 Pac. 1180 (lists of customers); *Cornish v. Dickey*, 172 Cal. 120, 155 Pac. 629 (same); *Grand Union Tea Co. v. Dodds*, 164 Mich. 50, 31 L. R. A. (N. S.) 260, and note, 128 N. W. 1090 (same); *Stevens & Co. v. Stiles*, 29 R. I. 399, 17 *Ann. Cas.* 140, 20 L. R. A. (N. S.) 933, 71 Atl. 802, reviewing many cases (same); *Merchants' Syndicate Catalogue Co. v. Retailers' Factory Catalogue Co.*, 206 Fed. 545 (methods of doing a mail order business, though plaintiff had used other catalogues in the preparation of his own).

lowing may be enumerated: In aid or in place of cancellation, to prevent the transfer of negotiable instruments, at the suit of the defrauded maker or acceptor, or of the party claiming to be the true owner, or to have an interest in them;<sup>32</sup> or the transfer, under like circumstances, of stocks or other securities not strictly negotiable;<sup>33</sup> to prevent the transfer or injury of chattels of a special nature and value,<sup>34</sup> or of other chattels wrongfully detained by an agent in violation of his trust,<sup>35</sup> in connection with a suit for their delivery up; in aid of the rights of an equitable assignee against interference by his assignor;<sup>36</sup> to protect the estate of a supposed insane person during the pendency of lunacy proceedings;<sup>37</sup> in connection with creditors' bills;<sup>38</sup> to

<sup>32</sup> Pom. Eq. Jur., § 1340. The text of Pom. Eq. Jur. is quoted in *Yount v. Setzer*, 155 N. C. 213, 71 S. E. 209; *Atkinson v. Cain*, 61 W. Va. 355, 123 Am. St. Rep. 984, 56 S. E. 519. See *post*, chapter on Cancellation.

<sup>33</sup> Pom. Eq. Jur., § 1340. The text of Pom. Eq. Jur. is quoted in *Yount v. Setzer*, 155 N. C. 213, 71 S. E. 209. See *post*, chapter on Cancellation.

<sup>34</sup> *Lloyd v. Loaring*, 6 Ves. 773 (Masonic regalia); *Church v. Haeger* (Com. Pl. S. T.), 33 N. Y. Supp. 47 (wedding presents). Compare *Rudolph Wurlitzer Co. v. Jackson*, 134 Ga. 333, 67 S. E. 879 (preliminary injunction should not be granted to compel defendant to deliver the personal property to the plaintiff). See *post*, chapter on Specific Performance.

<sup>35</sup> *Wood v. Rowcliffe*, 3 Hare, 304, 308. See *post*, chapter on Specific Performance.

<sup>36</sup> *Dulaney v. Scudder*, 94 Fed. 6, 36 C. C. A. 52 (and the court may retain jurisdiction for the purpose of assessing damages, but not in aid of a legal assignee, whose right has been acknowledged by the debtor, to prevent execution on a judgment recovered by the assignor against the debtor, since the assignee's right is not prejudiced thereby, and his remedy at law against the debtor is complete); *Perry v. Thompson*, 108 Ala. 586, 18 South. 524.

<sup>37</sup> *In re Harris*, 7 Del. Ch. 42, 28 Atl. 329.

<sup>38</sup> See *post*, chapter on Creditors' Suits. For instance of injunction to preserve the fund belonging to the debtor until judgment at law is obtained, see *Hawks v. Hawks* (Vt.), 54 Atl. 959.



prevent a defendant from affecting or encumbering the property in litigation by contract, conveyance, mortgage, or any other act;<sup>39</sup> and, in general, in all suits to enforce an equitable right against specific property,—as to enforce an equitable estate and compel the conveyance of the legal title, to enforce a trust, or an equitable lien,<sup>40</sup> to compel the specific performance of a contract;<sup>41</sup> and the like,—the court will grant an injunction to restrain a threatened transfer of the property, whether land, chattels, or securities, during the pendency of the action.<sup>42</sup>

39 Pom. Eq. Jur., § 1340; *Daly v. Kelly*, 4 Dow, 417, 440. See *ante*, § 262, note 1, § 264, as to preliminary or interlocutory injunction.

40 See *Williams v. Harlan*, 88 Md. 1, 71 **Am. St. Rep.** 394, 41 Atl. 51 (lien of tenant in common for improvements benefiting the estate, or of one subrogated to his rights, protected from an unfair partition); *Pensacola & G. R. Co. v. Spratt*, 12 Fla. 26, 91 **Am. Dec.** 747 (holder of equitable lien may have relief on ground of waste only when defendant's use of the property impairs the security); *Robinson v. Pickering*, L. R. 16 Ch. D. 371, 660 (in suit to enforce married woman's contract against her separate estate, an injunction restraining her from alienating her property will not be granted before the plaintiff establishes his right by obtaining a judgment, because her contract, by the English doctrine, creates no lien or charge on her estate). See, also, *Michigan Iron & Land Co. v. Nester*, 147 Mich. 599, 111 N. W. 177 (to protect a vendor's lien on cut timber).

41 *Weaver v. Richardson*, 21 Wyo. 343, 132 Pac. 1148 (to preserve *status quo*); *Rice v. H. L. Doherty & Co.*, 184 Fed. 878, 107 C. C. A. 202 (same). See *post*, chapters on Injunction to Prevent Breach of Contract, and on Specific Performance.

42 Pom. Eq. Jur., § 1340. To protect various equitable estates: See *Carmine v. Bowen*, 104 Md. 198, 9 **Ann. Cas.** 1135, 64 Atl. 932 (title of tenant to a crop, resting on equitable estoppel; quoting § 1339, Pom. Eq. Jur.); *Huffman v. Smyth*, 47 Or. 573, 114 **Am. St. Rep.** 938, 8 **Ann. Cas.** 678, 84 Pac. 80 (to protect inchoate or equitable right to homestead of settler on unsurveyed public lands, though defendants are in possession); *Watts v. Spencer*, 51 Or. 262, 94 Pac. 39 (to protect equitable title to a water right, held under parol sale; quoting § 1339, Pom. Eq. Jur.).

In aid of suits to cancel deeds, to preserve the *status quo*: Compare Bankers' Surety Co. v. Linder, 156 Iowa, 486, 137 N. W. 496 (*lis pendens* insufficient protection), with Zander v. Phillips, 213 Fed. 29, 129 C. C. A. 615 (*lis pendens* sufficient protection). See Pom. Eq. Jur., § 1339, note.

"To prevent a *cloud upon title*. The use of the injunction to prevent acts which would create a cloud upon title is governed by the same rules which control the remedy of removing a cloud from title": 4 Pom. Eq. Jur., § 1345; cited, McConnaughy v. Pennoyer, 43 Fed. 342. See *post*, chapters on Injunction Against Taxation, *passim*, and (in Vol. II) on Cloud on Title.

In aid of suit to *quiet title*: Smith Oyster Co. v. Darbee & I. O. & L. Co., 149 Fed. 555 (injunction a matter of course, on proper showing); Dorris v. McManus, 3 Cal. App. 576, 86 Pac. 909; Cameron v. Rogers, 70 Fla. 300, 70 South. 389; Chancey v. Allison, 48 Tex. Civ. App. 441, 107 S. W. 605.

"To protect *married women's property*. An injunction may be needed for this purpose; as, for example, to restrain the sale of her property for her husband's debts when her title is clear, but not unless it is clear: Allen v. Benners, 10 Phila. 10; Simson v. Bates, 10 Phila. 66; to prevent the collection of a mortgage assigned by a wife, when the assignment was void: French v. Snell, 29 N. J. Eq. 95"; 4 Pom. Eq. Jur., § 1345, and note 6; cited, Filler v. Tyler, 91 Va. 458, 22 S. E. 235. See, also, Kirkpatrick v. Buford, 21 Ark. 268, 76 Am. Dec. 363 (to protect separate property from husband's creditors); Pritchett v. Davis, 101 Ga. 236, 65 Am. St. Rep. 298, 28 S. E. 666 (to protect homestead); Hulett v. Inlow, 57 Ind. 412, 26 Am. Rep. 64; Wagoner v. Wagoner, 77 Md. 189, 26 Atl. 284 (to protect legal separate estate; case of probable irreparable injury must be shown); Dority v. Dority (Tex.), 71 S. W. 950 (husband's interference with statutory separate estate enjoined). Injunction is often authorized by statute as an incident to a suit for divorce, to prevent alienation of the husband's property to defeat the right to alimony: See In re White, 113 Cal. 282, 45 Pac. 323; Uhl v. Irwin, 3 Okl. 388, 41 Pac. 376; cf. Smith v. Smith (S. C.), 29 S. E. 227; or to prevent his interference with the wife's property: See Robinson v. Robinson, 123 N. C. 136, 31 S. E. 371; Lyon v. Lyon, 102 Ga. 453, 66 Am. St. Rep. 189, 42 L. R. A. 194, 31 S. E. 34; Symonds v. Hallett, L. R. 24 Ch. D. 346, and Stewart v. Stewart, 105 Md. 297, 66 Atl. 16 (no injunction unless alienation is *mala fide*).

## CHAPTER XIII.

INJUNCTIONS TO PREVENT THE VIOLATION OF  
CONTRACTS.

## ANALYSIS.

- § 270. Injunctions to prevent violation of contracts—In general.
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§ 1691. (§ 270.) **Injunctions to Prevent the Violation of Contracts—In General.**—“An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrines and rules; and it may be stated as a general proposition that wherever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit.<sup>1</sup> Where the agreement stipulates that certain acts shall not be done, an injunction preventing the commission of those acts is

<sup>1</sup> Quoted in *McDaniel v. Orner*, 91 Ark. 171, 120 S. W. 829; *Pitcock v. State*, 91 Ark. 527, 134 Am. St. Rep. 88, 121 S. W. 742; *Chicago Municipal G. L. & C. Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616; *South Chicago City R. Co. v. Calumet El. St. R. Co.*, 171 Ill. 391, 49 N. E. 576; *Welty v. Jacobs*, 171 Ill. 624, 40 L. R. A. 98, 49 N. E. 723; *Cleveland v. Martin*, 218 Ill. 73, 3 L. R. A. (N. S.) 629, 75 N. E. 772; *Ulrey v. Keith*, 237 Ill. 284, 86 N. E. 696; *Cincinnati, B. & C. R. R. v. Wall*, 48 Ind. App. 605, 96 N. E. 389; *Melson v. Ormsby*, 169 Iowa, 522, 151 N. W. 817; *Fox v. Fitzpatrick*, 190 N. Y. 259, 82 N. E. 1103; *Lanston Monotype Machine Co. v. Times-Dispatch Co.*, 115 Va. 797, 80 S. E. 736. This paragraph is cited, generally, in *In re Consumers' Albany Brewing Co.*, 224 Fed. 235; *Lucas v. Futrall*, 84 Ark. 540, 106 S. W. 667; *H. W. Gossard Co. v. Crosby*, 132 Iowa, 155, 6 L. R. A. (N. S.) 1115, 109 N. W. 483; *Grow v. Taylor*, 23 N. D. 469, 137 N. W. 451; sections 1341-1343 are cited in *Cincinnati, B. & C. R. R. v. Wall*, 48 Ind. App. 605, 96 N. E. 389 (fact that injunction will not give complete relief is no ground for withholding, if facts justify equitable interference).



evidently the only mode of enforcement; but the remedy of injunction is not confined to contracts whose stipulations are negative; it often extends to those which are affirmative in their provisions, where the affirmative stipulation implies or includes a negative. The universal test of the jurisdiction, admitted alike by the courts of England and of the United States, is the inadequacy of the legal remedy of damages in the class of contracts to which the particular instance belongs."<sup>2</sup>

<sup>2</sup> 4 Pom. Eq. Jur., § 1341. The text is quoted in *McDaniel v. Orner*, 91 Ark. 171, 120 S. W. 829; *Cincinnati, B. & C. R. R. v. Wall*, 48 Ind. App. 605, 96 N. E. 389; *State v. State Journal Co.*, 77 Neb. 752, 110 N. W. 763, dissenting opinion. The author adds in the note: "The modern English decisions have been much more liberal than the American cases in applying this test, and the English courts have more freely used the injunction to prevent the violation of contracts than the majority of the American judges have been willing to go. The tendency of the American courts has been to limit, rather than to enlarge, the jurisdiction in cases of contracts. English courts will enjoin the violation of some contracts, even though they cannot be specifically enforced. The American decisions, with few exceptions, refuse to adopt this doctrine." These observations are quoted in *H. W. Gossard Co. v. Crosby*, 132 Iowa, 155, 6 L. R. A. (N. S.) 1115, 109 N. W. 483. They have hardly the force, at the present day, that they possessed at the time when they were written (1883). Indeed, the English and American courts appear to have changed places in respect to their attitude towards one important class of contracts—those for personal services: See *post*, §§ 288, 289.

*Injunction Substantially a Negative Specific Performance and Governed by the Same Rules.*—Pom. Eq. Jur., § 1341, is cited to this point in *Shubert v. Woodward*, 167 Fed. 47, 92 C. C. A. 509; *United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.*, 194 Fed. 947, 114 C. C. A. 583; *Grubb Bros. v. Moore, Clemens & Co.*, 108 Va. 72, 60 S. E. 757.

*Inadequacy of the Legal Remedy the Test of Jurisdiction.*—Pom. Eq. Jur., § 1341, is cited to this effect in *United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.*, 194 Fed. 947, 114 C. C. A. 583; *Lanston Monotype Mach. Co. v. Times-Dispatch Co.*, 115 Va. 797, 80 S. E. 736. Eq. Rem., § 270 *et seq.*, is cited to this effect in *Kelly v. Mosby*, 34 Okl. 218, 124 Pac. 984 (contract relating to real estate will usually be

§ 1692. (§ 271.) Principles Regulating Specific Performance Apply.—Since restraining the breach of a contract by injunction is merely a mode of specifically en-

forced on theory that damage is an inadequate remedy). Injunction refused because contract one of a class which, because of the adequacy of the legal remedy, will not be affirmatively specifically enforced: *Fothergill v. Rowland*, L. R. 17 Eq. 132, a contract for the sale of chattels, viz., of all the coal which defendants should get from a certain mine; *Harlow v. Oregonian Pub. Co.* (Or.), 78 Pac. 737. See, also, *infra*, § 271, and *post*, Vol. II, chapters on Specific Performance.

For instances of injunction granted, although there was *no express negative stipulation*, if such negative can reasonably be implied: *Montague v. Flockton*, L. R. 16 Eq. 189; *Manchester Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37; *Singer Sewing Machine Co. v. Union B. & E. Co.*, 1 Holmes, 253, Fed. Cas. No. 12,904; *Chicago & A. R. Co. v. New York, L. E. & W. R. Co.*, 24 Fed. 516; *Beatty v. Coble*, 142 Ind. 329, 41 N. E. 590; *Dwight v. Hamilton*, 113 Mass. 175; *Duff v. Russell*, 60 N. Y. Super. Ct. (28 Jones & S.) 80, 39 N. Y. St. Rep. 266, 14 N. Y. Supp. 134, affirmed without opinion, 133 N. Y. 678, 31 N. E. 622 (contract for personal services); *Hoyt v. Fuller*, 19 N. Y. Supp. 962 (same); *Cort v. Lassard*, 18 Or. 221, 17 Am. St. Rep. 726, 6 L. R. A. 653, 22 Pac. 1054. So far as contracts for personal services are concerned, it is now generally taken to be settled in England that an express negative clause in the contract is necessary to warrant an injunction: *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416; and the stipulation must be negative in substance as well as in form: *Davis v. Foreman*, [1894] 3 Ch. 654. See, also, *Burton v. Marshall*, 4 Gill (Md.), 487, 45 Am. Dec. 171.

For instances of injunction granted, notwithstanding that some *parts of the contract were incapable of specific enforcement*, see *Whittaker v. Howe*, 3 Beav. 383; *Rolfe v. Rolfe*, 15 Sim. 88; *Dietrichsen v. Cabburn*, 2 Phill. Ch. 52, per Lord Cottenham, C. ("the equitable jurisdiction to restrain by injunction an act which the defendant by contract or duty was bound to abstain from, cannot be confined to cases in which the court has jurisdiction over the acts of the plaintiff"); *Lumley v. Wagner*, 1 De Gex, M. & G. 604 (the leading case, decided in 1852, reviewing all prior authorities); *Donnell v. Bennett*, L. R. 22 Ch. D. 835 (immaterial whether the negative clause is a separable part of the whole contract); *Singer Sewing Machine Co. v. Union Button-Hole etc. Co.*, 1 Holmes, 253, Fed. Cas. No. 12,904, per Lowell, J.,

forcing the contract,<sup>3</sup> it follows that the discretion of the court in awarding the injunction is guided by the same equitable principles and doctrines as those which regulate the remedy of specific performance. Thus, the breach of a contract will not be enjoined unless the terms of the contract are certain and definite;<sup>4</sup> if the injunction will work a "hardship" to the defendant or innocent third parties, within the meaning of that term in

reviewing many English cases ("I think the fair result of the later cases may be thus expressed: If the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it"); *Western Union Tel. Co. v. Union Pac. R. Co.*, 1 McCrary, 558, 3 Fed. 423; *Western Union Tel. Co. v. St. Joseph & W. R. Co.*, 1 McCrary, 565, 3 Fed. 430; *Chicago & A. R. Co. v. New York, L. E. & W. R. Co.*, 24 Fed 516 (enjoining diversion of traffic from a railroad); *Xenia Real Estate Co v. Macy*, 147 Ind. 568, 47 N. E. 147 (contract to supply natural gas); *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 68 **Am. St. Rep.** 749, 43 **L. R. A.** 854, 51 N. E. 408, affirming 30 App. Div. 564, 52 N. Y. Supp. 433, and reversing 22 Misc. Rep. 624, 50 N. Y. Supp. 1056 (see *post*, § 295); *Peabody v. Norfolk*, 98 Mass. 452, 96 **Am. Dec.** 664; *House v. Clemens*, 24 Abb. N. C. 381, 9 N. Y. Supp. 484 (agreement by defendant, an author, to permit plaintiff to dramatize a novel written by the former). But see *Welty v. Jacobs*, 171 Ill. 624, 40 **L. R. A.** 98, 49 N. E. 723; *Iron Age Publishing Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 **Am. St. Rep.** 758, 3 South. 449; *Strang v. Richmond, P. & C. R. Co.*, 93 Fed. 71; *Hills v. Croll*, 2 Phill. Ch. 60.

<sup>3</sup> This paragraph is cited, generally, in *Indiana Mfg. Co. v. Nichols & Shepard Co.*, 190 Fed. 579.

<sup>4</sup> See *Gaslight & E. Co. of New Albany v. City of New Albany*, 139 Ind. 660, 39 N. E. 462; *Xenia Real Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147; *Giles v. Dunbar*, 181 Mass. 22, 62 N. E. 985; *Strang v. Richmond, T. & C. R. Co.*, 93 Fed. 71.

equity;<sup>5</sup> if the contract is tainted with illegality;<sup>6</sup> if there has been no performance by the plaintiff of that which, under the terms of the contract, he was obliged first to perform;<sup>7</sup> or when the decree of injunction would be nugatory,<sup>8</sup> etc.

§ 1693. (§ 272.) **Restrictive Covenants — Equitable Easements.**—Injunctions are frequently allowed to restrain the violation of covenants restricting the use of the land. "When the owner of land enters into a covenant concerning it, when in a deed the grantor or the grantee covenants, or in a lease the lessor or the lessee covenants, concerning the land, concerning its use, restricting certain specified uses, stipulating for certain specified uses, subjecting it to easements or servitudes, and the like, and the land is afterwards conveyed, or sold, or passes to one who has actual or constructive notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or

<sup>5</sup> This paragraph of the text is cited to this effect in *Edmundson-Randle Drug Co. v. Partin Mfg. Co.* (Ala.), 75 South. 966. See *Goddard v. American Queen*, 27 Misc. Rep. 482, 59 N. Y. Supp. 46. Nor will a contract inequitable and unconscionable, which defendant probably did not understand, be enforced by injunction: *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 36 L. Ed. 414, 12 Sup. Ct. 632.

<sup>6</sup> See *Pacific Postal Tel. Co. v. Western Union Tel. Co.*, 50 Fed. 493; *South Chicago City R. Co. v. Calumet E. St. R. Co.*, 171 Ill. 391, 49 N. E. 576; *Olin v. Bale*, 98 Ill. 53, 38 Am. Rep. 78 (contract of doubtful propriety); *Fullington v. Kyle Lumber Co.*, 139 Ala. 242, 35 South. 852.

<sup>7</sup> The text is cited to this effect in *Grubb Bros. v. Moore, Clemens & Co.*, 108 Va. 72, 60 S. E. 757. See *Chicago M. G. L. & F. Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616; *New York Chemical Co. v. Halleck* (Com. P. S. T.), 15 N. Y. Supp. 517. As to *mutuality*, see *supra*, § 270, last paragraph of note 2.

<sup>8</sup> See *Brett v. East India & L. S. Co.*, 2 Hem. & M. 404. See, generally, on all these subjects, *post*, Vol. II, chapters on Specific Performance.



will be restrained from violating it, at the suit of the original covenantee or of any other person who has a sufficient equitable interest, although perhaps without any legal interest, in such performance.”<sup>9</sup> The application of this doctrine is wholly independent of the question whether the covenant is of such a character as to run with the land.<sup>10</sup> It is a creation

<sup>9</sup> Pom. Eq. Jur., § 1295. This section of Pom. Eq. Jur. is cited in *Howland v. Andrus*, 80 N. J. Eq. 276, 83 Atl. 982; *Kelly v. Mosby*, 34 Okl. 218, 124 Pac. 984.

<sup>10</sup> *Tulk v. Moxhay*, 2 Phill. 774. “The question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.” See, also, *Morris v. Tuskaloosa Mfg. Co.*, 83 Ala. 565, 3 South. 690; *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 107 Pac. 625; *Merchants’ Union Trust Co. v. New Philadelphia Graphite Co.*, 10 Del. Ch. 18, 83 Atl. 520; *Willoughby v. Lawrence*, 116 Ill. 11, 56 Am. Rep. 758, 4 N. E. 356, citing Pom. Eq. Jur., §§ 1295, 1342; *Sprague v. Kimball*, 213 Mass. 380, Ann. Cas. 1914A, 431, 45 L. R. A. (N. S.) 962, 100 N. E. 622; *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364; *Leaver v. Gorman*, 73 N. J. Eq. 129, 67 Atl. 111; *Brown v. Huber*, 80 Ohio St. 183, 28 L. R. A. (N. S.) 705, 88 N. E. 322; *Duester v. Alvin*, 74 Or. 544, 145 Pac. 660; *Woods v. Lowrance*, 49 Tex. Civ. App. 542, 109 S. W. 418.

*Affirmative Covenants.*—It is questionable whether affirmative covenants of similar nature will be enforced in equity. Professor Pomeroy in Pom. Eq. Jur., § 1295, says: “I have, as it will be seen, continued to state the doctrine in its most general form as applying to affirmative as well as to restrictive covenants, and as rendering the owner liable to the affirmative duty of specifically performing the covenant, as well as to the negative remedy of restraint from violating it, notwithstanding the very recent decisions by the English court of appeal holding that the doctrine applies only to restrictive covenants, and does not extend to those which stipulate for affirmative acts.” See *London etc. R’y v. Gomm*, L. R. 8 Q. B. D. 562; *Haywood v. Brunswick Bldg. Soc.*, L. R. 8 Q. B. D. 403. In *Morland v. Cook* L. R. 6 Eq. 252, an affirmative covenant was enforced. In *Stevens v. Annex Realty Co.*, 173 Mo. 511, 73 S. W. 505, an affirmative covenant to pay assessments for improvements was enforced. On the other hand, relief was re-

of equity and can be enforced by an equitable remedy.<sup>11</sup>

fused, because the covenant was affirmative and not restrictive, in *Merchants' Union Trust Co. v. New Philadelphia Graphite Co.*, 10 Del. Ch. 18, 83 Atl. 520 (agreement by lessee to pay taxes and as rent pay to his lessor a percentage of the net receipts); *Miller v. Clary*, 210 N. Y. 127, *Ann. Cas.* 1915B, 872, 103 N. E. 1114, citing § 1295, *Pom. Eq. Jur.* It appears to the editor that the conflict among the cases on this point may, very possibly, be solved by reference to the question, in each case, whether the facts were such that a decree of specific performance would have been proper between the original parties, the covenantor and covenantee. In this view of the matter, many of the cases fall within the well-known rule that specific performance will usually be refused where the contract calls for continuous or repeated acts on the defendants' part, making repairs, etc. If, on the other hand, the case falls within the equally familiar exception to that rule, where performance *in specie* by the grantee is indispensable to the grantor (*post*, §§ 760, 761), there seems no sound reason for enabling performance to be evaded by a conveyance of the land to a sub-grantee. In short, there is no need of making an arbitrary exception, as the English courts have done, to the rule of *Tulk v. Moxhay*, in favor of affirmative covenants; the matter is taken care of by the ordinary rules governing the remedy of specific performance between the original parties to the contract. As tending to support this suggestion, see *Miller v. Clary*, 210 N. Y. 127, *Ann. Cas.* 1915B, 872, 103 N. E. 1114, where the court declined to enforce a covenant against the grantee of the covenantor, on the ground that the legal remedy of the covenantee was adequate, "That work [constructing and maintaining a shaft on the grantor-covenantor's land] the plaintiffs can do as well as the defendants, and for the purpose of performing it may enter upon the defendants' property."

<sup>11</sup> "The most frequent condition of facts to which the doctrine has been applied in the United States is the following: A, the owner of a block of land, divides it into lots for sale, and sells all these lots to different grantees. In the deed of lot No. 1 are covenants of the grantee not to build nearer the street than a certain line, or not to build certain kinds of buildings, or not to use the lots for certain purposes, or not to build so as to cut off a certain prospect, or other negative or affirmative covenants. The deeds of all the other lots contain similar covenants. Finally, the whole land is sold, so that A retains no interest whatever. The lots are afterwards conveyed to subsequent

§ 1694. (§ 273.) **Questions Stated.**—"Every owner of real property has the right so to deal with it as to restrain its uses by his grantees within such limits as to prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of

grantees. Each subsequent grantee would be charged with constructive notice of the covenants in the original deed under which he claimed title. If the subsequent grantee of any lot—say No. 1—should violate the covenants in the deed of his lot, then plainly there would be no right of action at law against him in favor of the owner of any other lot; for there would be no legal privity whatsoever between them." "The following cases also illustrate the doctrine: In *Clark v. Martin*, 49 Pa. St. 289, each grantee of adjoining lots covenanted not to build on the rear portion of his premises above a certain height, and this was enforced; *Schwoerer v. Boylston Market Assn.*, 99 Mass. 285 (a covenant that a strip of land should not be subject to fences, and should be used as a way, was enforced by the subsequent grantee of other land benefited thereby); *Peck v. Conway*, 119 Mass. 546 (a covenant not to erect a building on the land conveyed was enforced against a subsequent grantee of the covenantor by a subsequent grantee of the original covenantee; the defendant had constructive notice from his title deeds); *Whitney v. Union etc. R'y Co.*, 11 Gray, 359, 71 **Am. Dec.** 715 (a covenant not to use the land in a certain manner enforced against a subsequent grantee charged with notice); *Parker v. Nightingale*, 6 Allen, 341, 83 **Am. Dec.** 632 (in conveyances of adjoining lots by same grantor, each grantee covenanted that the lot should only be used for dwelling-houses; held binding on all subsequent grantees, and enforceable by any subsequent grantee against another"): *Pom. Eq. Jur.*, § 1295, note. In addition to the cases cited in the sections following, and in *Pom. Eq. Jur.*, §§ 689, 1295, 1342, see, also, the following illustrations of the general doctrine: *Leek v. Meeks* (Ala.), 74 South. 31; *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 107 Pac. 625; *Cotton v. Cresse*, 80 N. J. Eq. 540, 49 **L. R. A. (N. S.)** 357, 85 Atl. 600; *Reid v. King*, 158 N. C. 85, 73 S. E. 168.

As to what is a sufficient threat or evidence of intention to violate the restriction, to warrant an injunction, see *King v. St. Louis Union Trust Co.*, 226 Mo. 351, 126 S. W. 415; *Kenwood Land Co. v. Hancock Inv. Co.*, 169 Mo. App. 715, 155 S. W. 861.

This doctrine is known by various names in the different jurisdictions. Most of the cases have arisen in England, New York, Massachusetts, New Jersey, or Pennsylvania. In some jurisdictions such

the land which he retains. The only restriction on this right is, that it shall be exercised reasonably, with due regard to public policy, and without creating any unlawful restraint of trade."<sup>12</sup> When a restriction has once been placed upon the use of land, questions arise as to who is bound and who may enforce.

§ 1695. (§ 274.) **Action by Grantor.**—When the action is brought by the grantor, the case is simple. If, in such a case, the defendant is the original grantee, an action can be maintained at law, and in a proper case an injunction will be awarded. If he is a grantee of a grantee, an injunction will be allowed upon the principle that a party shall not be permitted to use land in a manner inconsistent with the contract entered into by his vendor, with notice of which he purchased.<sup>13</sup> This

covenants are called covenants running with the land. Elsewhere they are said to be in the nature of easements. And in still other jurisdictions they are simply called restrictive covenants. Under whatever name, the principles applied are practically the same, so that for the purpose of this treatment we may disregard the diversity. Even where they are called covenants running with the land it is held that they are covenants enforceable only in equity. It would seem that the most accurate designation is "equitable easements," for these terms describe the particular covenants, to the exclusion of all others. In Massachusetts it is well settled that the rights created are in the nature of easements: *Codman v. Bradley*, 201 Mass. 361, 87 N. E. 591; and hence cannot be imposed upon land by parol: *Rev. Laws, c. 127, § 3*; *Sprague v. Kimball*, 213 Mass. 380, *Ann. Cas.* 1914A, 431, 45 *L. R. A. (N. S.)* 962, 100 N. E. 622; *Sargent v. Leonardi*, 223 Mass. 556, 112 N. E. 633.

<sup>12</sup> *Whitney v. Union R'y Co.*, 11 Gray, 359, 71 *Am. Dec.* 715.

<sup>13</sup> *Tulk v. Moxhay*, 2 Phill. Ch. 774; *Wilson v. Hart*, 2 Hem. & M. 551, 11 Jur., N. S., 735, *L. R.* 1 Ch. 463; *Fielden v. Slater*, *L. R.* 7 Eq. 523; *Sullivan v. Kohlenberg*, 31 Ind. App. 215, 67 N. E. 541 (recorded contract not to sell liquor enforced against purchaser); *Beck v. Heckman*, 140 Iowa, 351, 132 *Am. St. Rep.* 277, 118 N. W. 510 (against grantee; covenant not to build a fence); *Dawson v. Western Maryland R. Co.*, 107 Md. 70, 126 *Am. St. Rep.* 337, 15 *Ann. Cas.* 678, 14 *L. R. A. (N. S.)* 809, 68 Atl. 301 (contract to maintain a canal



is subject to the limitation in some jurisdictions that the restriction must "touch or concern," or "extend to the support" of the land.<sup>14</sup>

§ 1696. (§ 275.) **Action by Purchaser of Other Land.**  
When it clearly appears that such restrictions are in-

basin); *Hayes v. Wayerly & P. R. Co.*, 51 N. J. Eq. 348, 27 Atl. 649; *Cornish v. Wiessman*, 56 N. J. Eq. 610, 35 Atl. 408; *Lignot v. Jaekle*, 72 N. J. Eq. 233, 65 Atl. 221; *Chelsea Land & Improvement Co. v. Adams*, 71 N. J. Eq. 771, 14 *Ann. Cas.* 758, 66 Atl. 180; *Goater v. Ely*, 80 N. J. Eq. 40, 82 Atl. 611; *Sanford v. Keer*, 80 N. J. Eq. 240, 40 *L. R. A. (N. S.)* 1090, 83 Atl. 225; *Walker v. McNulty*, 19 *Misc. Rep.* 701, 45 N. Y. Supp. 42; *Guilford County v. Porter*, 167 N. C. 366, 83 S. E. 564 (deeds to town of a plot for a public square, containing provision that it should not be built upon). In *Jenks v. Pawlowski*, 98 *Mich.* 110, 39 *Am. St. Rep.* 522, 22 *L. R. A.* 863, 56 N. W. 1105, it was held that if the grantor sells his remaining land without inserting restrictions, he waives them as to his prior grantee. In *Los Angeles University v. Swarth*, 107 *Fed.* 798, 54 *L. R. A.* 262, 46 *C. C. A.* 647, it was held that a grantor who has disposed of all his land in the vicinity cannot obtain an injunction. The argument is that he suffers no injury by the breach. See, also, *Rector etc. of St. Stephen's P. E. Church v. Rector etc. of Church of Transfiguration*, 201 N. Y. 1, *Ann. Cas.* 1912A, 760, 94 N. E. 191. *Contra*, *Van Sant v. Rose*, 260 *Ill.* 401, 49 *L. R. A. (N. S.)* 186, 103 N. E. 194 (original grantor and covenantee may have injunction though he owns no other property in the vicinity, and never has owned such); and see *Riverbank Improvement Co. v. Bancroft*, 209 *Mass.* 217, *Ann. Cas.* 1912B, 450, 34 *L. R. A. (N. S.)* 730, 95 N. E. 216 (original owner who has parted with all lots may join as plaintiff in suit to enforce restriction). That, where the grantor sells the *whole* of his land, to one purchaser, with a restrictive covenant by the vendee, such covenant is personal, and the vendor's executor cannot enjoin an assign of the purchaser in respect of a breach committed after the vendor's death, see *Formby v. Barker*, [1903] 2 *Ch.* 539, reviewing many cases. It has been held that where several grantors unite in a deed to a city and covenant therein that no buildings shall be built on a certain strip, one grantor may enjoin another from violating the covenant: *Evans v. New Auditorium Pier Co. (N. J. Eq.)*, 58 Atl. 191.

<sup>14</sup> *Norcross v. James*, 140 *Mass.* 188, 2 N. E. 946. See, also, *Los Angeles Terminal Land Co. v. Muir*, 136 *Cal.* 36, 68 *Pac.* 308.

tended to inure to the benefit of other land, at the time of conveyance or formerly belonging to the grantor, a subsequent grantee of such other parcel may enforce the restriction by injunction. The principal question to be determined in such cases is whether the intent is sufficiently clear to warrant the court in giving relief. It is a matter for construction of the words of the covenant, in connection with the surrounding circumstances. If the language is explicit in stating the intent, the grantee's right is admitted.<sup>15</sup> The difficulty arises when the covenant merely restrains the use without indicating the beneficiary.

Where an owner of a tract of land lays it out in building lots, makes a plan showing a general building scheme, and sells in accordance therewith to various purchasers, inserting restrictions in all the deeds, the intent will be inferred. The purpose of the restrictions is clearly to benefit all the land in the tract and to make an inducement for purchase. Accordingly, one grantee may enjoin a breach by another, or by one who takes with notice.<sup>16</sup> Some courts have intimated that either

<sup>15</sup> *Lattimer v. Livermore*, 72 N. Y. 174; *Schwoerer v. Boylston Market Ass'n*, 99 Mass. 285; *Roger v. Hosegood*, [1900] 2 Ch. 388.

<sup>16</sup> **General Building Scheme.**—The essentials of such a scheme, and the conditions under which the covenants may be enforced, are carefully summed up in *Elliston v. Reacher*, [1908] 2 Ch. 374, 384 by Parker, J. "It must be proved (1) that both the plaintiffs and defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled, the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were intended to be and were for the benefit of other land retained by the vendor;

a general building scheme or an express declara-

and (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to inure for the benefit of the other lots included in the general scheme, whether or not they were also to inure for the benefit of other lands retained by the vendors. If these four points be established, I think that the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor irrespective of the dates of the respective purchases. I may observe, with respect to the third point, that the vendor's object in imposing the restrictions must in general be gathered from all the circumstances of the case, including in particular the nature of the restrictions. If a general observance of the restrictions is in fact calculated to enhance the value of the several lots offered for sale, it is an easy inference that the vendor intended the restrictions to be for the benefit of all the lots, even though he might retain other land the value of which might be similarly enhanced, for a vendor may naturally be expected to aim at obtaining the highest possible price for his land. Further, if the first three points be established, the fourth point may readily be inferred, provided the purchasers have notice of the facts involved in the three first points; but if the purchaser purchases in ignorance of any material part of those facts, it would be difficult, if not impossible, to establish the fourth point."

In the following cases there was a general scheme of improvement which was held sufficient to show an intent to give a grantee a right to enforce: Nottingham Patent Brick & Tile Co. v. Butler, L. R. 16 Q. B. D. 778 (a leading case); Collins v. Castle, L. R. 36 Ch. D. 243; Spicer v. Martin, L. R. 14 App. Cas. 12; Child v. Douglas, Kay, 560; Whatmah v. Gilson, 9 Sim. 196; Schreiber v. Creed, 10 Sim. 196; Pollard v. Gore, [1901] 1 Ch. 834; Elliston v. Reacher, [1908] 2 Ch. 374, affirmed, [1908] 2 Ch. 665; Fisk v. Ley, 76 Conn. 295, 56 Atl. 559; Curtis v. Rubin, 244 Ill. 88, 135 Am. St. Rep. 307, 91 N. E. 84; Wiegman v. Kusel, 270 Ill. 520, 110 N. E. 884 (fact that original owner repurchases lots and sells them again does not free them from restrictions); Loomis v. Collins, 272 Ill. 221, 111 N. E. 999 (building restrictions may be created by a recorded plat of a subdivision, on which is noted a building line, although the purchaser takes without restrictions in his deed; but the grantor in the deed may modify or limit the scope of the restrictions); Summers v. Beeler, 90 Md.

tion in the covenant is essential; but the better

474, 78 **Am. St. Rep.** 446, 48 **L. R. A.** 54, 45 **Atl.** 19; *Parker v. Nightingale*, 6 **Allen** (88 **Mass.**), 341, 83 **Am. Dec.** 632; *Hamlen v. Werner*, 144 **Mass.** 396, 11 **N. E.** 684; *Hano v. Bigelow*, 155 **Mass.** 341, 29 **N. E.** 628; *Allen v. Barrett*, 213 **Mass.** 36, **Ann. Cas.** 1913E, 820, 99 **N. E.** 575; *Sprague v. Kimball*, 213 **Mass.** 380, **Ann. Cas.** 1914A, 431, 45 **L. R. A. (N. S.)** 962, 100 **N. E.** 622; *Hartt v. Rueter*, 223 **Mass.** 207, 111 **N. E.** 1045 (conveyance of lot with "appurtenances" entitles vendee to benefit of restrictions in prior purchasers' deeds); *Velie v. Richardson*, 126 **Minn.** 334, 148 **N. W.** 286; *Godley v. Weisman*, 133 **Minn.** 1, **L. R. A.** 1917A, 333, 157 **N. W.** 711, 158 **N. W.** 333; *Winfield v. Henning*, 21 **N. J. Eq.** 188; *Morrow v. Hasselman*, 69 **N. J. Eq.** 612, 61 **Atl.** 369; *Barton v. Slifer*, 72 **N. J. Eq.** 812, 66 **Atl.** 899; *Bowen v. Smith*, 76 **N. J. Eq.** 456, 74 **Atl.** 675; *Sanford v. Keer*, 80 **N. J. Eq.** 240, 40 **L. R. A. (N. S.)** 1090, 83 **Atl.** 225; *Schmidt v. Palisade Supply Co. (N. J. Eq.)*, 84 **Atl.** 807 (scheme embraces lots in tract afterward acquired by common grantor); *Henderson v. Champion*, 83 **N. J. Eq.** 554, 91 **Atl.** 332; *Winslow v. Newcomb*, 87 **N. J. Eq.** 480, 100 **Atl.** 613; *Barrow v. Richard*, 8 **Paige (N. Y.)**, 351, 35 **Am. Dec.** 713; *Tallmadge v. East River Bank*, 26 **N. Y.** 105; *Binson v. Bultman*, 3 **App. Div.** 198, 38 **N. Y. Supp.** 209; *Duester v. Alvin*, 74 **Or.** 544, 145 **Pac.** 660; *Hooper v. Lottman (Tex. Civ. App.)*, 171 **S. W.** 270; *Boyden v. Roberts*, 131 **Wis.** 659, 111 **N. W.** 701. For a collection of authorities see note, 21 **Am. St. Rep.** 489.

In the following cases the proof was insufficient to show the existence of a general building scheme; *Reid v. Bickerstaff*, [1909] 2 **Ch.** 305 (there must be definite reciprocal rights and obligations extending over a defined area); *Judd v. Robinson*, 41 **Colo.** 222, 124 **Am. St. Rep.** 128, 14 **Ann. Cas.** 1018, 92 **Pac.** 724 (no general scheme, though all lots sold in a large city contained similar anti-liquor covenants); *Webber v. Landrigan*, 215 **Mass.** 221, 102 **N. E.** 460; *Sargent v. Leonardi*, 223 **Mass.** 556, 112 **N. E.** 633 (no restriction appeared on the recorded plan of the tract, and nearly half the lots, including defendant's, were sold without restrictions); *St. Patrick's Religious, Educational & Charitable Ass'n v. Hale*, 227 **Mass.** 175, 116 **N. E.** 407 (lots conveyed with various restrictions, and some with none at all); *Doerr v. Cobbs*, 146 **Mo. App.** 342, 123 **S. W.** 547 (an instructive case); *Zinn v. Sidler*, 268 **Mo.** 680, **L. R. A.** 1917A, 455, 187 **S. W.** 1172 (covenants not implied from building line appearing on plat); *Sailer v. Podolski*, 82 **N. J. Eq.** 459, 88 **Atl.** 967 (nearly half the lots



view seems to be that the intent may be otherwise determined.<sup>17</sup>

conveyed without restrictions); *Kiley v. Hall*, 96 Ohio St. 374, 117 N. E. 359 (no intimation of the "scheme" on the recorded plats, and no actual notice thereof by the grantees. They were, therefore, not parties to the scheme, and their deeds only gave them notice that the grantor could enforce the restriction). Absolute uniformity in all the covenants is not essential to the existence of a general building scheme; especially where the location of a few of the lots renders the restriction, as to them, unnecessary: *Allen v. Barrett*, 213 Mass. 36, *Ann. Cas.* 1913E, 820, 99 N. E. 575; *Hartt v. Rueter*, 223 Mass. 207, 111 N. E. 1045; *Velie v. Richardson*, 126 Minn. 334, 148 N. W. 286 (four lots out of 128); *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369 (different building lines may be adopted for different streets); *Sanford v. Keer*, 80 N. J. Eq. 240, 40 L. R. A. (N. S.) 1090, 83 Atl. 225; *Hooper v. Lottman* (Tex. Civ. App.), 171 S. W. 270 (one plot, deeded to a water company, necessarily omitted the restrictions).

<sup>17</sup> The rules are summed up in *De Gray v. Monmouth Beach Club-house Co.*, 50 N. J. Eq. 329, 24 Atl. 388, as follows: "The action is held not to be maintainable between purchasers not parties to the original covenant, in cases in which—(1) It does not appear that the covenant was entered into to carry out some general scheme or plan for the improvement or development of the property which the act of defendant disregards in some particular. (2) It does not appear that the covenant was entered into for the benefit of the land of which complainant has become the owner. (3) It appears that the covenant was not entered into for the benefit of subsequent purchasers, but only for the benefit of the original covenantee and his next of kin. (4) It appears that the covenant has not entered into the consideration of the complainant's purchase. (5) It appears that the original plan has been abandoned without dissent, or the character of the neighborhood has so changed as to defeat the purpose of the covenant, and to thus render its enforcement unreasonable." All of the statements seem fully supported by authority, with the exception of the first. In probably the majority of the cases where injunctions have been granted there has been a general building scheme. But it will be seen that such relief has been granted where there has been no such scheme.

The modern English doctrine, in cases where there is no general building scheme, is summed up as follows: "A subsequent purchaser

§ 1697. (§ 275a.) **Action by Prior Purchaser.**—A difficulty arises where a prior purchaser of one of the lots attempts to enforce a restriction contained in the deed of a lot subsequently purchased from the common gran-

of part of the estate does not take the benefit of the covenant unless (a) he is an *express assignee of the covenant*, as distinct from assignee of the land; or (b) the restrictive covenant is *expressed* to be for the benefit and protection of the particular parcel purchased by the subsequent purchaser. . . . [In the latter case] the benefit of the covenant passes to the purchaser, whether he knew of its existence or not. It is in the nature of an easement attached to his property as the dominant tenement": *Reid v. Bickerstaff*, [1907] 2 Ch. 305, 320, by Cozens-Hardy, M. R.

In *Beals v. Case*, 138 Mass. 138, the rule was laid down as follows: "But it is always a question of intention of the parties; and, in order to make this rule applicable, it must appear from the terms of the grant, or from the situation and surrounding circumstances, that it was the intention of the grantor in inserting the restriction to create a servitude or right which should inure to the benefit of the plaintiff's land, and should be annexed to it as an appurtenance."

In the following cases the court found sufficient evidence of the intention: *Tobey v. Moore*, 130 Mass. 448; *Peck v. Conway*, 119 Mass. 546; *Bauer v. Gribbel*, 2 App. Div. 80, 37 N. Y. Supp. 609; *Electric City Land & Imp. Co. v. West Ridge Coal Co.*, 187 Pa. St. 500, 41 Atl. 458; *Muzzarelli v. Hulshizer*, 163 Pa. St. 643, 30 Atl. 291; *St. Andrew's Church's Appeal*, 67 Pa. St. (17 P. F. Smith), 512; *Clark v. Martin*, 49 Pa. St. 289; *Duncan v. Central Passenger R'y Co.*, 85 Ky. 425, 4 S. W. 228; *Morris v. Tuskaloosa Mfg. Co.*, 83 Ala. 565, 3 South. 689; *Greene v. Creighton*, 7 R. I. 1; *Phoenix Ins. Co. v. Continental Ins. Co.*, 14 Abb. Pr., N. S., 266; *Hills v. Metzger*, 173 Mass. 423, 53 N. E. 890; *Linzee v. Mixer*, 101 Mass. 512; *Coughlin v. Barker*, 46 Mo. App. 54; *Moxhay v. Inderwick*, 1 De Gex & S. 708 (not an injunction case); *In re Birmingham & D. L. Co.*, [1893] 1 Ch. 343; *Nottingham Patent Brick & Tile Co. v. Butler*, L. R. 15 Q. B. D. 268 (not an injunction case); *Meriwether v. Joy*, 85 Mo. App. 634. See, also, the following recent cases, in which there was no general building scheme but the intent was to annex the benefit of the covenant to the remaining land of the grantor, and the subsequent grantee of the whole or part of that land, therefore, was allowed to enforce the restriction: *Hartz v. Kales Realty Co.*, 178 Mich. 560, 146 N. W. 160; *Bowen v. Smith*, 76 N. J. Eq. 456, 74

tor. If the lots are embraced within a general building scheme, this is not felt to be a practical difficulty, even though the deeds are silent as to any intention on the part of the grantor to impose restrictions on future purchasers; the restrictions may be enforced by and against grantees, regardless of the order of their pur-

Atl. 675; *Wooton v. Seltzer*, 83 N. J. Eq. 163, 90 Atl. 701; *Ball v. Milliken*, 31 R. I. 36, **Ann. Cas.** 1912B, 30, 37 **L. R. A. (N. S.)** 623, 76 Atl. 789 (an instructive case, reviewing authorities; the intent may appear from the circumstances of the case; here, the land conveyed was restricted to the trade of blacksmithing, which was thought to be advantageous to the business conducted on the land retained). That a mortgagee may enforce building restrictions for the benefit of the property mortgaged, see *Stewart v. Finkelstone*, 206 Mass. 28, 138 **Am. St. Rep.** 370, 28 **L. R. A. (N. S.)** 634, 92 N. E. 37.

In the following cases it was held that the evidence of intention was not sufficiently clear to warrant an injunction: *Lowell Inst. for Sav. v. City of Lowell*, 153 Mass. 530, 27 N. E. 518; *Dana v. Wentworth*, 111 Mass. 291; *Jewell v. Lee*, 14 Allen, 145, 92 **Am. Dec.** 744; *Sharp v. Ropes*, 110 Mass. 381; *Nottingham Patent Brick & Tile Co. v. Butler*, **L. R.** 16 Q. B. D. 778 (not an injunction case); *Badger v. Boardman*, 16 Gray, 559 (not an injunction case); *Renals v. Cowlishaw*, **L. R.** 9 Ch. D. 125; *Knapp v. Hall*, 63 Hun, 624, 17 N. Y. Supp. 437; *Keates v. Lyon*, **L. R.** 4 Ch. App. 218 (not an injunction case); *Master v. Hansard*, **L. R.** 4 Ch. D. 718. In the following recent cases, also, there was no intent to annex the benefit of the restriction to the adjoining land, so that it would pass to a subsequent grantee: *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 37 **L. R. A. (N. S.)** 5, 117 Pac. 677; *Beetem v. Garrison*, 129 Md. 664, 99 Atl. 897; *Webber v. Landrigan*, 215 Mass. 221, 102 N. E. 460; *Dcerr v. Cobbs*, 146 Mo. App. 342, 123 S. W. 547; *Wright v. Pfrimmer*, 99 Neb. 447, **L. R. A.** 1917A, 323, 156 N. W. 1060; *McNichol v. Townsend*, 73 N. J. Eq. 276, 67 Atl. 938, 70 Atl. 965; *Sailer v. Podolski*, 82 N. J. Eq. 459, 88 Atl. 967.

The use of the word "heirs" in a covenant not to build without the consent of the "grantor or her heirs" has been held to indicate an intention to make the covenant personal: *Hemsley v. Marlborough Hotel Co.*, 65 N. J. Eq. 167, 55 Atl. 994. It is held that when a party whose land is subject to a restrictive covenant sells part of it without any restriction, he cannot enjoin the purchaser, although the other land owners can. The restriction on the part sold was not

chases.<sup>18</sup> If there is no general scheme, the mere fact that there is a covenant, similar to the plaintiff's, in the deed of a lot subsequently sold by the common grantor, does not give the plaintiff a right of action to enforce that covenant. There must, ordinarily, be a binding agreement made by the grantor at the time of the sale of the plaintiff's lot, to insert the restriction in the deed to the lot subsequently sold. The grantor's land thus becomes bound, in favor of the plaintiff, from the time of the first sale.<sup>19</sup>

intended to inure to the benefit of the part retained by the plaintiff: *King v. Dickeson*, L. R. 40 Ch. D. 596. In the following cases the injunction was denied because of special facts arising in the cases: *Davis v. Corporation of Liecester*, [1894] 2 Ch. 208; *Kirby v. School Board*, [1896] Ch. 437. In *Guardian of Tendring Union v. Dawton*, [1891] 3 Ch. 265, the plaintiff had a charge against land for street improvements. The land was subject to a restriction against building. The court held that the plaintiff could not sell the land free from the restriction. In *Welch v. Austin* (Mass.), 72 N. E. 972, a restriction was construed so as to limit its effect to the first house built upon the lot.

<sup>18</sup> *Sprague v. Kimball*, 213 Mass. 380, **Ann. Cas.** 1914A, 431, 45 **L. R. A. (N. S.)** 962, 100 N. E. 622; *Godley v. Weisman*, 133 Minn. 1, **L. R. A.** 1917A, 333, 157 N. W. 711, 158 N. W. 333; *Bowen v. Smith*, 76 N. J. Eq. 456, 74 Atl. 675; *Barton v. Slifer*, 72 N. J. Eq. 812, 66 Atl. 899; *Schmidt v. Palisade Supply Co.* (N. J. Eq.), 84 Atl. 807; *Barrow v. Richard*, 8 Paige (N. Y.), 351, 35 **Am. Dec.** 713, (a leading case).

<sup>19</sup> In the following cases prior purchasers of lots did not succeed in enforcing restrictions against subsequent purchasers from the common grantor; *Sprague v. Kimball*, 213 Mass. 380, **Ann. Cas.** 1914A, 431, 45 **L. R. A. (N. S.)** 962, 100 N. E. 622 (oral promise by grantor to sell remaining lot with restrictions is unavailing); *Doerr v. Cobbs*, 146 Mo. App. 342, 123 S. W. 547 (an instructive case; bare intention of grantor to make the covenant inure to benefit of all persons then or thereafter claiming under him is not enough, unless it is communicated to purchasers so as to affect them with notice when they bought); *Wright v. Pfrimmer*, 99 Neb. 447, **L. R. A.** 1917A, 323, 156 N. W. 1060 (burden is on plaintiff to show that restrictions were for benefit of his land); *Leaver v. Gorman*, 73 N. J. Eq. 129, 67 Atl.



§ 1698. (§ 276.) **Restrictions as to Use of Property.** These rules are not confined to mere restrictions as to the character or situation of buildings, but apply as well to restrictions as to their use. Very frequently it is stipulated that no intoxicating liquors shall be sold on the premises. These restrictions are sustained on the ground that a party has the right, in disposing of his property, to prevent such a use by the grantee as might diminish the value of remaining land or impair its eligibility for other uses.<sup>20</sup> Restrictions prohibiting the carrying on of any obnoxious business on the premises will be sustained upon the same ground.<sup>21</sup>

§ 1699. (§ 277.) **Restrictions Which are Enforceable.** The courts are divided on the question of what restrictions may be attached to land. It is held that a personal, as distinguished from a real, obligation, insisted upon by a grantor and assumed by a grantee, restrict-

111; *Hyman v. Tash* (N. J. Eq.), 71 Atl. 742. For instances where grantor effectively bound himself to insert covenants in later deeds, thus enabling the prior purchaser to sue the later grantee, see *Supplee v. Cohen*, 80 N. J. Eq. 83, 83 Atl. 373; *Howland v. Andrus*, 80 N. J. Eq. 276, 83 Atl. 982; and see *Wootton v. Seltzer*, 83 N. J. Eq. 163, 90 Atl. 701.

<sup>20</sup> *Jenks v. Pawlowski*, 98 Mich. 110, 39 **Am. St. Rep.** 522, 22 **L. R. A.** 863, 56 N. W. 1105; *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241; *Watrous v. Allen*, 57 Mich. 362, 58 **Am. Rep.** 363, 24 N. W. 104; *Wilson v. Hart*, **L. R.** 1 Ch. App. 463; *Sutton v. Head*, 86 Ky. 156, 9 **Am. St. Rep.** 274, 5 S. W. 410; *Carter v. Williams*, **L. R.** 9 Eq. 678; *Hall v. Solomon*, 61 Conn. 476, 29 **Am. St. Rep.** 218, 23 Atl. 876; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 **Am. Rep.** 556; *Star Brewing Co. v. Primas*, 163 Ill. 652, 45 N. E. 145; *Anderson v. Rowland*, 18 Tex. Civ. App. 460, 44 S. W. 911. See, also, *Gilmer v. Mobile & M. R. Co.*, 79 Ala. 569, 58 **Am. Rep.** 623 (citing *Pom. Eq. Jur.*, § 1342).

<sup>21</sup> *Haskell v. Wright*, 23 N. J. Eq. 389; *Brouwer v. Jones*, 23 Barb. 153. See, also, *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, **Ann. Cas.** 1912B, 450, 34 **L. R. A.** (N. S.) 730, 95 N. E. 216 (decree should merely restrain use for the forbidden purpose).

ing the use of land, may be enforced against the grantee and subsequent purchasers with notice. Thus, in New York an injunction will issue to restrain a purchaser with notice from violating an agreement not to sell sand from the land conveyed.<sup>22</sup> In Massachusetts, however, it has been held that where a grantor covenants not to open a quarry on his remaining land, an injunction will not issue against a purchaser of such remaining land.<sup>23</sup> Where such a stipulation creates an invalid restraint upon trade, equitable relief will be denied.<sup>24</sup> In Pennsylvania it is held that where a railroad company contributes money for the development of ore land and the owners agree to give all the traffic to and from the land to such company, a party acquiring title by foreclosure and taking all the benefits of the contract will be enjoined from shipping over other lines.<sup>25</sup> In Minnesota, however, it is held that an agreement to give a railroad the exclusive transportation of the products of the land does not impose an obligation which attaches to or concerns the land or its use or mode of enjoyment, and that therefore it will not be enforced in equity.<sup>26</sup>

<sup>22</sup> *Hodge v. Sloan*, 107 N. Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335.

<sup>23</sup> *Norcross v. James*, 140 Mass. 188, 2 N. E. 946. In this case the court said: "If it be asked what is the difference in principle between an easement to have land unbuilt upon, and an easement to have a quarry left unopened, the answer is, that, whether a difference of degree or of kind, the distinction is plain between a grant or covenant that looks to direct physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in the indirect way we have mentioned."

<sup>24</sup> *West Va. Trans. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 626, 46 Am. Rep. 527; *Brewer v. Marshall*, 19 N. J. Eq. 537.

<sup>25</sup> *Bald Eagle Val. R. Co. v. Nittany Val. R. Co.*, 171 Pa. St. 284, 50 Am. St. Rep. 807, 29 L. R. A. 423, 33 Atl. 239.

<sup>26</sup> *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461, 6 L. R. A. 111, 43 N. W. 469. To same effect see *Keppell v. Bayley*, 2 Mylne & K. 517.

§ 1700. (§ 278.) **Liability of Grantor.**—Where a *grantor* upon conveyance agrees with the grantee not to use his remaining land for certain specified purposes, the covenant will generally be held to be for the benefit of the land, and an injunction will be granted to restrain a breach. Thus, a covenant not to build on a common facing the land conveyed, or to fix a certain building line upon his remaining land will be enforced.<sup>27</sup> It has been held that, in case of doubt, a clause creating an equitable restriction is to be construed against the grantor.<sup>28</sup>

§ 1701. (§ 279.) **Effect of Change of Character of Neighborhood.**—The purpose of all these restrictions is to benefit certain land. When, therefore, the character of the neighborhood has so changed that the restriction is of no value to the land intended to be benefited, an injunction will be refused.<sup>29</sup> For instance, if the use of

<sup>27</sup> *Trustees etc. v. Cowen*, 4 Paige, 510, 27 **Am. Dec.** 80; *Hills v. Miller*, 3 Paige, 254, 24 **Am. Dec.** 218; *Kilpatrick v. Peshine*, 24 N. J. Eq. (9 C. E. Green) 206; *Halls v. Newbold*, 69 Md. 265, 14 Atl. 662. This last is not an injunction case, however.

<sup>28</sup> *American Unitarian Ass'n v. Minot*, 185 Mass. 589, 71 N. E. 551, and cases cited.

That restrictive covenants are to be strictly construed against the party seeking to enforce them, and will not be enforced where the right is doubtful, see *Melson v. Ormsby*, 169 Iowa, 522, 151 N. W. 817; *Wood v. Stehrer*, 119 Md. 143, 86 Atl. 128; *Maine v. Mulliken*, 176 Mich. 443, 142 N. W. 782; *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668; *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364; *Fortesque v. Carroll*, 76 N. J. Eq. 583, **Ann. Cas.** 1912A, 79, 75 Atl. 923; *Goater v. Ely*, 80 N. J. Eq. 40, 82 Atl. 611; *Meaney v. Stork*, 80 N. J. Eq. 60, 83 Atl. 492; *Howland v. Andrus*, 81 N. J. Eq. 175, 86 Atl. 391; *Camovito v. Matthews*, 82 N. J. Eq. 218, 88 Atl. 187; *Underwood v. Herman & Co.*, 82 N. J. Eq. 353, 89 Atl. 21; *Ronan v. Barr*, 82 N. J. Eq. 563, 89 Atl. 282.

<sup>29</sup> *Ewertsen v. Gerstenberg*, 186 Ill. 344, 51 **L. R. A.** 310, 57 N. E. 1051; *Jackson v. Stevenson*, 156 Mass. 496, 32 **Am. St. Rep.** 476, 31 N. E. 691; *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11; *Amerman*

land is restricted to residence purposes, it would be inequitable to enforce the covenant after the neighborhood has so changed that the adjoining property is used exclusively for business purposes. To enforce it would simply lessen the value of the property without accomplishing the purpose for which the restriction was made. Where, however, the restriction, notwithstanding the

v. Deane, 132 N. Y. 355, 28 **Am. St. Rep.** 584, 30 N. E. 741; Landell v. Hamilton, 175 Pa. St. 327, 34 **L. R. A.** 227, 34 **Atl.** 663. See, also, Trustees etc. v. Thacher, 87 N. Y. 311 (not an injunction case). In the case first cited the court laid down the rule as follows: "Equity will not, as a rule, enforce a restriction, where, by the acts of the grantor who imposed it, or of those who derived title under him, the property, and that in the vicinage, has so changed in its character and environment and in the uses to which it may be put as to make it unfit or unprofitable for use if the restriction be enforced, or where to grant the relief would be a great hardship on the owner and of no benefit to the complainant, or where the complainant has waived or abandoned the restriction; or, in short, it may be said that where, from all of the evidence, it appears that it would be against equity to enforce the restriction by injunction, relief will be denied, and the party seeking its enforcement will be left to whatever remedy he may have at law." In England it is held that change in the character of the neighborhood is ground for refusal of an injunction only where the alteration takes place through the acts or permission of the plaintiff or those under whom he claims, so that his enforcing his covenant becomes unreasonable: *Sayers v. Collyer*, **L. R.** 28 Ch. D. 103; *Duke of Bedford v. Trustees British Museum*, 2 **Mylne & K.** 552; *Osborne v. Bradley*, [1903] 2 Ch. 446.

Sections 279-281 are cited in *Guilford County v. Porter*, 167 N. C. 366, 83 S. E. 564. See the following recent cases, illustrating the rule of the text: *Sokey v. Sainsbury*, [1913] 2 Ch. 513; *Kneip v. Schroeder*, 255 Ill. 621, **Ann. Cas.** 1913D, 426, 99 N. E. 617 (building of elevated railroad has made lots undesirable for residence purposes); *Van Sant v. Rose*, 260 Ill. 401, 49 **L. R. A. (N. S.)** 186, 103 N. E. 194 (the rule refers only to a change since the covenant was originally made); *McArthur v. Hood Rubber Co.*, 221 Mass. 372, 109 N. E. 162 (restrictions removed as a cloud on title); *McClure v. Leaycraft*, 183 N. Y. 36, 5 **Ann. Cas.** 45, and note, 75 N. E. 961; *Batchelor v. Hinkle*, 210 N. Y. 243, 104 N. E. 629.



change of use of the land and buildings, is still of substantial value to the dominant lot, equity will restrain its violation.<sup>30</sup> It has been held that where an injunction would work a great hardship, damages may be awarded in lieu thereof.<sup>31</sup>

§ 1702. (§ 280.) **Complainant must Come into Court With Clean Hands—Acquiescence.**—An injunction will not be granted if the plaintiff has acted so as to make its issuance inequitable. A person who seeks to enforce such a covenant must permit no such breach of the stipulation as will frustrate all the benefit that would otherwise accrue to the other parties to the agreement. One

<sup>30</sup> *Landell v. Hamilton*, 175 Pa. St. 327, 34 L. R. A. 227, 34 Atl. 663; *Zipp v. Barker*, 55 N. Y. Supp. 246. See, also, *Turney v. Shriver*, 269 Ill. 164, 109 N. E. 708 (that the restriction prevents the most advantageous use of the lot is not a defense); *Wiegman v. Kusel*, 270 Ill. 520, 110 N. E. 884; *Evans v. Foss*, 194 Mass. 513, 11 Ann. Cas. 171, 9 L. R. A. (N. S.) 1039, 80 N. E. 587 (mere fact that there are indications of a change in future); *Codman v. Bradley*, 201 Mass. 361, 87 N. E. 591 (change in use of buildings immaterial as affecting a building line restriction, since that may be important in the case of business buildings); *Stewart v. Finkelstone*, 206 Mass. 28, 138 Am. St. Rep. 370, 28 L. R. A. (N. S.) 634, 92 N. E. 37; *Spahr v. Cape*, 143 Mo. App. 114, 122 S. W. 379 (not a defense that land is more valuable for business purposes); *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364 (same); *Fete v. Foerstel*, 159 Mo. App. 75, 139 S. W. 820 (that buildings involved are not of great value is unimportant); *Thompson v. Langan*, 172 Mo. App. 64, 154 S. W. 808; *Brown v. Huber*, 80 Ohio St. 183, 28 L. R. A. (N. S.) 705, 88 N. E. 322 (injunction if restriction is still of substantial benefit). The injunction may be granted with leave to apply for a modification if the character of the neighborhood should change: *Moore v. Curry*, 176 Mich. 456, 142 N. W. 839, quoting *Pom. Eq. Jur.*, § 1295, note; *Misch v. Lehman*, 178 Mich. 225, 144 N. W. 556.

<sup>31</sup> *Equitable Life Assur. Soc. v. Brennan*, 30 Abb. N. C. 260, 24 N. Y. Supp. 784. In *Langmaid v. Reed*, 159 Mass. 409, 34 N. E. 593, it was held that where the restriction expires by lapse of time during the pendency of injunction proceedings, damages may be awarded.

who stands by and acquiesces in repeated violations by the defendant and others cannot be heard to deny the right.<sup>32</sup> And where a party has violated the restrictions in his own deed, he cannot enjoin violations by

<sup>32</sup> *Peek v. Matthews*, L. R. 3 Eq. 515; *Knight v. Simmonds*, [1896] 2 Ch. 294; *Ewertsen v. Gerstenberg*, 186 Ill. 344, 51 L. R. A. 310, 57 N. E. 1051; *Melson v. Ormsby*, 169 Iowa, 522, 151 N. W. 817; *Loud v. Pendergast*, 206 Mass. 122, 92 N. E. 40; *Tillotson v. Gregory*, 151 Mich. 128, 114 N. W. 1025; *Hemsley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164, 50 Atl. 14; *Trout v. Lucas*, 54 N. J. Eq. 361, 35 Atl. 153; *Lignot v. Jaekle*, 72 N. J. Eq. 233, 65 Atl. 221; *Chelsea Land & Improvement Co. v. Adams*, 71 N. J. Eq. 771, 14 Ann. Cas. 758, and note, 66 Atl. 180 (two-thirds of lot owners have violated restrictions); *Leaver v. Gorman*, 73 N. J. Eq. 129, 67 Atl. 111 (but the right gained by acquiescence is no greater than what has been actually acquiesced in); *Zelman v. Kaufherr*, 76 N. J. Eq. 52, 73 Atl. 1048 (all lot owners have violated); *Sanford v. Keer*, 80 N. J. Eq. 240, 40 L. R. A. (N. S.) 1090, 83 Atl. 225; *Flint v. Charman*, 6 App. Div. 121, 39 N. Y. Supp. 892; *Moore v. Murphy*, 89 Hun, 175, 34 N. Y. Supp. 1130; *Aldrich v. Billings*, 14 R. I. 233. But where the restriction is as to the use of buildings, the right is not lost by failure to interfere with their construction: *Trustees etc. v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615. It has been held that even a grantor who sells off an estate in lots with restrictions will lose his right in equity if he permits other grantees to violate the same restrictions. The rule "rests upon the equitable ground that, if anyone who has a right to enforce the covenant, and so preserve the conditions which the covenant was designed to keep unaltered, shall acquiesce in material alterations of those conditions, he cannot thereafter ask a court of equity to assist him in preserving them. The complainant may be in privity with the defendant, and have his action at law for breach of covenant, but nevertheless in this situation a court of equity will not assist him": *Ocean City Ass'n v. Chalfant*, 65 N. J. Eq. 156, 55 Atl. 801; *Ocean City Land Co. v. Weber*, 83 N. J. Eq. 476, 91 Atl. 600; *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668. The same court has held, however, that where no general scheme of improvement is shown, it is no answer to a suit to enforce restrictions on defendant's lot to say that he has waived like restrictions elsewhere: *Haines v. Einwachter* (N. J. Eq.), 55 Atl. 38. It has been held that where there is a general building scheme, a failure to insert restrictions in a few of the deeds does

others, even though the covenant violated by the plaintiff is entirely different from that disregarded by the defendant.<sup>33</sup> But where the violations by plaintiff are

not prevent relief by others against those who do take subject to restrictions: *Frink v. Hughes*, 133 Mich. 63, 94 N. W. 601.

The question has been considered in a series of New Jersey cases. A violation of the covenant on other streets, or another part of the tract, does not affect plaintiff's rights: *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369; *Barton v. Slifer*, 72 N. J. Eq. 812, 66 Atl. 899; *Bowen v. Smith*, 76 N. J. Eq. 456, 74 Atl. 675; *Thorburn v. Morris* (N. J. Eq.), 75 Atl. 757 (scheme may be abandoned as to part of the property and retained as to the rest). A violation of the covenant on the same street, to affect plaintiff's rights, must be material, and such as to prevent the general plan relating to that street from being carried out. The materiality of the violation is to be determined by the circumstances of each case, and the question seems to be whether they are such as to indicate an abandonment of the original general plan and make its enforcement inequitable, because of the changed condition of the property under restriction: *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369; *Waters v. Collins* (N. J. Eq.), 70 Atl. 984; *Newbery v. Barkalow*, 75 N. J. Eq. 128, 71 Atl. 752 (acquiescence in trivial violations is not a general abandonment). The claim of acquiescence must be measured by the relation of the asserted violation to the individual lot: *Brigham v. H. G. Mulock Co.*, 74 N. J. Eq. 287, 70 Atl. 185; *Bowen v. Smith*, 76 N. J. Eq. 456, 74 Atl. 675. Where the restriction relates to the character or location of the building itself, the passive acquiescence of a purchaser in breaches of the covenant by which he sustains no particular injury does not deprive him of his equity to protection where the breach in question immediately affects his enjoyment of his own house: *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369 (slight projection beyond building line, in second stories); *Winslow v. Newcomb*, 87 N. J. Eq. 480, 100 Atl. 613 (same). A prohibited use of houses, of which plaintiff was ignorant, is not ground for refusal of relief: *Lignot v. Jaekle*, 72 N. J. Eq. 233, 65 Atl. 221.

<sup>33</sup> *Alvord v. Fletcher*, 28 App. Div. 493, 51 N. Y. Supp. 117; *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11. Instances where plaintiffs have violated the same restriction: *Curtis v. Rubin*, 244 Ill. 88, 135 Am. St. Rep. 307, 91 N. E. 84; *Kneip v. Schroeder*, 255 Ill. 621, Ann. Cas. 1913D, 426, 99 N. E. 617; *Loomis v. Collins*, 272 Ill. 221, 111

not substantial, and violations by other parties have been in places remote from plaintiff's lot, an injunction will not be denied.<sup>34</sup> Of course the injured party must make prompt application for relief, and must not knowingly permit money to be expended without taking any action.<sup>35</sup>

N. E. 999; *Loud v. Pendergast*, 206 Mass. 122, 92 N. E. 40; *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668; *Smith v. Spencer*, 81 N. J. Eq. 389, 87 Atl. 158.

<sup>34</sup> *McGuire v. Caskey*, 62 Ohio St. 419, 57 N. E. 53; *German v. Chapman*, L. R. 7 Ch. D. 271; *Richards v. Revitt*, L. R. 7 Ch. D. 224; *Lloyd v. London etc. R. Co.*, 2 De Gex, J. & S. 568; *Western v. Macdermott*, L. R. 2 Ch. App. 72.

Instances where plaintiff's failure to object to violations by other parties did not amount to a waiver as against defendant: *Alderson v. Cutting*, 163 Cal. 503, **Ann. Cas.** 1914A, 1, 126 Pac. 157 (violations caused no injury to plaintiff); *Codman v. Bradley*, 201 Mass. 361, 87 N. E. 591; *Schadt v. Brill*, 173 Mich. 647, 45 L. R. A. (N. S.) 726, 139 N. W. 878 (the violations did not affect plaintiff); *Misch v. Lehman*, 178 Mich. 225, 144 N. W. 556 (prior breaches had not resulted in any substantial change in character of the neighborhood); *Stewart v. Stark*, 181 Mich. 408, 148 N. W. 393 (only a few violations); *Thompson v. Langan*, 172 Mo. App. 64, 154 S. W. 808 (same); *Miller v. Klein*, 177 Mo. App. 557, 160 S. W. 562 (no proof of knowledge on plaintiff's part).

Instances of slight infractions of the restrictions by plaintiff, not barring him from relief: *Stewart v. Finkelstone*, 206 Mass. 28, 138 **Am. St. Rep.** 370, 28 L. R. A. (N. S.) 634, 92 N. E. 37 (plaintiff's infractions acquiesced in for forty years); *Godley v. Weisman*, 133 Minn. 1, L. R. A. 1917A, 333, 157 N. W. 711, 158 N. W. 333 (plaintiff's porch extends over building line); *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369 (same); *Hyman v. Tash* (N. J. Eq.), 71 Atl. 742; *Newbery v. Barkalow*, 75 N. J. Eq. 128, 71 Atl. 752; *Howland v. Andrus*, 80 N. J. Eq. 276, 83 Atl. 982 (plaintiff's porch over building line).

<sup>35</sup> *Hemsley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164, 50 Atl. 14; *Trout v. Lucas*, 54 N. J. Eq. 361, 35 Atl. 153; *Ocean City Ass'n v. Schurch*, 57 N. J. Eq. 268, 41 Atl. 914. In *Coles v. Sims*, 5 De Gex, M. & G. 1, it was held that it is not necessary to bring suit as soon as the work is started. It is sufficient if notice of the right is given and suit is brought within a reasonable time.



§ 1703. (§ 281.) **Remedy Independent of Amount of Injury.**—"The injunction in this class of cases is granted almost as a matter of course upon a breach of the covenant. The amount of damages, and even the fact that the plaintiff has sustained any pecuniary damages, are wholly immaterial. In the words of one of the ablest of modern equity judges: 'It is clearly established by authority that there is sufficient to justify the court interfering, if there has been a breach of the covenant. It is not for the court, but for the plaintiffs, to estimate the amount of damages that arises from the injury inflicted upon them. The moment the court finds that

Instances where plaintiff was guilty of laches, because he made no complaint until the building was completed: *Union Trust & Realty Co. v. Best*, 160 Cal. 263, 116 Pac. 737; *Loud v. Pendergast*, 206 Mass. 122, 92 N. E. 40; *Meaney v. Stork*, 80 N. J. Eq. 60, 83 Atl. 492; *Smith v. Spencer*, 81 N. J. Eq. 389, 87 Atl. 158; *Bridgewater v. Ocean City Ass'n*, 85 N. J. Eq. 379, 96 Atl. 905; *Winslow v. Newcomb*, 87 N. J. Eq. 480, 100 Atl. 613; *Da Gama v. D'Aquila* (N. J. Eq.), 101 Atl. 1028. Further instance of laches: *Stott v. Avery*, 156 Mich. 674, 121 N. W. 825. In the following cases there was no laches: *Goater v. Ely*, 80 N. J. Eq. 40, 82 Atl. 611; *Lignot v. Jaekle*, 72 N. J. Eq. 233, 65 Atl. 221; *Howland v. Andrus*, 80 N. J. Eq. 276, 83 Atl. 982; *Hooper v. Lottman* (Tex. Civ. App.), 171 S. W. 270. Laches excused by plaintiff's ignorance of defendant's violation: *Codman v. Bradley*, 201 Mass. 361, 87 N. E. 591 (work on defendant's lot was hidden from public view); *Stewart v. Finkelstone*, 206 Mass. 28, 138 Am. St. Rep. 370, 28 L. R. A. (N. S.) 634, 92 N. E. 37; *Sayles v. Hall*, 210 Mass. 281, Ann. Cas. 1912D, 475, 41 L. R. A. (N. S.) 625, 96 N. E. 712 (defendant kept a private boarding-house, without signs or advertisements); *Barton v. Slifer*, 72 N. J. Eq. 812, 66 Atl. 899 (plaintiff a nonresident). Laches excused by pendency of another's suit against the defendant relative to the same covenants: *Daly v. Foss*, 199 Mass. 104, 85 N. E. 94. The fact that plaintiff permits the defendant to violate one restriction does not estop him from enforcing others: *Davison v. Taylor*, 196 Mich. 605, 162 N. W. 1033. That promptness in bringing suit is not dispensed with by merely giving notice, see *Island Heights Ass'n v. Island Heights Water etc. Co.* (N. J. Eq.), 62 Atl. 773; *Ocean City Ass'n v. Headley*, 62 N. J. Eq. 322, 338, 50 Atl. 78.

there has been a breach of the covenant, that is an injury, and the court has no right to measure it, and no right to refuse to the plaintiff the specific performance of his contract, although his remedy is that which I have described,' namely an injunction."<sup>36</sup>

§ 1704. (§ 282.) **Actual Notice not Necessary.**—It is not necessary that a party, to be bound by such restrictions, should have actual notice. Constructive notice is sufficient, and the ordinary rules as to that subject

<sup>36</sup> See Pom. Eq. Jur., § 1342, and note, quoting Sir George Jessel, M. R., in *Leech v. Schweder*, L. R. 9 Ch. 463. This paragraph is quoted in *Joseph Schlitz Brewing Co. v. Nielsen*, 77 Neb. 868, 8 L. R. A. (N. S.) 494, 110 N. W. 746; *Van Sant v. Rose*, 260 Ill. 401, 49 L. R. A. (N. S.) 186, 103 N. E. 194; *Melson v. Ormsby*, 169 Iowa, 522, 151 N. W. 817; *Guilford County v. Porter*, 167 N. C. 366, 83 S. E. 564; *Spilling v. Hutcheson*, 111 Va. 179, 68 S. E. 250; and cited in *Longton v. Stedman*, 182 Mich. 405, 148 N. W. 738; *Pope-Turnbo v. Bedford*, 147 Mo. App. 692, 127 S. W. 426; *Brown v. Huber*, 80 Ohio St. 183, 28 L. R. A. (N. S.) 705, 88 N. E. 322; *Kelly v. Mosby*, 34 Okl. 218, 124 Pac. 984; *Woods v. Lowrance*, 49 Tex. Civ. App. 542, 109 S. W. 418; *Boyden v. Roberts*, 131 Wis. 659, 111 N. W. 701. To the same effect, see *Kilpatrick v. Peshine*, 24 N. J. Eq. (9 C. E. Green) 206; *St. Andrew's Church's Appeal*, 67 Pa. St. (17 P. F. Smith) 512; *Walker v. McNulty*, 19 Misc. Rep. 701, 45 N. Y. Supp. 42; *Osborne v. Bradley*, [1903] 2 Ch. 446. See, also, these recent cases: *Hartman v. Wells*, 257 Ill. 167, *Ann. Cas.* 1914A, 901, 100 N. E. 500; *Stewart v. Finkelstone*, 206 Mass. 28, 138 *Am. St. Rep.* 370, 28 L. R. A. (N. S.) 634, 92 N. E. 37 (comparative injury doctrine does not apply); *Tolsma v. James E. Scripps Corp.*, 153 Mich. 14, 116 N. W. 622; *Kenwood Land Co. v. Hancock Inv. Co.*, 169 Mo. App. 715, 155 S. W. 861; *Miller v. Klein*, 177 Mo. App. 557, 160 S. W. 562; *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369; *Lignot v. Jaekle*, 72 N. J. Eq. 233, 65 Atl. 221; *Goater v. Ely*, 80 N. J. Eq. 40, 82 Atl. 611; *Supplee v. Cohen*, 80 N. J. Eq. 83, 83 Atl. 373; *Smith v. Spencer*, 81 N. J. Eq. 389, 87 Atl. 158 (encroachment of fifteen inches). Compare *Loomis v. Collins*, 272 Ill. 221, 111 N. E. 999 (while absence of damage to plaintiff and cost to defendant is not a defense if plaintiff's right is clear, it is otherwise if the right is doubtful).

apply.<sup>37</sup> It is sufficient if the notice is contained in the chain of title. It has been held that the notice consisting of knowledge that all buildings erected on certain property have been placed on a certain line is sufficient.<sup>38</sup> The covenants are not binding, however, on one who takes without notice.<sup>39</sup>

§ 1705. (§ 283.) **Mandatory Injunctions.**—Where a party knowingly, and against remonstrances, builds in violation of restrictive covenants, a mandatory injunction may issue to compel the removal of such portions of the building as are in violation thereof. And in such a case it is no answer that the violation is slight.<sup>40</sup> If

<sup>37</sup> *Lowes v. Carter*, 124 Md. 678, 93 Atl. 216; *Whitney v. Union R'y Co.*, 11 Gray, 359, 71 Am. Dec. 715; *Allen v. Barrett*, 213 Mass. 36, Ann. Cas. 1913E, 820, 99 N. E. 575; *Riley v. Barron*, 227 Mass. 325, 116 N. E. 473; *Schadt v. Brill*, 173 Mich. 647, 139 N. W. 878; *Hartz v. Kales Realty Co.*, 178 Mich. 560, 146 N. W. 160; *Miller v. Klein*, 177 Mo. App. 557, 160 S. W. 562; *Cornish v. Wiessman*, 56 N. J. Eq. 610, 35 Atl. 408; *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369; *Bowen v. Smith*, 76 N. J. Eq. 456, 74 Atl. 675; *Howland v. Andrus*, 80 N. J. Eq. 276, 83 Atl. 982; *Wootton v. Seltzer*, 83 N. J. 163, 90 Atl. 701; *Flynn v. New York, W. & B. R'y Co.*, 218 N. Y. 140, Ann. Cas. 1918B, 588, 112 N. E. 913; *Boyden v. Roberts*, 131 Wis. 659, 111 N. W. 701. If the restriction is contained in an instrument which is not entitled to record, the record thereof, of course, is not constructive notice: *Sjoblom v. Mark*, 103 Minn. 193, 14 Ann. Cas. 125, 15 L. R. A. (N. S.) 1129, 114 N. W. 746. See 2 Pom. Eq. Jur., § 689.

<sup>38</sup> *Tallmadge v. East River Bank*, 26 N. Y. 105. The restrictions need not be in the deeds where purchasers have notice: *Allen v. Detroit*, 167 Mich. 464, 36 L. R. A. (N. S.) 890, 133 N. W. 317.

<sup>39</sup> *Atlantic City v. New Auditorium Pier Co.* (N. J. Eq.), 59 Atl. 159; *Lambrecht v. Gramlich*, 187 Mich. 251, 153 N. W. 834; *Williams v. Lawson*, 188 Mich. 88, 153 N. W. 1080; *Casterton v. Plotkin*, 188 Mich. 333, 154 N. W. 151.

<sup>40</sup> *Attorney-General v. Algonquin Club*, 153 Mass. 447, 11 L. R. A. 500, 27 N. E. 2. In general, see *Hartman v. Wells*, 257 Ill. 167, Ann. Cas. 1914A, 901, 100 N. E. 500; *Turney v. Shriver*, 269 Ill. 164, 109 N. E. 708 (building constructed pending suit); *Codman v. Brad-*

such relief were not allowed, something not much short of a right would be gained by stoutly asserting an invalid claim. But a mandatory injunction will not issue if the plaintiff's rights are not clear or if it is not clear that the building violates the restriction.<sup>41</sup>

§ 1706. (§ 284.) **Extension of the Doctrine—Application to Personal Property.**—An interesting extension of the doctrine is found in the case of *Lewis v. Gollner*.<sup>42</sup> Gollner, who owned a city lot upon which he intended to build flats, sold to neighbors and agreed not to erect such buildings in the vicinity. He then purchased a lot across the street, commenced to build a flat, and conveyed to his wife when suit was threatened. It was held that the restriction applied as soon as the land was purchased by the covenantor, and that the wife would be enjoined from violating because she took with notice.

ley, 201 Mass. 361, 87 N. E. 591 (where defendants acted with knowledge of the restriction); *Maine v. Mulliken*, 176 Mich. 443, 142 N. W. 782; *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369; *Hemsley v. Marlborough House Co.*, 68 N. J. Eq. 596, 61 Atl. 455; *Supplee v. Cohen*, 80 N. J. Eq. 83, 83 Atl. 373; *Spilling v. Hutcheson*, 111 Va. 179, 68 S. E. 250.

<sup>41</sup> *Gatzmer v. German Roman Catholic etc. Asylum*, 147 Pa. St. 313, 23 Atl. 452; *Bowes v. Law*, L. R. 9 Eq. 636. That application for a mandatory injunction must be made promptly, see *ante*, § 280, note, and *Kenwood Land Co. v. Hancock Inv. Co.*, 169 Mo. App. 715, 155 S. W. 861 (in lieu of mandatory injunction, objectionable use of building restrained); *Hemsley v. Marlborough House Co.*, 68 N. J. Eq. 596, 61 Atl. 455 (injury slight, and breach accidental); *Zelman v. Kaufherr*, 76 N. J. Eq. 52, 73 Atl. 1048; *Bullitt v. Hinchman*, 227 Pa. St. 197, 75 Atl. 1080. Where defendant himself did not commit the breach, but was merely the involuntary assignee of property on which the breach had been committed, a mandatory injunction was refused, in *Powell v. Helmsley*, [1909] 2 Ch. 252, affirming [1909] 1 Ch. 680.

<sup>42</sup> *Lewis v. Gollner*, 129 N. Y. 227, 26 Am. St. Rep. 516, 29 N. E. 81. See, also, *Schmidt v. Palisade Supply Co.* (N. J. Eq.), 84 Atl. 807.



It will be observed that the restriction was applied to after-acquired property.

In New York, in at least one case, the doctrine of restrictive covenants has been extended to personal property. A press company agreed with plaintiff's predecessor that it would not sell to anyone else a press upon which strip tickets could be printed. The company, in violation of its agreement, sold such a press to the defendant, who had full notice. It was held that an injunction should issue against user of the press by the defendant, but that the press company should be made a party defendant. The party purchasing under such circumstances takes the property burdened with the contracts made by its owner in reference thereto and which he had the power to make.<sup>43</sup>

§ 1707. (§ 285.) **Injunctions Against Breaches of Covenants Between Landlord and Tenant.**—Injunctions are granted with great freedom to restrain breaches of covenants between landlord and tenant. Where a lease stipulates that the premises are not to be used for certain purposes, or are to be used only for certain purposes, or are to be subject to certain restrictions, an injunction will issue at suit of the lessor to restrain a breach.<sup>44</sup> This jurisdiction is based upon the covenant,

<sup>43</sup> *New York Bank Note Co. v. Hamilton Bank Note Co.*, 83 Hun, 593, 31 N. Y. Supp. 1060.

<sup>44</sup> *De Wilton v. Saxon*, 6 Ves. 106; *Drury v. Molins*, 6 Ves. 328; *Gillian v. Norton*, 33 How. Pr. 373; *Maddox v. White*, 4 Md. 72, 59 Am. Dec. 67 (see note to this case in 59 Am. Dec.); *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 183, 58 N. E. 576; *Kraft v. Welch*, 112 Iowa, 695, 84 N. W. 908; *Mander v. Falke*, [1891] 2 Ch. 554; *Steward v. Winters*, 4 Sand. Ch. 628; *Bryden v. Northrup*, 58 Ill. App. 233; *Dodge v. Lambert*, 2 Bosw. 570; *Frank v. Brunneman*, 8 W. Va. 462. In this last case the court held that a court of equity will, in a proper case, grant an injunction to restrain the tenant from doing a certain act, whether it amounts to waste or not, provided it be directly contrary to the tenant's own covenant, or even

and is entirely independent of the question whether the acts complained of amount to waste. It will be observed, also, that the courts do not confine the relief strictly to negative covenants.<sup>45</sup> If the agreement is necessarily exclusive the injunction will issue. The grounds upon which the jurisdiction rests are the inadequacy of the legal remedy and the prevention of multiplicity of suits. If the lessor were obliged to depend upon his remedy at law, he would have difficulty in securing a proper estimate of damages, and besides, he would be obliged to bring suits every few days. It is not necessary that substantial damages be proved.<sup>46</sup>

in contravention of an agreement which may be inferred from the course of dealing between the parties. See, also, *Nicholson v. Rose*, 4 De Gex & J. 10; *Clements v. Welles*, L. R. 1 Eq. 200. Recent cases are: *Sharum v. Whitehead Coal Mining Co.*, 223 Fed. 282, 138 C. C. A. 524; *Chamberlain v. Brown*, 141 Iowa, 540, 120 N. W. 334; *Dycus v. Traders' Bank & Trust Co.*, 52 Tex. Civ. App. 175, 113 S. W. 329. To the effect that the right to relief may be lost by laches, see *Barret v. Blagrove*, 6 Ves. 104; by acquiescence and estoppel, see *Beebe v. Tyra*, 49 Wash. 157, 94 Pac. 940.

<sup>45</sup> *Kraft v. Welch*, 112 Iowa, 695, 84 N. W. 908. In the following cases injunction issued, though there was no negative language in the covenant: *Sharum v. Whitehead Coal Mining Co.*, 223 Fed. 282, 138 C. C. A. 524 (contract for prospecting and mining coal implied that land should not be used for storing coal mined on other property); *Gale v. McCullough*, 118 Md. 287, 84 Atl. 469 (covenant for surrender at end of term in same good condition as when received, injunction against permitting a thoroughfare to be opened across the land); *Krull v. Rose*, 88 Neb. 651, 130 N. W. 271 (covenant that all improvements made by tenant shall remain on the land, injunction against removing them at the end of the term). But that injunction is not a matter of course, by the English rule, where the covenant is not negative in form, see *Harris v. Boots, etc., Ltd.*, [1904] 2 Ch. 376 (covenant by assignee of lease to perform and observe the negative covenants in the lease, is not itself negative, within the rule).

<sup>46</sup> *Sharum v. Whitehead Coal Mining Co.*, 223 Fed. 282, 138 C. C. A. 524; *Oliphant v. Richman*, 67 N. J. Eq. 280, 59 Atl. 241; *Dycus v. Traders' Bank & Trust Co.*, 52 Tex. Civ. App. 175, 113

The lessor is entitled to have the covenant performed, and he must be the one to decide if he is damaged. It has been held, however, that an injunction will not issue to restrain a lessee from subletting in violation of covenant, where the lease provides for re-entry, for the remedy at law is said to be adequate.<sup>47</sup>

The lessor is allowed an injunction when the lessee fails to keep open a private gangway, in violation of covenant, or where the lessee interferes with the lessor's rights under the lease to enter upon or use the demised premises.<sup>48</sup> Thus, relief will be granted when the lessee refuses to allow the lessor to enter to plow the land, or to post "to let" signs, when the lease expressly permits.<sup>49</sup> It is also held that the lessor may enjoin a

S. W. 329. In *Consolidated Coal Co. v. Schmisser*, 135 Ill. 371, 25 N. E. 795, it was held that no damage need be shown if the covenant is express. Where it is implied, substantial injury must be shown. "The party not having seen fit to expressly stipulate against the act in his contract, a court of equity will not by implication insert it, and then enforce it, unless substantial injury is thereby to be prevented." This rule was followed in *Carlson v. Koerner*, 226 Ill. 15, 80 N. E. 562. Compare 2 Ill. L. Rev. 235, criticising these decisions; and 1 Ill. Law Bulletin, 121 *et seq.*, by the present author. See, also, *McEacharn v. Colton*, [1902] App. Cas. (Priv. Coun.) 104, citing *Doherty v. Allman*, 3 App. Cas. 719 (covenant by lessee not to assign lease without consent of lessor). In *Campau v. National Film Co.*, 159 Mich. 169, 123 N. W. 606, injunction against the prohibited use of the premises was refused where the injury was slight and the lessor had tacitly encouraged such use.

<sup>47</sup> *Gillian v. Norton*, 33 How. Pr. 373. In *Brown v. Niles*, 165 Mass. 276, 43 N. E. 90, it was intimated that where there is a right to terminate the lease for breach of a covenant, an injunction will be refused.

<sup>48</sup> *Beckwith v. Howard*, 6 R. I. 1; *State Bank of Nebraska v. Rohren*, 55 Neb. 223, 75 N. W. 543; *United States Trust Co. v. O'Brien*, 61 N. Y. Super. Ct. (29 Jones & S.) 1, 18 N. Y. Supp. 798.

<sup>49</sup> *State Bank of Nebraska v. Rohren*, 55 Neb. 223, 75 N. W. 543; *United States Trust Co. v. O'Brien*, 61 N. Y. Super. Ct. (29 Jones & S.) 1, 18 N. Y. Supp. 798.

lessee who has covenanted not to sell any beer on the premises except that furnished by the plaintiff.<sup>50</sup> And it is held that such a covenant may be enforced at the suit of a brewing company, not a party to the contract, but its beneficiary.<sup>51</sup> In some states an insolvent lessee will be restrained from disposing of property subject to a landlord's lien.<sup>52</sup> In England it is held that where a lessee builds in violation of a covenant, the lessor may have a mandatory injunction.<sup>53</sup>

§ 1708. (§ 286.) **Same — Rights of Lessee.**—On the other hand, the lessee is frequently allowed an injunction against his lessor. If the lessor covenants as to the use of his remaining land, the lessee may enjoin him from committing a breach.<sup>54</sup> He may also enjoin any act by the lessor which will make the lease useless or

<sup>50</sup> *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145; *In re Consumers' Albany Brewing Co.*, 224 Fed. 235; *Joseph Schlitz Brewing Co. v. Nielsen*, 77 Neb. 868, 8 L. R. A. (N. S.) 494, 110 N. W. 746. In *Luker v. Dennis*, L. R. 7 Ch. 227, the lessee was restrained from selling beer at another public house owned by a different landlord, in violation of a covenant with the first landlord. See, also, *Clegg v. Hands*, L. R. 44 Ch. D. 503; *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 341; *Manchester Brewing Co. v. Coombs*, [1901] 2 Ch. 608 (covenant by lessee to purchase all his beer of the lessor or "his successors in business," enforced by the latter). But see *Voigt Brewery Co. v. Holtz*, 168 Mich. 352, 134 N. W. 19.

<sup>51</sup> *Ferris v. American Brewing Co.*, 155 Ind. 539, 52 L. R. A. 305, 58 N. E. 701.

<sup>52</sup> *Gray v. Bremer & Strother*, 122 Iowa, 110, 97 N. W. 991; *Wallin v. Murphy*, 117 Iowa, 640, 91 N. W. 930.

<sup>53</sup> *Wood v. Cooper*, [1894] 3 Ch. 671.

<sup>54</sup> *Neiman v. Butler*, 46 N. Y. St. Rep. 928, 19 N. Y. Supp. 403; *Rankin v. Huskisson*, 4 Sim. 13; *Hovnanian v. Bedessern*, 63 Ill. App. 353. But that a covenant not to "let" other parts of a building for a business similar to lessee's does not include an agreement not to "use" for such purpose, see *Brigg v. Thornton*, [1904] 1 Ch. 386 (lessor enjoined, but not the rival lessee), citing *Kemp v. Bird*, L. R. 5 Ch. D. 974.



of less value. Thus, where the lessor has agreed to furnish water or power, he may be enjoined from cutting it off.<sup>55</sup> Likewise, he may be enjoined from pulling down the building for the purpose of erecting a new one or of adding to the old.<sup>56</sup> In these cases the courts will not consider the relative inconvenience to the parties. Although the construction of an expensive building may be indefinitely postponed as the result of an injunction issued at the suit of a party renting only a few rooms, still, if the suit is brought before the building is completed or substantially started, relief will not be denied. The principle is that a wrong-doer should not be allowed to compel an innocent party to sell at a valuation. After the completion, however, a mandatory injunction will

<sup>55</sup> *Hendricks v. Hughes*, 117 Ala. 591, 23 South. 637; *Brauns v. Glesige*, 130 Ind. 167, 29 N. E. 1061; *Traitel Marble Co. v. Chase*, 35 Misc. Rep. 233, 71 N. Y. Supp. 628.

For instances of relief against interference in general, see *Ingle v. Bottoms*, 160 Ind. 73, 66 N. E. 160; *Foster v. Roseberry* (Tex. Civ. App.), 78 S. W. 701 (against insolvent landlord). See, also, the following recent cases: *Halla v. Rogers*, 176 Fed. 709, 34 L. R. A. (N. S.) 120, 100 C. C. A. 263 (against interfering with possession of lessee of mine for a reasonable time after the expiration of the lease, where lessor has prevented removal of minerals during the term of the lease); *Ashe-Carson Co. v. Bonifay*, 147 Ala. 376, 41 South. 816 (relief denied because lessee had violated lease in relation to the same subject-matter); *Morris v. Iden*, 23 Cal. App. 388, 138 Pac. 120 (lessor threatened to sell off cattle leased with dairy farm); *Foor v. Edwards*, 45 Ind. App. 259, 90 N. E. 785 (lessor permits nuisance in another part of the building, causing loss of business to lessee); *Huffman v. Cooley*, 28 S. D. 475, 134 N. W. 49; *Silver v. Washington Inv. Co.*, 65 Wash. 541, 118 Pac. 748 (obstructing access). Injunction by lessee in oil or gas lease against taking of oil and gas by a subsequent adverse lessee: *Lindlay v. Raydure*, 239 Fed. 928; *Douney v. Gooch*, 240 Fed. 527; *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188, 86 N. E. 219.

<sup>56</sup> *Brande v. Grace*, 154 Mass. 210, 31 N. E. 633; *Lynch v. Union Inst. for Savings*, 158 Mass. 394, 33 N. E. 603; *Proskey v. Cumberland Realty Co.*, 35 Misc. Rep. 50, 70 N. Y. Supp. 1125.

not issue to compel removal.<sup>57</sup> Where a party has leased a building to be constructed according to certain plans, he may enjoin a construction under other plans which will deprive him of the benefit for which he has contracted.<sup>58</sup> It is held that where a large building is rented, according to a general scheme, for residence purposes, a lessee may enjoin the lessor from using it for other purposes.<sup>59</sup> A lessee who is to take possession in the future cannot, however, enjoin future interference by one who purchases with notice.<sup>60</sup>

§ 1709. (§ 287.) **Same—Rights of Sub-tenant.**—Where a lessee has contracted with third persons in regard to the use of the premises, as where the lessee of a trotting park gives a sign privilege, or where a hotel lessee gives an exclusive right to a telegraph company, such person may enjoin a breach.<sup>61</sup> In such cases it is immaterial that the lease prohibits the acts.

§ 1710. (§ 288.) **Contracts for Personal Services of Special Character.**—“Where a contract stipulates for special, unique or extraordinary personal services or acts, or for such services or acts to be rendered or done by a party having special, unique, and extraordinary qualifications,—as, for example, by an eminent actor, singer, artist, and the like,—it is plain that the remedy

<sup>57</sup> *Brande v. Grace*, 154 Mass. 210, 31 N. E. 633; *Hessler v. Schaffer*, 20 Misc. Rep. 645, 46 N. Y. Supp. 1076.

<sup>58</sup> *Backes v. Curran*, 69 App. Div. 188, 74 N. Y. Supp. 723.

<sup>59</sup> *Hudson v. Cripps*, [1896] 1 Ch. 265. And where a covenant, against carrying on a trade, purports to bind the lessor, his heirs, executors and administrators, it may be enforced against his other lessees: *Holloway Bros., Ltd., v. Hill*, [1902] 2 Ch. 612, citing *Johnstone v. Hall*, 2 Kay & J. 414, *Wilson v. Hart*, L. R. 1 Ch. 463, and *Feilden v. Slater*, L. R. 7 Eq. 523.

<sup>60</sup> *Forbes v. Carl* (Iowa), 101 N. W. 100.

<sup>61</sup> *Willoughby v. Lawrence*, 116 Ill. 11, 56 Am. Rep. 758, 4 N. E. 356; *Western Union Tel. Co. v. Rogers*, 42 N. J. Eq. 311, 11 Atl. 13.

at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same or the same kind of services or acts elsewhere, or by employing any other person.<sup>62</sup> It is, however, a familiar doctrine that a court of equity will not exercise its jurisdiction to grant the remedy of an *affirmative* specific performance, however inadequate may be the remedy of damages, whenever the contract is of such a nature that the decree for its specific performance cannot be enforced and its obedience compelled by the ordinary processes of the court. A specific performance in such cases is said to be impossible; and contracts stipulating for personal acts have been regarded as the most familiar illustrations of this doctrine, since the court cannot in any direct manner compel an actor to act, a singer to sing, or an artist to paint.<sup>63</sup> Applying the same course of reasoning, the English courts formerly held that they could not *negatively* enforce the specific performance of such contracts by means of an injunction restraining their violation.<sup>64</sup> Those courts have, however, entirely receded from this latter conclusion. The rule, [as late as 1891], appeared to be firmly estab-

<sup>62</sup> The text is quoted in *Hammond v. Georgian Co.*, 133 Ga. 1, 65 S. E. 124; *McCall Co. v. Wright*, 198 N. Y. 143, 31 L. R. A. (N. S.) 249, 91 N. E. 516. Pom. Eq. Jur., § 1343, is cited to this effect in *Cain v. Garner*, 169 Ky. 633, *Ann. Cas.* 1918B, 824, L. R. A. 1916E, 682, 185 S. W. 122 (jockey); *Rosenstein v. Zentz*, 118 Md. 564, 44 L. R. A. (N. S.) 63, 85 Atl. 675 (services of piano salesman not extraordinary). Section 288 is cited, generally, in *Indiana Mfg. Co. v. Nichols & Shepard Co.*, 190 Fed. 579.

<sup>63</sup> The text is cited to this effect in *New Idea Pattern Co. v. Whitner*, 215 Pa. St. 193, 64 Atl. 518.

<sup>64</sup> 4 Pom. Eq. Jur., § 1343; citing *Kemble v. Kean*, 6 Sim. 333; *Kimberley v. Jennings*, 6 Sim. 340. These cases were expressly overruled by *Lumley v. Wagner*, but have a considerable following in the earlier American cases; see, for example, *Sanquirico v. Benedetti*, 1 Barb. 315.

lished in England that the violation of such contracts may be restrained by injunction, whenever the legal remedy of damages would be inadequate, and the contract is of such a nature that its negative specific enforcement is possible'';<sup>65</sup> and as so formulated, the rule is now generally accepted and applied in this country.

§ 1711. (§ 289.) **Same; Lumley v. Wagner—Whether Stipulation must be Expressly Negative in Form.**—The leading case on the subject is *Lumley v. Wagner* (1852).<sup>66</sup> In that case a famous "prima donna" agreed to sing in the complainant's opera-house for a certain time and not to sing for anyone else during that time. The court held that the services were of such a character that damages would be inadequate, and that therefore an injunction was proper to restrain the defendant, from singing elsewhere. The opinion of Lord Chancellor St. Leonards fully reviews the previous authorities, and has been generally accepted, both in England and in this country, upon a similar state of facts. The most frequent application has been in cases of actors and actresses of established reputation.<sup>67</sup> Contracts

<sup>65</sup> 4 Pom. Eq. Jur., § 1343. For the recent restriction of the rule in England, see the next section. The stipulation on the defendant's part, express or, it may be, implied, not to engage in an employment inconsistent with his contract obligation to the defendant, is freely enforced by injunction, notwithstanding that the complainant's obligation is frequently of a character incapable of enforcement by the processes of a court of equity: See *ante*, § 270, notes. For the bearing of these cases on the doctrine as to mutuality of remedy, in the law of specific performance, see *post*, Vol. II, chapter on Specific Performance.

<sup>66</sup> 1 De Gex, M. & G. 604.

<sup>67</sup> *Daly v. Smith*, 38 N. Y. Super. Ct. 158; *Hayes v. Willis*, 11 Abb. Pr., N. S., 167; *McCaull v. Braham*, 16 Fed. 37; *Canary v. Russell*, 9 Misc. Rep. 558, 30 N. Y. Supp. 122; *Comstock v. Lopokowa*, 190 Fed. 599 (Russian dancers). See as to preliminary injunction, *Hammerstein v. Tetrizzini*, 183 Fed. 670. See *contra*, *Sanquirico v. Benedetti*, 1 Barb. 315.



for their services often stipulate that they shall not perform elsewhere during their engagement with a particular manager. Their services being extraordinary and special, an injunction is generally granted against the breach of such a stipulation. It will likewise be granted when an artist agrees to work for the complainant and for no one else.<sup>68</sup> Miscellaneous cases will be found in the note. Upon the question whether the negative covenant must be express in order to warrant an injunction, there is now a direct conflict of opinion. In England it was formerly (1873) held that a negative would be implied in cases of this kind, and that the implied covenant would be enforced by injunction.<sup>69</sup> Later (1891) it was held that a negative will not be implied even where the defendant has agreed to give the "whole of his time" to the complainant's business; and the case last referred to was expressly overruled.<sup>70</sup> This late restriction of

<sup>68</sup> *Fredericks v. Mayer*, 13 How. Pr. 566 (*dictum*).

Miscellaneous.—In *Morris v. Colman*, 18 Ves. 436, a playwright was enjoined from writing for another theater in violation of contract. In *Philadelphia Ball Club v. Lajoie*, 202 Pa. St. 210, 90 Am. St. Rep. 627, 58 L. R. A. 227, 51 Atl. 973, a professional baseball player was enjoined from playing with any other club. See, also, *Edmundson-Randle Drug Co. v. Partin Mfg. Co. (Ala.)*, 75 South. 966; *Cain v. Garner*, 169 Ky. 633, Ann. Cas. 1918B, 824, L. R. A. 1916E, 682, 185 S. W. 122 (jockey; but contract unenforceable in this case, as defendant is an infant).

<sup>69</sup> *Montague v. Flockton*, L. R. 16 Eq. 189. See, also, *De Mattos v. Gibson*, [1859] 4 De Gex & J. 276 (*semble*, injunction proper to enforce a charter-party containing no express negative stipulation).

<sup>70</sup> *Whitwood Chemical Co. v. Hardman*, [1891] L. R. 2 Ch. 416; *Lindley, L. J.*, took strong ground against the policy of enjoining breaches of negative contracts, and spoke of *Lumley v. Wagner* as an "anomaly." In *Clarke v. Price*, [1819] 2 Wils. Ch. 157, Lord Eldon had refused to enjoin the defendant from writing law books for another firm. There was no express negative stipulation. And no injunction will be granted where the covenant, though negative in form, is positive in substance: thus, an agreement that an em-

the rule in England appears to have had little influence in the United States.<sup>71</sup> In New York, where this class of contracts has most frequently come before the courts, it seems to be established that where a contract is intended "to give the plaintiffs, not the divided, but exclusive, services of the defendant . . . a negative clause is unnecessary."<sup>72</sup>

§ 1712. (§ 290.) **Same — No Relief upon Contracts for Ordinary Services.**—Where the services contracted for are neither special, extraordinary nor unique, the courts generally refuse equitable relief. "It may sometimes be difficult to say just what is a special, unique and extraordinary service, or whether the employee possesses special, unique or extraordinary qualifications.

ployer will not require his manager to leave his employ is equivalent to a stipulation that he will retain the manager in his employ, and will not be enforced by injunction: *Davis v. Foreman*, [1894] 3 Ch. 654; *Kirchner & Co. v. Gruban*, [1909] 1 Ch. 413. It should be observed that this restrictive rule of *Whitwood Chemical Co. v. Hardman*, *supra*, applies to contracts for personal services only; in other kinds of contracts a negative may still be implied; so explained in the recent case, *Metropolitan Electric Supply Co., Ltd., v. Gender*, [1901] 2 Ch. 799.

<sup>71</sup> Holding an express negative necessary, see the early case, *Burton v. Marshall*, 4 Gill, 487, 45 *Am. Dec.* 171; *contra*, *Cort v. Lassard*, 18 Or. 221, 17 *Am. St. Rep.* 726, 6 *L. R. A.* 653, 22 *Pac.* 1054. In this case the court said: "The agreement to perform at a particular theater for a particular time of necessity involves an agreement not to perform at any other during that time. According to the true spirit of such an agreement, the implication precluding the defendant from acting at any other theater during the period for which he has agreed to act for the plaintiff follows as inevitably and logically as if it was expressed." In support of the text, see, also, *New Idea Pattern Co. v. Whitner*, 215 *Pa. St.* 193, 64 *Atl.* 518, citing *Pom. Eq. Jur.*, § 1343.

<sup>72</sup> *Hoyt v. Fuller*, 19 *N. Y. Supp.* 962; *Duff v. Russell*, 133 *N. Y.* 678, 31 *N. E.* 622, affirming 41 *N. Y. St. Rep.* 955, 16 *N. Y. Supp.* 958, and 60 *N. Y. Super. Ct.* 80, 14 *N. Y. Supp.* 134, on opinion in latter case; *Daly v. Smith*, 38 *N. Y. Sup. Ct.* 158 (*dictum*).

The solution may generally be reached by an inquiry as to whether a substitute for the employee can readily be obtained, and whether such substitute will substantially answer the purpose of the contract; in other words, whether the individual service specially contracted for is essential to prevent irreparable injury."<sup>73</sup> Accordingly, when it appears that the plaintiff has himself substituted another in place of the defendant, an injunction has been refused.<sup>74</sup> In the note will be found a number of instances where it has been held that the employment is not so special as to warrant an injunction.<sup>75</sup>

<sup>73</sup> *Strobridge Lithographing Co. v. Crane*, 12 N. Y. Supp. 898. Where, however, by seeking other employment during his term of service, the defendant puts himself in a position to disclose the plaintiff's trade secrets, a separate ground for injunctive relief is afforded, independent of the question whether the services were or were not unique; so held by a divided court, in *McCall Co. v. Wright*, 198 N. Y. 143, 31 L. R. A. (N. S.) 249, 91 N. E. 516. As to injunction after termination of employment, see section 294.

<sup>74</sup> *W. J. Johnston Co. v. Hunt*, 66 Hun, 504, 21 N. Y. Supp. 314, affirmed, 142 N. Y. 621, 37 N. E. 564.

<sup>75</sup> *Lithographer—Strobridge Lith. Co. v. Crane*, 58 Hun, 611, 12 N. Y. Supp. 898. *Solicitor—Burney v. Ryle*, 91 Ga. 701, 17 S. E. 986; *Hammond v. Georgian Co.*, 133 Ga. 1, 65 S. E. 124 (advertising solicitor of newspaper.). *Miscellaneous—Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 18 Am. St. Rep. 278, 7 L. R. A. 779, 20 Atl. 467; *Universal Talking Mach. Co. v. English*, 34 Misc. Rep. 342, 69 N. Y. Supp. 813; *Carter v. Ferguson*, 58 Hun, 569, 12 N. Y. Supp. 580 (actor of no extraordinary qualifications; quoting Pom. Eq. Jur., § 1343); *Cort v. Lassard*, 18 Or. 221, 17 Am. St. Rep. 726, 6 L. R. A. 653, 22 Pac. 1054 (acrobat); *Kimberly v. Jennings*, 6 Sim. 340; *Chain Belt Co. v. Von Spreckelsen*, 117 Wis. 106, 94 N. W. 78. See, further, *H. W. Gossard Co. v. Crosby*, 132 Iowa, 155, 6 L. R. A. (N. S.) 1115, 109 N. W. 483, citing Pom. Eq. Jur., § 1343, note (corset model: an instructive opinion); *Rosenstein v. Zentz*, 118 Md. 564, 44 L. R. A. (N. S.) 63, 85 Atl. 675 (piano salesman); *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, 133 Am. St. Rep. 753, 24 L. R. A. (N. S.) 933, 69 Atl. 186; *Columbia College of Music v. Tunberg*, 64 Wash. 19, 116 Pac. 280 (music teacher). See, also, *Eberman v. Bartholomew*, [1898] 1 Ch. 671 (agreement of traveling agent of wine mer-

§ 1713. (§ 291.) **Limitations.**—It is held that an employee cannot restrain his employer from discharging him.<sup>76</sup> In general, in applying the remedy the courts will be bound by the equitable principles which govern the remedy of specific performance. The rights of third persons will be considered; and if the granting of equitable relief will work an injustice to innocent third parties who have contractual rights with the employee, it will be refused.<sup>77</sup> Nor will an injunction be granted when the agreement is uncertain or where it would work a hardship on the defendant.<sup>78</sup> By hardship must be understood such hardship as would be a defense to a bill for specific performance.

§ 1714. (§ 292.) **Other Agreements, Generally Negative in Their Nature.**—“In all these agreements, where the stipulations are expressly negative in form, and where they belong to a class of which the specific performance would be enforced if they were affirmative in form, an injunction to restrain their violation will be granted as a general rule, and almost as a matter of course. The inadequacy of the legal remedy is the criterion; but the fact that the agreements belong to a class

chants “not to engage in any other business” during the ten years’ term of employment contracted for; injunction refused, on the ground that the stipulation was unreasonable).

<sup>76</sup> *Davis v. Foreman*, [1894] 3 Ch. 654; *Shubert v. Woodward*, 167 Fed. 47, 92 C. C. A. 509; *Miller v. Warner*, 42 App. Div. 208, 59 N. Y. Supp. 956; *Stewart v. Pierce*, 116 Iowa, 733, 89 N. W. 234. See, also, *Welty v. Jacobs*, 171 Ill. 624, 40 L. R. A. 98, 49 N. E. 723; *Stocker v. Broeckelbank*, 3 Maen. & G. 250. But see *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436, 37 L. R. A. 682, 39 S. W. 486, 40 S. W. 353, where such relief was allowed on special facts.

<sup>77</sup> *Roosen v. Carlson*, 46 App. Div. 233, 47 App. Div. 638, 62 N. Y. Supp. 157.

<sup>78</sup> *Arena Athletic Club v. McPartland*, 41 App. Div. 352, 58 N. Y. Supp. 477; *Metropolitan Exhibition Co. v. Ewing*, 42 Fed. 198, 7 L. R. A. 381; *Rice v. D’Arville*, 162 Mass. 559, 39 N. E. 180.



which would be specifically enforced necessarily shows that the legal remedy is inadequate.”<sup>79</sup> Among the commonest of such agreements are those (1) not to carry on a trade or (2) not to compete; and (3) agreements giving an exclusive right.

§ 1715. (§ 293.) **Agreements not to Carry on a Trade, Express or Implied—Sale of Good-will.**—A class of cases where injunction is held to be a proper remedy to restrain the breach of contract is where there is an agreement not to engage in a particular profession or trade. A discussion of the rules as to the validity of contracts in restraint of trade belongs properly to a treatise on the law of contracts. Where such a contract is illegal, of course equity will not enjoin a breach;<sup>80</sup> the questions to be here considered, therefore, concern the remedy by injunction against violations of valid contracts of this character.

It is very common, when a tradesman sells his business to another or retires from a partnership, to insert a stipulation in the agreement that the selling party shall not engage in a similar business within certain prescribed limits. These agreements are usually upheld as reasonable restraints of trade. Equity courts will grant injunctive relief against violations because generally the remedy of damages is inadequate.<sup>81</sup> The

<sup>79</sup> Pom. Eq. Jur., § 1344. This paragraph of Pom. Eq. Jur. is cited in *Harris v. Theus*, 149 Ala. 133, 123 Am. St. Rep. 17, 10 L. R. A. (N. S.) 204, 43 South. 131; *Lucas v. Futrall*, 84 Ark. 540, 106 S. W. 667; *Hollister v. Ernston*, 124 Minn. 49, 144 N. W. 415; *Pope-Turnbo v. Bedford*, 147 Mo. App. 692, 127 S. W. 426; *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, 133 Am. St. Rep. 753, 24 L. R. A. (N. S.) 933, 69 Atl. 186; *Turner v. Abbott*, 116 Tenn. 718, 8 Ann. Cas. 150, 6 L. R. A. (N. S.) 892, 94 S. W. 64.

<sup>80</sup> See, also, 2 Pom. Eq. Jur., § 934.

<sup>81</sup> *Rolfe v. Rolfe*, 15 Sim. 88; *Williams v. Williams*, 2 Swanst. 253; *Nordenfelt v. Maxim-Nordenfelt G. & A. Co., Ltd.*, [1894] App. Cas. 535; *Davis v. A. Booth & Co.*, 131 Fed. 31, 65 C. C. A. 269

relief is not confined to contracts between parties engaged in trade, but applies equally to contracts between professional men, such as physicians, lawyers and the

(affirming 127 Fed. 875); *American Fisheries Co. v. Lennen*, 118 Fed. 869; *Camors-McConnell Co. v. McConnell*, 140 Fed. 412, affirmed, *McConnell v. Camors-McConnell Co.*, 140 Fed. 987, 72 C. C. A. 681; *Moore etc. Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 13 **Am. St. Rep.** 23, 6 South. 41; *Harris v. Theus*, 149 Ala. 133, 123 **Am. St. Rep.** 17, 10 **L. R. A. (N. S.)** 204, and note, 43 South. 131; *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995; *Mullis v. Nichols*, 105 Ga. 465, 30 S. E. 654; *W. F. Markert & Co. v. Jefferson (Ga.)*, 50 S. E. 398; *McAuliffe v. Vaughan*, 135 Ga. 852, **Ann. Cas.** 1912A, 290, 33 **L. R. A. (N. S.)** 255, 70 S. E. 322; *Frazer v. Frazer Lubricator Co.*, 121 Ill. 147, 2 **Am. St. Rep.** 73, 13 N. E. 639; *Alcock v. Alcock*, 267 Ill. 422, 108 N. E. 671; *Beard v. Dennis*, 6 Ind. 200, 63 **Am. Dec.** 380; *Baker v. Pottmeyer*, 75 Ind. 451; *Eisel v. Haves*, 141 Ind. 41, 40 N. E. 119; *W. S. Wolverton & Son v. Bruce, etc.*, 6 Ind. Ter. 135, 89 S. W. 1018; *Swigert v. Tilden*, 121 Iowa, 650, 100 **Am. St. Rep.** 374, 97 N. W. 82; *Pohlman v. Dawson*, 63 Kan. 471, 88 **Am. St. Rep.** 249, 54 **L. R. A.** 913, 65 Pac. 689; *Flaherty v. Libby*, 108 Me. 377, 81 Atl. 166; *Gueraud v. Dandeleit*, 32 Md. 561, 3 **Am. Rep.** 164; *Anchor Elect. Co. v. Hawkes*, 171 Mass. 101, 68 **Am. St. Rep.** 403, 41 **L. R. A.** 189, 50 N. E. 509; *Ropes v. Upton*, 125 Mass. 258; *Angier v. Webber*, 96 Mass. (14 Allen) 211, 92 **Am. Dec.** 748; *Up River Ice Co. v. Denler*, 114 Mich. 296, 68 **Am. St. Rep.** 480, 72 N. W. 157; *Beal v. Chase*, 31 Mich. 490; *Grow v. Seligman*, 47 Mich. 607, 41 **Am. Rep.** 737, 11 N. W. 404; *Hubbard v. Miller*, 27 Mich. 15, 15 **Am. Rep.** 153; *Holliston v. Ernston*, 124 Minn. 49, 144 N. W. 415; *Downing v. Lewis*, 56 Neb. 386, 76 N. W. 900; *Bailey v. Collins*, 59 N. H. 459; *Richardson v. Peacock*, 26 N. J. Eq. 40, 28 N. J. Eq. 151, 33 N. J. Eq. 597; *Seudder v. Kilfoil*, 57 N. J. Eq. 171, 43 **L. R. A.** 86, 40 Atl. 602; *Fleckenstein Bros. Co. v. Fleckenstein (N. J. Eq.)*, 53 Atl. 1043; *Jarvis v. Peck*, 10 Paige, 118; *A. Booth & Co. v. Seibold*, 37 Misc. Rep. 101, 74 N. Y. Supp. 776; *Zimmerman v. Gerzog*, 13 App. Div. 210, 43 N. Y. Supp. 339; *United States Cordage Co. v. Wm. Wall's Sons Rope Co.*, 90 Hun, 429, 35 N. Y. Supp. 978; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 **Am. Rep.** 464, 13 N. E. 419; *Francisco v. Smith*, 143 N. Y. 488, 38 N. E. 980; *Baumgartner v. Broadway*, 77 N. C. 8; *Kramer v. Old*, 119 N. C. 1, 56 **Am. St. Rep.** 650, 34 **L. R. A.** 389, 25 S. E. 813; *Cowan v. Fairbrother*, 118 N. C. 406, 54 **Am. St. Rep.** 733, 32 **L. R. A.** 829, 24 S. E. 212;

like.<sup>82</sup> It must be certain that there has been a violation before the court will interfere or that a violation is threatened.<sup>83</sup> The benefit of the covenant may be as-

Faust v. Rohr, 166 N. C. 187, 81 S. E. 1096; Bradshaw v. Millikin, 173 N. C. 432, 92 S. E. 161; Morgan v. Perhamus, 36 Ohio St. 517, 38 **Am. Rep.** 607; Patterson v. Glassmire, 166 Pa. St. 230, 31 Atl. 40; Stofflet v. Stofflet, 160 Pa. St. 529, 28 Atl. 857; Monongahela River Consol. Coal & Coke Co. v. Jutte (Pa.), 59 Atl. 1088; Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 49 **Am. St. Rep.** 784, 23 **L. R. A.** 639, 28 Atl. 973; Jackson v. Byrnes, 103 Tenn. 698, 54 S. W. 984 (*dictum*); Tomlin v. Clay (Tex. Civ. App.), 167 S. W. 604; My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540. See, also, Turner v. Evans, 2 De Gex, M. & G. 740. In O'Neal v. Hines, 145 Ind. 32, 43 N. E. 946, the court laid down the rule as follows: "It is a general rule that when one has made a valid contract with another that he will not engage in a certain business or occupation, and it is shown by the other party to the contract that the same is being violated to his injury, he is entitled to an injunction restraining the offending party. This is upon the ground that from the nature of the case just and adequate damages cannot be estimated for a breach of the contract."

<sup>82</sup> In the following cases the rule was laid down in contracts between physicians: McCurry v. Gibson, 108 Ala. 451, 51 **Am. St. Rep.** 177, 18 South. 806; Styles v. Lyon, 87 Conn. 23, 86 Atl. 564; Beatty v. Coble, 142 Ind. 329, 41 N. E. 590; Cole v. Edwards, 93 Iowa, 477, 61 N. W. 940; Doty v. Martin, 32 Mich. 462; Timmerman v. Dever, 52 Mich. 34, 50 **Am. Rep.** 240, 17 N. W. 230; Glover v. Shirley, 169 Mo. App. 637, 155 S. W. 878; Marvel v. Jonah, 83 N. J. Eq. 295, **Ann. Cas.** 1916C, 185, **L. R. A.** 1915B, 206, 90 Atl. 1004; Threlkeld v. Steward, 24 Okl. 403, 138 **Am. St. Rep.** 888, 103 Pac. 630; McClurg's Appeal, 58 Pa. St. 51; Wilkinson v. Colley, 164 Pa. St. 35, 26 **L. R. A.** 114, 30 Atl. 286, 35 Week. Not. Cas. 177; French v. Parker, 16 R. I. 219, 27 **Am. St. Rep.** 733, 14 Atl. 870; Butler v. Burleson, 16 Vt. 176; Hulen v. Earel, 13 Okl. 246, 73 Pac. 927 (*dictum*); Ryan v. Hamilton, 203 Ill. 191, 68 N. E. 781. Lawyer—Whittaker v. Howe, 3 Beav. 383. Dentist—Niles v. Fenn, 12 Misc. Rep. 470, 33 N. Y. Supp. 857. Playwright—Moris v. Coleman, 18 Ves. 436. Music teacher—Columbia College of Music v. Tunberg, 64 Wash. 19, 116 Pac. 280. In general, see Freudenthal v. Espey, 45 Colo. 488, 26 **L. R. A. (N. S.)** 961, and note, 102 Pac. 280.

<sup>83</sup> Harris v. Theus, 149 Ala. 133, 123 **Am. St. Rep.** 17, 10 **L. R. A. (N. S.)** 204, and note, 43 South. 131 (may enjoin on vendor's begin-

signed with the business, and the assignee's rights will be protected by injunction.<sup>84</sup> What amounts to a breach is a question of substantive law; but the courts of equity will not allow a violation under color of compliance with the letter of the contract. Thus, an injunction will not be denied because the promisor has taken in a partner or has formed a corporation to compete with the plaintiff, or has put the business in his wife's name.<sup>85</sup> Where it appears that the parties engaging in business with the party violating the agreement had notice of its terms, they may be enjoined from carrying it on in connection

ning to make preparations to enter competing business); *Caswell v. Gibbs*, 33 Mich. 331; *Bowers v. Whittle*, 63 N. H. 147, 56 *Am. Rep.* 499.

<sup>84</sup> *Cowan v. Fairbrother*, 118 N. C. 406, 54 *Am. St. Rep.* 733, 32 *L. R. A.* 829, 24 S. E. 212; *Francisco v. Smith*, 143 N. Y. 488, 38 N. E. 980; *Fleckenstein Bros. Co. v. Fleckenstein* (N. J. Eq.), 53 Atl. 1043. See, also, *Knowles v. Jones*, 182 Ala. 187, 62 South. 514 (covenant usually passes with the business; not personal unless the language is so strong as to lead to that result); *Johnston v. Blanchard*, 16 Cal. App. 321, 116 Pac. 973; *Haugen v. Sundseth*, 106 Minn. 129, 16 *Ann. Cas.* 259, and note, 118 N. W. 666 (benefit of covenant passes on sale of the business).

<sup>85</sup> *Beard v. Dennis*, 6 Ind. 200, 63 *Am. Dec.* 380; *Kramer v. Old*, 119 N. C. 1, 56 *Am. St. Rep.* 650, 34 *L. R. A.* 389, 25 S. E. 813; *Up River Ice Co. v. Denler*, 114 Mich. 296, 68 *Am. St. Rep.* 480, 72 N. W. 157; *Pittsburg Stove & Range Co. v. Pennsylvania Stove Co.*, 208 Pa. St. 37, 57 Atl. 77. See, also, *Old Corner Book Store v. Upham*, 194 Mass. 101, 120 *Am. St. Rep.* 532, 80 N. E. 228 (on sale of goodwill, vendor enjoined from working for or holding stock in a corporation formed by him, and corporation enjoined from dealing with him). When the business belongs to the wife, however, and not to the husband, she is not bound by the covenant: *Smith v. Hancock*, [1894] 2 Ch. 377; *Fleckenstein Bros. Co. v. Fleckenstein* (N. J. Eq.), 57 Atl. 1025. In *Gophir Diamond Co. v. Wood*, [1902] 1 Ch. 950, it was held that a covenant not to become directly or indirectly "interested" in a similar business to that of the covenantor does not prevent the covenantor from becoming a servant at a fixed salary in a similar business.



with him.<sup>86</sup> Third parties, however, will not be enjoined from receiving business aid from such person, nor from purchasing goods from him.<sup>87</sup> As the injury is difficult to measure in all these cases, only nominal damage need be shown.<sup>88</sup> The injured party need not establish his right at law.<sup>89</sup> In Pennsylvania, it is held that damages will be awarded in connection with the equitable relief.<sup>90</sup>

It is questionable whether an express negative covenant is necessary, the same conflict of opinion existing here as in regard to injunctions against the violation of contracts of personal service. In some jurisdictions it is held as a matter of substantive law that no covenant not to engage in business can be implied from a sale of good-will, and of course an injunction is denied.<sup>91</sup> In a late case it is said that "where the good-will of a business is sold, without further provision, the vendor may set up a rival business, but he is not entitled to canvass the customers of the old firm, and may be restrained by injunction from soliciting any person who was a customer of the old firm prior to the sale to continue to deal

<sup>86</sup> *A. Booth & Co. v. Seibold*, 37 Misc. Rep. 101, 74 N. Y. Supp. 776.

<sup>87</sup> *Appeal of Harkinson*, 78 Pa. (28 P. F. Smith) 196, 21 *Am. Rep.* 9; *Reeves v. Sprague*, 114 N. C. 647, 19 S. E. 707.

<sup>88</sup> *Brown v. King*, 101 Cal. 295, 35 Pac. 995; *Andrews v. Kingsbury* (Ill.), 72 N. E. 11.

<sup>89</sup> *Carll v. Snyder* (N. J. Eq.), 26 Atl. 977.

<sup>90</sup> *Stofflet v. Stofflet*, 160 Pa. St. 529, 28 Atl. 857; *Patterson v. Glassmire*, 166 Pa. St. 230, 31 Atl. 40.

<sup>91</sup> *Jackson v. Byrnes*, 54 S. W. 984, 103 Tenn. 698; *Newark Coal Co. v. Spangler*, 54 N. J. Eq. 354, 34 Atl. 932; *Close v. Flesher*, 8 Misc. Rep. 299, 28 N. Y. Supp. 737; *MacMartin v. Stevens* (Wash.), 79 Pac. 1099. *Contra*, that the vendor of a good-will is precluded from setting up a competing business, and may be enjoined: *Old Corner Book Store v. Upham*, 194 Mass. 101, 120 *Am. St. Rep.* 532, 80 N. E. 228; *Foss v. Roby*, 195 Mass. 292, 11 *Ann. Cas.* 571, 10 *L. R. A.* (N. S.) 1200, 81 N. E. 199. For a definition of "good-will," see 4 *Pom. Eq. Jur.*, § 1355.

with the vendor or not to deal with the purchaser."<sup>92</sup> It has been held that where a physician sells the good-will of his practice or agrees to retire, an injunction will issue to restrain him from continuing in practice.<sup>93</sup> And an injunction has been granted to restrain parties who have sold good-will from using a firm name similar to that of the firm from which they have retired.<sup>94</sup>

An injunction will not issue when it would be inequitable. Thus, when a party signs an agreement without reading it and plaintiff makes no objection until the defendant has expended a large sum in fitting up his place of business, an injunction will be refused.<sup>95</sup> Likewise, it will not issue against mere nominal members of a firm, the active members of which have agreed for the firm not to engage in certain business.<sup>96</sup>

In some jurisdictions it is held that these agreements are valid and will be enforced only when the promisor sells out his business or retires from the firm.<sup>97</sup>

<sup>92</sup> *Althen v. Vreeland* (N. J. Eq.), 36 Atl. 479. See similar statements in *Zantierjian v. Boornazian* (R. I.), 55 Atl. 199; *Trego v. Hunt*, [1896] App. Cas. 7; *Gillingham v. Beddow*, [1900] 2 Ch. 242; *Curl Brothers, Ltd., v. Webster*, [1904] 1 Ch. 685; *Rauft v. Reimers* (Ill.), 65 N. E. 720. The vendor will not be restrained from merely dealing with former customers: *Leggott v. Barrett*, 15 Ch. D. 306. It has been held that this rule does not apply as against a bankrupt whose good-will has been sold by his trustees in bankruptcy: *Walker v. Moltram*, 19 Ch. D. 355.

<sup>93</sup> *Dwight v. Hamilton*, 113 Mass. 175; *Beatty v. Coble*, 142 Ind. 329, 41 N. E. 590.

<sup>94</sup> *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. 961, 20 N. W. 545.

<sup>95</sup> *Smith v. Brown*, 164 Mass. 584, 42 N. E. 101. And where a partnership agreement was canceled for a trivial breach by one partner, injunction against his engaging in a competing business was refused, as oppressive and contrary to the justice of the case: *Marvel v. Jonah*, 81 N. J. Eq. 369, 86 Atl. 968.

<sup>96</sup> *United States Cordage Co. v. Wm. Wall's Sons Rope Co.*, 90 Hun, 429, 35 N. Y. Supp. 978.

<sup>97</sup> *Chapin v. Brown*, 83 Iowa, 156, 32 Am. St. Rep. 297, 12 L. R. A. 428, 48 N. W. 1074. See, also, *Osius v. Hinchman*, 150 Mich. 603,

§ 1716. (§ 294.) **Same — Injunctions Against Employees.**—Where an employee stipulates that he will not engage in similar business within a certain territory for a certain period after the termination of his employment, an injunction will issue to restrain a breach.<sup>98</sup> But where the restraint is unreasonable and extends beyond anything apparently necessary for the protection of the employer, an injunction will be refused.<sup>99</sup>

16 **L. R. A. (N. S.)** 393, 114 N. W. 402. Thus, in California, an agreement by a vendor of stock in a corporation not to engage in the same business cannot be enforced: *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879.

<sup>98</sup> *Davies v. Racer*, 72 Hun, 43, 25 N. Y. Supp. 293; *A. L. & J. J. Reynolds Co. v. Dreyer*, 12 Misc. Rep. 368, 33 N. Y. Supp. 649; *Hayes v. Donean*, [1899] 2 Ch. 13; *Turner v. Abbott*, 116 Tenn. 718, 8 **Ann. Cas.** 150, 6 **L. R. A. (N. S.)** 892, 94 S. W. 64. See, also, *Robinson v. Heuer*, 67 L. J. Ch. 644, [1898] 2 Ch. 451, 79 L. J., N. S., 281, 47 Week. Rep. 34 (not to compete during term of employment); *Dubowski v. Goldstein*, [1896] 1 Q. B. 478; *Kinney v. Scarbrough Co.*, 138 Ga. 77, 40 **L. R. A. (N. S.)** 473, 74 S. E. 772; *Eureka Laundry Co. v. Long*, 146 Wis. 205, 35 **L. R. A. (N. S.)** 119, 131 N. W. 412 (contract not to solicit business from employer's customers for one year after termination of employment; uniqueness of service not the test where injury to business). Compare *Simms v. Burnette*, 55 Fla. 702, 127 **Am. St. Rep.** 201, 15 **Ann. Cas.** 690, 16 **L. R. A. (N. S.)** 389, 46 South. 90 (injunction refused because it does not appear that employer will be damaged); *Osius v. Hinchman*, 150 Mich. 603, 16 **L. R. A. (N. S.)** 393, 114 N. W. 402 (same).

<sup>99</sup> *Herreshoff v. Boutineau*, 17 R. I. 3, 33 **Am. St. Rep.** 850, 8 **L. R. A.** 469, 19 Atl. 712; *Stanley v. Pollard*, 5 Misc. Rep. 490, 25 N. Y. Supp. 766. See, also, *Ehrmann v. Bartholomew*, 67 L. J. Ch. 319, [1898] 1 Ch. 671, 78 L. J., N. S., 646, 46 Week. Rep. 509; *General Bill Posting Co., Ltd., v. Atkinson*, [1907] 1 Ch. 537, affirmed, [1909] A. C. 118 (servant wrongfully discharged without notice not bound by the restriction); *Sir W. C. Leng & Co., Ltd., v. Andrews*, [1909] 1 Ch. 763; *Measures Brothers, Ltd., v. Measures*, [1910] 2 Ch. 248, affirming [1910] 1 Ch. 336 (insolvency and winding up of employing company releases servant from restraint); *S. V. Nevances & Co. v. Walker & Foreman*, [1914] 1 Ch. 413 (restriction for one year after termination of agreement from engaging in competing

§ 1717. (§ 295.) **Agreements not to Compete.**—Instances of such agreements enforced by injunction are: An agreement by a rival quarry not to supply stone to a municipal corporation during a certain period;<sup>100</sup> an agreement by a city with a water company not to build rival waterworks;<sup>101</sup> a contract between plaintiff, a manufacturer of patterns, and defendant, a dealer, whereby the latter was appointed agent of the former for the sale of its patterns, defendant covenanting not to sell, or allow to be sold, on his premises any other make of patterns; specific performance was refused of the contract in its entirety, but defendant enjoined from selling patterns of another make.<sup>102</sup> It has been held,

business within the United Kingdom, too broad); *Easter v. Russ*, [1914] 1 Ch. 468 (restriction unlimited in time held void); *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, 133 *Am. St. Rep.* 753, 24 *L. R. A. (N. S.)* 933, 69 *Atl.* 186, reversing (*N. J. Eq.*), 65 *Atl.* 695.

<sup>100</sup> *Jones v. North*, *L. R.* 19 *Eq.* 426.

<sup>101</sup> *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 *Sup. Ct.* 77; the remedy at law by recovery of damages held to be inadequate: *Columbia Ave. etc. Co. v. City of Dawson*, 130 *Fed.* 152; *Farmers' Loan & Trust Co. v. City of Sioux Falls*, 131 *Fed.* 890. See *post*, § 299.

<sup>102</sup> **Not to Sell Rival Goods.**—*Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 66, 68 *Am. St. Rep.* 749, 51 N. E. 408, affirming 30 *App. Div.* 564, 52 N. Y. *Supp.* 433, and reversing 22 *Misc. Rep.* 624, 50 N. Y. *Supp.* 1056. It is observed that "the court should extend its remedy as far as it is able, and thus prevent the principal defendant not only from making money by breaking its agreement, but from inflicting a double wrong upon the plaintiff by depriving it of the right to sell, and conferring that right on a business competitor." To the same effect, *Butterick Publishing Co. v. Fisher*, 203 *Mass.* 122, 133 *Am. St. Rep.* 283, 89 N. E. 189, reviewing cases; *Peerless Pattern Co. v. Gauntlett Dry Goods Co.*, 171 *Mich.* 158, 42 *L. R. A. (N. S.)* 843, 136 N. W. 1113; *Butterick Pub. Co. v. Rose*, 141 *Wis.* 533, 124 N. W. 647; *New Idea Pattern Co. v. Whitner*, 215 *Pa. St.* 193, 64 *Atl.* 518 (no injunction, contract being construed not to imply that defendant was to refrain from selling



however, that a vendor cannot restrain his vendee from selling a patented article at less than a fixed price, in violation of contract.<sup>103</sup>

§ 1718. (§ 296.) **Contracts Conferring an Exclusive Right.**—Where a contract confers on one party an exclusive right or privilege, a breach of the contract through conduct of the other party inconsistent with the exclusiveness of the right or privilege may be enjoined, subject to the general principle as to the inadequacy of the legal remedy for the breach. It is immaterial that such inconsistent conduct is not prohibited by the express terms of the contract. Contracts giving to one party an exclusive right to the personal services of another are a common species of agreements of this general class, and have already been discussed.<sup>104</sup> Contracts giving the plaintiff the exclusive right to buy articles manufactured or produced by the defendant, or constituting the plaintiff the sole agent for their sale, have frequently been enforced by enjoining the sale of the

rival goods). Compare *Paxson v. Butterick Pub. Co.*, 136 Ga. 774, 71 S. E. 1105 (injunction refused because defendant's services were ordinary and damages an adequate remedy). For further instances of such contracts, see *Royer Wheel Co. v. Miller*, 20 Ky. Law Rep. 1831, 50 S. W. 62. Contracts by saloon-keepers to sell plaintiffs beer exclusively have frequently furnished grounds for injunction; the difficulty of determining the amount of the commodity sold and the profit at which it might be sold, the continuing character of the injury, and the necessity for a multiplicity of suits, showing the inadequacy of the legal remedy: *People's Brewing Co. of Trenton v. Levin*, 78 N. J. Eq. 583, 81 Atl. 1114; *Christian Feigenspan v. Nizolek*, 71 N. J. Eq. 382, 65 Atl. 703 (instructive opinion by Pitney, V. C.); and see *ante*, § 285, note 50. Compare *Christian Feigenspan v. Q'Neill*, 79 N. J. Eq. 305, 82 Atl. 921 (preliminary injunction in such case refused).

<sup>103</sup> *National Phonograph Co. v. Schlegel*, 117 Fed. 624.

<sup>104</sup> The text is cited in *Edmundson-Randle Drug Co. v. Partin Mfg. Co.* (Ala.), 75 South. 966. See *ante*, §§ 288-291. For injunction to protect exclusive *franchises*, see chapter XXVII.

articles by the defendant to third parties, if the article is of such a character that an agreement for its sale would be specifically enforced.<sup>105</sup> Other instances of

<sup>105</sup> *Dietrichsen v. Cabburn*, 2 Phill. Ch. 52, where defendant, having agreed to employ plaintiff as agent and supply him with oil at forty per cent discount, and not to allow more than twenty-five per cent discount to others, was enjoined from committing a breach of the latter stipulation; *Donnell v. Bennett*, L. R. 22 Ch. D. 835, injunction against breach of express negative covenant not to sell fish to manufacturers other than the plaintiff; *Singer Sewing Machine Co. v. Union Button Hole Co.*, 1 Holmes, 253, Fed. Cas. No. 12,904, contract making plaintiff sole agent for a patented article; *Lowenbein v. Fuldner*, 2 Misc. Rep. 176, 21 N. Y. Supp. 615, contract to manufacture for plaintiff, and no one else, furniture of a special and unique design furnished by plaintiff; *Valley Iron Works Mfg. Co. v. Goodwick*, 103 Wis. 436, 78 N. W. 1096, specific performance of agreement to transfer patent, and injunction against disposing of it to other parties; *Manhattan Mfg. etc. Co. v. New Jersey etc. Co.*, '23 N. J. Eq. 161, contract by stock-yards company giving complainant, a fertilizer company, sole right to remove offal from its premises enforced by injunction against its lessee with notice; injunction to avoid multiplicity of suits, and because of impossibility of computing damages; *Myers v. Steele Mach. Co.* (N. J. Eq.), 57 Atl. 1080. See, also, *New York Phonograph Co. v. Edison*, 136 Fed. 600, affirmed, *New York Phonograph Co. v. National Phonograph Co.*, 144 Fed. 404, 75 C. C. A. 382 (injunction by exclusive licensee of a patent within certain territory against assignee of licensor); *Chadeloid Chemical Co. v. H. B. Chalmers Co.*, 243 Fed. 606, 156 C. C. A. 304 (C. agreed to assign all his inventions in a certain line to plaintiff; injunction against C. and his assignee with notice).

On the other hand, a breach of a contract to sell to plaintiff all the coal defendants should get from a certain mine will not be enjoined, since coal is not an article a contract for the sale of which will be specifically enforced: *Fothergill v. Rowland*, L. R. 17 Eq. 132. See, also, *Simms v. Southern Pipe Line Co.* (Tex. Civ. App.), 195 S. W. 283 (contract to sell oil to plaintiff); *American Snuff Co. v. Walker*, 175 Ky. 149, 193 S. W. 1021 (contract to deliver tobacco; distinguishing the similar case, *H. Friedberg, Inc., v. McClary*, 173 Ky. 579, 191 S. W. 300, on the ground of the insolvency of the defendant in that case and the multiplicity of suits by other parties to which plaintiff was exposed). So, in case of a contract to sell a

exclusive rights protected by injunction are enumerated in the note.<sup>106</sup>

certain amount of wood to the plaintiff every year for a period of years, and not to sell to anyone else so as to prevent fulfillment of the contract, injunction was refused: *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 55 App. Div. 225, 67 N. Y. Supp. 149, reversing 31 Misc. Rep. 695, 66 N. Y. Supp. 59.

<sup>106</sup> Exclusive right of removing garbage, or dead animals, under contract with a city: *National Fertilizer Co. v. Lambert*, 48 Fed. 458; *Sanitary Reduction Works of San Francisco v. California Reduction Co.*, 94 Fed. 693. Contract allowing plaintiff exclusive right for one year to display an advertising curtain in front of the stage of defendant's theater: *Beer v. Canary*, 2 App. Div. 518, 38 N. Y. Supp. 23 (defendant insolvent; plaintiff had a number of advertising contracts; and damages could not be ascertained). Contract giving exclusive right to exhibit certain moving pictures, injunction against a rival exhibitor of the same pictures: *Gilligham v. Ray*, 157 Mich. 488, 122 N. W. 111. Exclusive right to act as A's agent in certain territory, injunction against B, who has persuaded A to break the contract and make B agent: *Beekman v. Marsters*, 195 Mass. 205, 122 Am. St. Rep. 232, 11 Ann. Cas. 332, 11 L. R. A. (N. S.) 201, 80 N. E. 817. *A contract to purchase from plaintiff exclusively all of a certain article which defendant should need*: *Petrolia Mfg. Co. v. Jenkins*, 29 App. Div. 403, 51 N. Y. Supp. 1028 (injunction to avoid multiplicity of suits for breaches of the contract). But in *James T. Hair Co. v. Huckins*, 56 Fed. 366, 5 C. C. A. 522, 12 U. S. App. 359, it was held, without discussion, that for breach of defendant's contract to use plaintiff's hotel register in his business, and no others, the remedy at law was adequate; and in *American Laundry Co. v. E. & W. Dry Cleaning Co. (Ala.)*, 74 South. 58, a contract giving the plaintiff the exclusive right to do all dry-cleaning business for defendant laundry in a certain community, an injunction was refused on grounds of public policy, as the contract tended to monopoly.

In the recent case of *Manchester Ship Canal Co. v. Manchester R. Co.*, [1901] 2 Ch. 37, affirming [1900] 2 Ch. 352, the contract was, to give the plaintiff the "first refusal" of certain land. It was held that a negative was involved, and an injunction was granted against the owner and an intending purchaser. In *Metropolitan El. Supply Co., Ltd., v. Gender*, [1901] 2 Ch. 799, there was a contract by a consumer to take the whole of the electric energy required for certain premises, from the company; held, in substance, an agree-

§ 1719. (§ 297.) **Miscellaneous Agreements, Expressly Negative.**—The following contracts, enforced by injunction, are given as illustrations merely: An agreement not to ring a certain bell;<sup>107</sup> agreements not to disclose trade secrets;<sup>108</sup> by subscribers to news associations, not to publish the information received or furnish it to others;<sup>109</sup> by the vendor of the plates of a book, not to publish the book except under certain conditions;<sup>110</sup> ante-nuptial contract by woman, not to apply for dower;<sup>111</sup> mutual covenants of persons owning two

ment not to take such energy from another source, and injunction awarded. Similar contracts were enforced by injunction in *Beck v. Indianapolis Light & Power Co.*, 36 Ind. App. 600, 76 N. E. 312; *Montgomery Light & Water Power Co. v. Montgomery Traction Co.*, 219 Fed. 963. But in *United Fuel Gas Co. v. West Virginia Paving & Pressed Brick Co.*, 74 W. Va. 484, 82 S. E. 329, a contract to take gas from plaintiff for three years was not enforced by injunction, on the ground that the plaintiff's approximate profits might easily be ascertained.

<sup>107</sup> *Martin v. Nutkin*, 2 P. Wms. 266, the leading case. Ringing the bell was an injury to one of the complainants, who was an invalid.

<sup>108</sup> *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *S. Jarvis Adams Co. v. Knapp*, 121 Fed. 34; *Murjahn v. Hall*, 119 Fed. 186; *Stone v. Goss*, 65 N. J. Eq. 756, 55 Atl. 736; *Fralich v. Despar*, 165 Pa. St. 24, 30 Atl. 521; *Salomon v. Hertz*, 40 N. J. Eq. 400, 2 Atl. 379; *National Gum & M. Co. v. Braendly*, 27 App. Div. 219, 51 N. Y. Supp. 93. See *ante*, § 268.

<sup>109</sup> *Gold & Stock Tel. Co. v. Todd*, 17 Hun (N. Y.), 548; *Board of Trade v. Christie Grain & Stock Co.* (U. S.), 25 Sup. Ct. 637 (against divulging board of trade quotations, although they may concern illegal acts). See, also, *F. W. Dodge Co. v. Construction Information Co.*, 183 Mass. 62, 97 Am. St. Rep. 412, 60 L. R. A. 810, 66 N. E. 204 (agreement apparently not expressly negative). See, also, *Associated Press v. International News Service*, 245 Fed. 244, 157 C. C. A. 436 (injunction against inducing breach of contract by members of news association).

<sup>110</sup> *Standard Am. Pub. Co. v. Methodist Book Concern*, 33 App. Div. 409, 54 N. Y. Supp. 55.

<sup>111</sup> *Cummings v. Cummings* (R. I.), 57 Atl. 302.



sides of a building that no change shall be made in the front without mutual consent.<sup>112</sup> Other illustrations are given in the note.<sup>113</sup>

§ 1720. (§ 298.) **Miscellaneous Agreements, not Expressly Negative.**—Threatened breaches of the contracts of gas and water companies, by shutting off the supply of gas or water from the consumer, have frequently been restrained by injunction. It is plain that in such cases the damages which will be suffered by the consumer may either be irreparable, or not readily capable of ascertainment, and that the recovery of damages may involve a multiplicity of actions at law. Moreover, there is usually no other source of supply of which the plaintiff may avail himself.<sup>114</sup> It has also been held that a

<sup>112</sup> *First Nat. Bank v. Portsmouth Sav. Bank*, 71 N. H. 547, 53 Atl. 1017.

<sup>113</sup> Thus, one who procures a retailer to violate an agreement not to sell goods of a manufacturer at less than a certain price, may himself be enjoined from so selling: *Garst v. Charles* (Mass.), 72 N. E. 839. See, also, for an application of the same principle, *Exchange Tel. Co., Ltd., v. Central News, Ltd.*, [1897] 2 Ch. 48. In general, see *Dickenson v. Grand Junction Canal Co.*, 15 Beav. 260, 2 Keener's Cas. on Eq. Jur. 312 (injunction against diverting water). In the following cases injunctions were issued to restrain a railroad from running trains past a station without stopping, in violation of contract: *Rigby v. Great West. R'y*, 2 Phill. Ch. 44; *Hood v. North East R'y*, L. R. 8 Eq. 666, 5 Ch. 525; *Phillips v. Great Western R'y Co.*, L. R. 7 Ch. 409.

<sup>114</sup> *Gallagher v. Equitable Gaslight Co.*, 141 Cal. 699, 75 Pac. 329; *Edwards v. Milledgeville Water Co.*, 116 Ga. 201, 42 S. E. 417; *Xenia Real Est. Co. v. Macy*, 147 Ind. 568, 47 N. E. 147; *Simpson v. Pittsburgh Plate Glass Co.*, 28 Ind. App. 343, 62 N. E. 753; *Graves v. Key City Gas Co.*, 83 Iowa, 714, 50 N. W. 283; *Wood v. City of Auburn*, 87 Me. 287, 29 L. R. A. 376, 32 Atl. 906; *Horsky v. Helena Cons. Water Co.*, 13 Mont. 229, 33 Pac. 689 (breach would ruin plaintiff's business); *McDowell v. Avon-by-the-Sea Land & Imp. Co.* (N. J. Eq.), 63 Atl. 13 (water for domestic purposes); *Sickles v. Manhattan Gas-Light Co.*, 64 How. Pr. 33; *Whiteman v. Fayette Fuel Gas Co.*, 139 Pa. St. 492, 20 Atl. 1062 (mandatory preliminary injunc-

municipality may enjoin a gas company from charging rates to individuals in excess of the maximum fixed, in violation of contract with the city.<sup>115</sup>

Further illustrations of the use of injunction to restrain the breach of contracts, although such breach was not forbidden by an express negative, are found in the following cases: Contract by a railroad to maintain and keep open a passageway for stock under its road;<sup>116</sup> lease of a railroad enforced against the lessee by an injunction against abandoning the operation of the road;<sup>117</sup> many other contracts relating to the operation

tion); *School District of Borough of Sewickley v. Ohio Val. Gas Co.*, 154 Pa. St. 539, 25 Atl. 868; *People's Natural Gas Co. v. American Natural Gas Co.*, 233 Pa. St. 569, 82 Atl. 935 (against purchaser with notice). *Contra*, in *Loy v. Madison etc. Gas Co.*, 156 Ind. 332, 58 N. E. 844, plaintiffs were held not entitled to enjoin a gas company from shutting off their supply of gas on the ground of irreparable injury, as there was no evidence that they had no other means of heating and lighting their houses. In *Bienville W. S. Co. v. Mobile*, 112 Ala. 260, 57 Am. St. Rep. 28, 33 L. R. A. 59, 20 South. 742, the injunction was granted against shutting off the water supply of a city on the ground of a breach of public duty, in the nature of a public nuisance.

A telephone company may be enjoined from removing its instrument from plaintiff's residence: *Anderson v. Mt. Sterling Telephone Co. (Ky.)*, 86 S. W. 1119.

Of course one who refuses to pay reasonable rates demanded is not entitled to an injunction: *Mulrooney v. Obear*, 171 Mo. 613, 71 S. W. 1019. It is held that a purchaser of water rights from a water company may enjoin the company from destroying his headgates and ditches: *Hargrave v. Hall*, 3 Ariz. 252, 73 Pac. 400.

<sup>115</sup> *Muncie Nat. Gas Co. v. City of Muncie*, 160 Ind. 97, 66 N. E. 436. See, also, *City of St. Mary's v. Hope Natural Gas Co.*, 71 W. Va. 76, 43 L. R. A. (N. S.) 994, 76 S. E. 841.

<sup>116</sup> *Rock Island & P. R. Co. v. Dimick*, 144 Ill. 628; 19 L. R. A. 105, 32 N. E. 291; *Moore v. Chicago, R. I. & P. R'y Co.*, 7 Kan. App. 242, 53 Pac. 775. See, also, *Hartshorn v. Chicago Great Western R'y Co.*, 137 Iowa, 324, 113 N. W. 840.

<sup>117</sup> *Southern R. Co. v. Franklin & P. R. Co.*, 96 Va. 693, 44 L. R. A. 297, 32 S. E. 485. Suit at law would not afford an ade-

of railroads;<sup>118</sup> contract by a street railroad with a city to change its tracks from the side to the center of the street.<sup>119</sup> A publisher agreed with an author to publish his book and pay him a royalty; pending suit for accounting against the publisher, who was insolvent and unable to pay, the defendant was restrained from publishing the book, notwithstanding that the author's interest therein was not protected by copyright.<sup>120</sup> Defendant, a novelist, agreed to permit plaintiff, a playwright, to dramatize a novel written by the former; the novelist having subsequently authorized a dramatization of the novel by the other defendants, its performance on the stage was enjoined, although the court could not have enforced a performance of the contract as an entirety by compelling the defendant to put plaintiff's dramatization on the stage.<sup>121</sup> An agreement among the merchants of a town to close their stores at a certain hour in the evening was repudiated by one of the parties; injunction was held to be the proper remedy, to avoid a multiplicity of actions, by numerous plaintiffs, for recurring breaches of the contract.<sup>122</sup> Where

quate remedy, since the damages to the lessor from loss of traffic, decay of buildings and structures, and possible forfeiture of its franchises could not be estimated, or if such injuries were reparable in damages, it would require a multiplicity of actions for the daily breach of the agreement; *City of Tyler v. St. Louis, S. W. R'y Co.*, 99 Tex. 491, 13 *Ann. Cas.* 911, 91 S. W. 1, (railroad enjoined from removing its offices and machine-shops from a city where it has contracted to maintain them).

<sup>118</sup> See *post*, Vol. II, chapters on Specific Performance: *Brooklyn El. R. Co. v. Brooklyn, B. & W. E. R. Co.*, 23 App. Div. 29, 48 N. Y. Supp. 665.

<sup>119</sup> *City of Gloversville v. Johnstown, G. & H. Horse R. Co.*, 66 Hun, 627, 21 N. Y. Supp. 146.

<sup>120</sup> *Saltus v. Belford Co.*, 133 N. Y. 499, 31 N. E. 518, affirming 64 Hun, 632, 18 N. Y. Supp. 619.

<sup>121</sup> *House v. Clemens*, 24 Abb. N. C. 381, 9 N. Y. Supp. 484.

<sup>122</sup> *Stovall v. McCutchen*, 107 Ky. 577, 92 *Am. St. Rep.* 373, 47 L. R. A. 287, 54 S. W. 969.

the proprietor of a water-power leases the use of a specific quantity of water, and the lessee persistently uses water in excess of the amount covered by the lease, and threatens to continue in so doing, and where the extent of such use is contingent, and its value difficult of ascertainment and of doubtful estimation, such proprietor may enjoin the lessee from using such excess, without alleging or proving that such excess is essential to the operation of other mills, or is diverted therefrom.<sup>123</sup>

§ 1721. (§ 299.) **Adequate Remedy at Law.**—In all these cases, if the breach of the contract, committed or threatened, can be adequately redressed by the recovery of damages in a single suit at law, injunction will not issue to restrain the breach.<sup>124</sup> Thus an injunction has been refused against retaining money belonging to the plaintiff under the contract;<sup>125</sup> against a turnpike company collecting toll from one who claimed exemption from payment by virtue of an agreement with the com-

<sup>123</sup> *Lawson v. Menasha Wooden-Ware Co.*, 59 Wis. 393, 48 Am. Rep. 528, 18 N. W. 440. The decision rests on the ground not only of the impossibility of proving the amount of the excess used, but also of avoiding a multiplicity of suits for recurring breaches of the contract. Compare *Saltsburg Gas Co. v. Borough of Saltsburg*, 138 Pa. St. 250, 10 L. R. A. 193, 20 Atl. 844, where it seems to be held that a gas company cannot enjoin a town from using more gas than it is entitled to under its contract, since the company may sue at law for the excess.

<sup>124</sup> See cases *passim* in preceding sections; also *Gaslight etc. Co. of New Albany v. City of New Albany*, 139 Ind. 660, 39 N. E. 462; *Glassbrenner v. Groulik*, 110 Wis. 402, 85 N. W. 962; *Wabaska Electric Co. v. City of Wymore*, 60 Neb. 199, 82 N. W. 626; *World's Columbian Exposition v. United States*, 56 Fed. 654, 6 C. C. A. 58, 18 U. S. App. 42; *Gallagher v. Fayette Co. R. R.*, 38 Pa. St. 102. See, also, *McDaniel v. Orner*, 91 Ark. 171, 120 S. W. 829 (injunction to protect plaintiff's rights as winner in a prize contest refused, as recovery at law of the value of the prize was an adequate remedy).

<sup>125</sup> *Chicago & A. R. Co. v. New York, L. E. & W. R. Co.*, 24 Fed. 516.



pany;<sup>126</sup> against a board of education substituting another text-book for use in schools in violation of contract with publishers.<sup>127</sup> Likewise, an injunction to restrain breach of an agreement not to use any other trading stamp than plaintiff's<sup>128</sup> has been denied. It has been held that a toll-road company has an adequate remedy at law for unnecessary encroachments by an electric railway company which has a contract authorizing necessary encroachments.<sup>129</sup>

§ 1722. (§ 300.) **Effect of Provisions for Penalties and Liquidated Damages.**—It frequently happens in cases of negative covenants that stipulations for penalties or liquidated damages are inserted. The question which arises in these cases is whether such provisions furnish an adequate remedy at law so as to oust equity of its jurisdiction to grant an injunction. It seems to be generally conceded that if the stipulation is to be construed as a penalty, equity does not lose its jurisdiction.<sup>130</sup> A penalty is merely a security for the performance of the contract, and is not the price for doing what a man has expressly agreed not to do. "In determining the question whether in a given case the sum named

<sup>126</sup> Kellett v. Clayton, 99 Cal. 210, 33 Pac. 885. The court were of the opinion that a multiplicity of actions by plaintiff to recover the tolls paid was not probable, but that one such action would end the dispute.

<sup>127</sup> Attorney-General v. Board of Education, 133 Mich. 681, 95 N. W. 746.

<sup>128</sup> Sperry & Hutchinson Co. v. Vine (N. J. Eq.), 57 Atl. 1036.

<sup>129</sup> Detroit & B. Plank Road Co. v. Oakland R'y Co., 131 Mich. 663, 92 N. W. 346.

<sup>130</sup> Dills v. Doeblér, 62 Conn. 366, 36 Am. St. Rep. 345, 20 L. R. A. 432, 26 Atl. 398; Wilkinson v. Colley, 164 Pa. St. 35, 26 L. R. A. 114, 30 Atl. 286; Ropes v. Upton, 125 Mass. 258; Robinson v. Heuer, 67 L. J. Ch. 644, [1898] 2 Ch. 451, 79 L. T., N. S., 281, 47 Week. Rep. 34. See, further, Indiana Mfg. Co. v. Nichols & Shepard Co., 190 Fed. 579. See, also, 1 Pom. Eq. Jur., § 446.

is a penalty or liquidated damages, courts give but little weight to the mere form of words, but gather the intent from the general scope and purport of the contract."<sup>131</sup> Where the stipulation is construed as one for liquidated damages, the courts are not agreed as to the remedy. The better rule seems to be that it is a question of intention. "It is, of course, competent for parties to a covenant to agree that a fixed sum shall be paid in case of a breach by the party in default, and that this should be the exclusive remedy. The intention in that case would be manifest that the payment of the penalty should be the price of non-performance. But the taking of a bond in connection with a covenant does not exclude the jurisdiction of equity in a case otherwise cognizable therein, and the fact that the damages in the bond are liquidated does not change the rule. It is a question of intention, to be deduced from the whole instrument and the circumstances; and if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of a breach, the covenant will be enforced."<sup>132</sup> All that is settled by the insertion of an agreement for liquidated damages is that if an action is brought for damages, the recovery

<sup>131</sup> *Dills v. Doeblor*, 62 Conn. 366, 36 *Am. St. Rep.* 345, 20 *L. R. A.* 432, 26 *Atl.* 398.

<sup>132</sup> *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 *Am. Rep.* 469, 13 N. E. 419; *Zimmerman v. Gerzog*, 13 App. Div. 210, 43 N. Y. Supp. 339; *A. L. & J. J. Reynolds Co. v. Dreyer*, 12 *Misc. Rep.* 368, 33 N. Y. Supp. 649; *Ropes v. Upton*, 125 Mass. 258; *McCurry v. Gibson*, 108 Ala. 451, 54 *Am. St. Rep.* 177, 18 *South.* 806. See, further, *Harris v. Theus*, 149 Ala. 133, 123 *Am. St. Rep.* 17, 10 *L. R. A.* (N. S.) 204, 43 *South.* 131; *Johnston v. Blanchard*, 16 Cal. App. 321, 116 *Pac.* 973; *Grant County Board of Control v. Allphin*, 152 Ky. 280, 153 S. W. 417; *Bradshaw v. Millikin*, 173 N. C. 432, 92 S. E. 161. See, also, *Howard v. Woodward*, 10 Jur., N. S., 1123. Where it appears that performance and payment are made alternative, relief will be refused: *Sainter v. Ferguson*, 1 *Macn. & G.* 286.

shall be for the amount named, neither more nor less.<sup>133</sup> On the other hand, there is a line of cases holding that where liquidated damages are stipulated for, injunctive relief must be denied, the argument being that the ground of the jurisdiction is the inadequacy of the legal remedy. When parties have stipulated as to the amount of damage, the difficulty is removed. Accordingly, the legal remedy is held to be exclusive.<sup>134</sup>

<sup>133</sup> *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 18 South. 806.

<sup>134</sup> *Dills v. Doeblor*, 62 Conn. 366, 36 Am. St. Rep. 345, 20 L. R. A. 432, 26 Atl. 398; *O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946; *Martin v. Murphy*, 129 Ind. 464, 28 N. E. 1118; *Hahn v. Concordia Soc.*, 42 Md. 460. Compare 1 Pom. Eq. Jur., 4th ed., § 447, and note (a).

## CHAPTER XIV.

## INJUNCTIONS AGAINST CORPORATIONS AND THEIR OFFICERS.

## ANALYSIS.

- §§ 301-304. *Ultra vires* acts—Questions stated.
- § 302. Suits by the attorney-general.
- § 303. Suits by stockholders.
- § 304. Suits by third parties.
- § 305. Suits by stockholders against directors for wrongful dealing with corporate property.
- § 306. Other suits by stockholders.
- § 307. No injunction to determine title to corporate office.
- § 308. Existence of a corporation cannot be challenged by injunction—Injunction in connection with receivership.

§ 1723. (§ 301.) **Ultra Vires Acts—Questions Stated.** The principles governing the jurisdiction of equity to restrain *ultra vires* acts of private corporations vary with the character of the parties plaintiff. It is obvious that actions for such injunctions may be brought by three different classes of plaintiffs, viz.: (1) the attorney-general on behalf of the state; (2) a stockholder, and (3) a third party, having no connection with the corporation. In each of these cases the right to an injunction rests upon a theory of its own; therefore, each must be considered separately.

§ 1724. (§ 302.) **Suits by the Attorney-General.**—It is now well settled that where a corporate excess of power or misuse of franchise “tends to the public injury or to defeat public policy,” it may be restrained at the suit of the attorney-general.<sup>1</sup> This jurisdiction

<sup>1</sup> *Stockton v. Central R. Co.*, 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964; *State v. American etc. Ass’n*, 64 Minn. 349, 67 N. W. 1;



is somewhat similar to that of equity to restrain a public nuisance.<sup>2</sup> The question which arises in many of the cases, therefore, is simply whether the acts tend to the public injury. Thus, where a railroad company violates a penal statute by charging excessive fares, the injury to the public is such as will warrant an injunction.<sup>3</sup> Likewise, an injunction is proper when the abuse tends to foster a monopoly, as where, in violation of the constitution or statutes of a state, one railroad is about to purchase a parallel line,<sup>4</sup> or, under circumstances tending to stifle competition, is about to lease its lines to,<sup>5</sup> or buy shares in,<sup>6</sup> another railroad. The reason is well laid down in a leading English case, as follows:<sup>7</sup> "Now, why has the rule been established, that railway companies must not carry on any business other than that for which they were constituted? It is because

Louisville & N. R. Co. v. Com., 97 Ky. 675, 31 S. W. 476; Attorney-General v. Chicago etc. R. R. Companies, 35 Wis. 530; Attorney-General v. Great North. R'y Co., 1 Drew & S. 154; Trust Co. of Ga. v. State, 109 Ga. 736, 48 L. R. A. 520, 35 S. E. 323. If the contract tends to affect the public interest injuriously, it is not necessary to show that it has already done so: McCarter v. Firemen's Ins. Co., 74 N. J. Eq. 372, 135 Am. St. Rep. 708, 18 Ann. Cas. 1048, 29 L. R. A. (N. S.) 1194, 73 Atl. 80, 414.

<sup>2</sup> Attorney-General v. Chicago etc. R. R. Companies, 35 Wis. 530. This case contains a good statement of the principles and an exhaustive citation of authority.

<sup>3</sup> Attorney-General v. Chicago etc. R. R. Companies, 35 Wis. 530. As to the right of a private individual to enjoin the collection of excessive rates, see Madison v. Madison Gas & Electric Co., 129 Wis. 249, 116 Am. St. Rep. 944, 9 Ann. Cas. 819, 8 L. R. A. (N. S.) 529, 108 N. W. 65.

<sup>4</sup> Louisville & N. R. Co. v. Commonwealth, 97 Ky. 675, 31 S. W. 476.

<sup>5</sup> Stockton v. Central R. Co., 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964.

<sup>6</sup> Trust Co. of Ga. v. State, 109 Ga. 736, 48 L. R. A. 520, 35 S. E. 323.

<sup>7</sup> Attorney-General v. Great North. R'y, 1 Drew & S. 154.

these companies, being armed with the power of raising large sums of money, if they were allowed to apply their funds to purposes other than those for which they were constituted, might acquire such a preponderating influence and command over some particular branch of trade or commerce, as would enable them to drive the ordinary private traders out of the field, and create in their own favor a practical monopoly, whereby the interests of the public would be most seriously injured."

There is a tendency in some jurisdictions to extend the remedy, and to allow the attorney-general an injunction against every abuse of corporate power by a *quasi* public corporation.<sup>8</sup> The argument is that every excess of corporate power is a violation of the charter contract with the government, and is therefore an invasion of public rights which equity should protect. Thus, it has been held that a railroad company will be enjoined at the suit of the attorney-general from unlawfully laying its tracks in a highway, even though no public injury results.<sup>9</sup> This expansion of the rule, however, has not been applied to purely private business corporations,<sup>10</sup> the theory being that as equity protects only substantial rights, the jurisdiction must be confined to enjoining acts which tend to substantial public injury.

<sup>8</sup> Attorney-General v. London & N. W. R. Co., [1900] 1 Q. B. 78; Attorney-General v. Birmingham & O. T. Co., 3 Macn. & G. 453, 461.

<sup>9</sup> Attorney-General v. Greenville & H. R'y Co., 59 N. J. Eq. 372, 46 Atl. 638; Grey v. Greenville & H. R'y Co., 60 N. J. Eq. 153, 46 Atl. 636.

<sup>10</sup> Attorney-General v. Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227; Attorney-General v. Bank of Niagara, Hopk. Ch. 354; Attorney-General v. Utica Ins. Co., 2 Johns. Ch. 371. After a foreign corporation has complied with the law and has received permission to do business within the state, it cannot be enjoined, at the suit of the state, from performing contracts made before such permission was obtained: Kansas v. American Book Co., 69 Kan. 1, 2 Ann. Cas. 56, 1 L. R. A. (N. S.) 1041, 76 Pac. 411.

The adequacy of the legal remedy by *quo warranto* is no defense to an action by the attorney-general. In many cases he is allowed a discretion to choose either remedy.<sup>11</sup> It is often better for the public interest to restrain such violations than to enforce a forfeiture, and this is especially true in regard to *quasi*-public corporations.<sup>12</sup> Moreover, as stated in a *quo warranto* case, "acts *ultra vires* may justify interference on the part of the state by injunction to prohibit a continuance of the excess of powers which would not be a sufficient ground for a forfeiture in proceedings in *quo warranto*."<sup>13</sup>

§ 1725. (§ 303.) **Suits by Stockholders.**—As a general rule, it may be stated that a stockholder may obtain an injunction against *ultra vires* acts. This is based on the principle that there is a contract relation between the stockholders and the corporation which is a subject of equitable protection. "The directors are their trustees to employ the joint capital in the management, . . . to the end that from the investment the stockholders have chosen they may reap the contemplated profits. And this is the agreement of the stockholders among themselves. They each contract with the other that their money shall be so employed. What the majority determine within the scope of this mutual contract, they agree to abide by, but there their mutual contract ends, and no majority, however large, has a right to divert one cent of the joint capital to any purpose not consistent

<sup>11</sup> *Stockton v. Central R. Co.*, 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964, 974. Ordinarily *mandamus* is the proper remedy to enforce the performance of an affirmative duty; and a mandatory injunction will not ordinarily issue: *State v. Elizabethtown Water Co.*, 83 N. J. Eq. 216, 89 Atl. 1039.

<sup>12</sup> *Louisville & N. R. Co. v. Commonwealth*, 97 Ky. 675, 31 S. W. 476.

<sup>13</sup> *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1020.

with, and growing out of this original fundamental joint intention.”<sup>14</sup> Thus, a minority stockholder is entitled to an injunction to restrain a corporation from selling, leasing, or transferring all of its property,<sup>15</sup> or from consolidating, *ultra vires*, with another corporation,<sup>16</sup> or from issuing paper to circulate as money,<sup>17</sup> or from guaranteeing bonds of another corporation.<sup>18</sup> Likewise, such a stockholder may obtain an injunction to restrain the appropriation of corporate funds for any object not warranted by the charter,<sup>19</sup> or to prevent the fraudu-

<sup>14</sup> *Kean v. Johnson*, 9 N. J. Eq. 401, 409. See, also, on the subject of this section, 3 Pom. Eq. Jur., § 1093. In general, see *Union Savings & Investment Co. v. District Court*, 44 Utah, 397, *Ann. Cas.* 1917A, 821, 140 Pac. 221; *Hertle v. Riddell*, 127 Ky. 623, 128 *Am. St. Rep.* 364, 15 *L. R. A. (N. S.)* 796, 106 S. W. 282. The text is cited in *Holmes v. Jewett*, 55 Colo. 187, 134 Pac. 665.

<sup>15</sup> *Kean v. Johnson*, 9 N. J. Eq. 401; *Abbott v. American Hard Rubber Co.*, 33 Barb. 578; *Small v. Minneapolis Electro-Matrix Co.*, 45 Minn. 264, 47 N. W. 797; *Black v. Delaware & R. C. Co.*, 24 N. J. Eq. 455; *Forrester v. Boston & M. Cons. C. & S. M. Co.*, 21 Mont. 544, 55 Pac. 229, 353; *New Albany Waterworks v. Louisville Banking Co.*, 122 Fed. 776.

<sup>16</sup> *Botts v. Simpsonville & B. C. Turnpike Road Co.*, 88 Ky. 54, 2 *L. R. A.* 594, 10 S. W. 134; *Langan v. Francklyn*, 29 Abb. N. C. 102, 20 N. Y. Supp. 404.

<sup>17</sup> *Bliss v. Anderson*, 31 Ala. 612, 70 *Am. Dec.* 511.

<sup>18</sup> *Zabriskie v. Cleveland, C. & C. R. Co.*, 23 How. (64 U. S.) 381, 16 *L. Ed.* 488.

<sup>19</sup> *Platteville v. Galena etc. R. R.*, 43 Wis. 493; *Stevens v. Erie R. Co.*, 29 Vt. 545; *Cohen v. Wilkinson*, 1 Maen. & G. 481; *Hodgson v. Earl of Powis*, 1 De Gex, M. & G. 6; *Kernaghan v. Williams*, *L. R.* 6 Eq. 228; *Pickering v. Stephenson*, *L. R.* 14 Eq. 322; *Alexander v. Atlanta & W. P. R. Co.*, 113 Ga. 193, 54 *L. R. A.* 305, 38 S. E. 772; *Bagshaw v. Eastern Union R'y*, 7 Hare, 114, 130, 131; *Bernan v. Rufford*, 6 Eng. L. & Eq. 106, 1 Sim. (N. S.) 550; *Simpson v. Denison*, 10 Hare, 51; *Colman v. Eastern Counties R'y*, 10 Beav. 1; *Central R'y Co. v. Collins*, 40 Ga. 582; *Stewart v. Erie & W. T. Co.*, 17 Minn. 372; *Salomons v. Laing*, 12 Beav. 377. He may enjoin the unlawful payment of premiums on life insurance policies taken out in the name of the officers: *Victor v. Louise Cotton Mills*, 148 N. C. 107, 16 *Ann. Cas.* 291, 16 *L. R. A. (N. S.)* 1020, 61 S. E. 648.



lent payment of private debts with corporate funds.<sup>20</sup> Upon the same principle, he is entitled to an injunction to restrain the *ultra vires* purchase of land;<sup>21</sup> to restrain such a change in the certificate of incorporation as will reduce the dividend on preferred shares;<sup>22</sup> and to restrain an increase of capital stock to be given for property worth less than the face value of the stock.<sup>23</sup> Likewise, a stockholder may enjoin a bank from discounting notes at usurious rates, in violation of its charter.<sup>24</sup> The fact that such contracts may be beneficial both to the corporation and to the stockholder is no ground for refusing the relief, for the stockholder has a contract right which he is entitled to have protected.<sup>25</sup> But until this contract is fully made there is no ground for action. Therefore, a subscriber for stock who has not fulfilled the conditions of his subscription, has no standing in court.<sup>26</sup> It has sometimes been held that relief will be granted only to a *bona fide* stockholder, and accordingly the injunction has been refused when the plaintiff has been in reality acting in the interest of another corporation.<sup>27</sup> It is said that a stockholder cannot restrain payment for benefits received under an *ultra vires* contract, where the other party had no notice of the excess of power.<sup>28</sup>

<sup>20</sup> *Sears v. Hotchkiss*, 25 Conn. 171, 65 Am. Dec. 557.

<sup>21</sup> *Hough v. Cook County Land Co.*, 73 Ill. 23, 24 Am. Rep. 230.

<sup>22</sup> *Pronick v. Spirits Dist. Co.*, 58 N. J. Eq. 97, 42 Atl. 586.

<sup>23</sup> *Donald v. American S. & R. Co.*, 62 N. J. Eq. 729, 48 Atl. 771, 1116.

<sup>24</sup> *Manderson v. Commercial Bank*, 28 Pa. St. 379.

<sup>25</sup> *Byrne v. Schuyler Elect. Mfg. Co.*, 65 Conn. 336, 28 L. R. A. 304, 31 Atl. 833; *Victor v. Louise Cotton Mills*, 148 N. C. 107, 16 Ann. Cas. 291, 16 L. R. A. (N. S.) 1020, 61 S. E. 648.

<sup>26</sup> *Busey v. Hooper*, 35 Md. 15, 6 Am. Rep. 350.

<sup>27</sup> *Jenkins v. Auburn City R'y Co.*, 27 App. Div. 553, 50 N. Y. Supp. 852; *Filder v. London etc. R. R. Co.*, 1 Hem. & M. 489. Cf. *post*, § 305, at note 59.

<sup>28</sup> *Rankin v. Southwestern Brewery & Ice Co. (N. M.)*, 73 Pac. 612.

While a stockholder may thus obtain final relief, he is often denied a preliminary injunction. Such an injunction is granted ordinarily only where a clear case can be made out in the complaint. Questions of *ultra vires* depend largely upon the construction and constitutionality of laws and charters, and consequently are frequently of too difficult a nature to be determined upon a preliminary application.<sup>29</sup> And in order to obtain any relief whatever, he must act promptly.<sup>30</sup> "Shareholders cannot lie by, sanctioning, or by their silence at least acquiescing in, an arrangement which is *ultra vires* of the company to which they belong, watching the result—if it be favorable and profitable to themselves, to abide by it and insist on its validity; but if it prove unfavorable and disastrous, then to institute proceedings to set it aside."<sup>31</sup> Thus, where a corporation issued preferred stock *ultra vires*, a stockholder was refused an injunction to restrain payment of privileged dividends, after the stock had reached the hands of a *bona fide* purchaser.<sup>32</sup>

§ 1726. (§ 304.) **Suits by Third Parties.**—A private individual who is not a stockholder is not entitled to an injunction to restrain an act merely *ultra vires*. He has no relation of a contractual nature which gives him any rights, nor is he entitled to sue on behalf of the state.<sup>33</sup>

<sup>29</sup> *Stevens v. Missouri, K. & T. R'y Co.*, 106 Fed. 771, 45 C. C. A. 611; *Smith v. Reading City Pass. R'y Co.*, 156 Pa. St. 5, 26 Atl. 779.

<sup>30</sup> *Black v. Delaware & R. C. Co.*, 22 N. J. Eq. 415; *Great Western R'y Co. v. Oxford, W. & W. R'y Co.*, 3 De Gex, M. & G. 341; *Tanner v. Lindell R'y Co.*, 180 Mo. 1, 103 Am. St. Rep. 534, 79 S. W. 155.

<sup>31</sup> *Gregory v. Patchett*, 33 Beav. 595, 602; *Rabe v. Dunlap*, 51 N. J. Eq. 40, 25 Atl. 959.

<sup>32</sup> *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159.

<sup>33</sup> *Henry v. Ann Arbor R'y Co.*, 116 Mich. 314, 75 N. W. 886. See *Packard v. Thiel College (Pa.)*, 56 Atl. 869, where the question was left undecided, whether subscribers to a fund to build a college

Where, however, the *ultra vires* act amounts to a private nuisance, or is a public nuisance which specially injures the individual, or where it interferes with some vested right and is otherwise a subject of equitable jurisdiction, an injunction will be granted. In accordance with these principles relief has been denied where a railroad track, although a public nuisance, would not specially injure the plaintiff;<sup>34</sup> where a railroad moved its station and abandoned part of its track;<sup>35</sup> and where a road corporation was using material not authorized by its charter.<sup>36</sup> Likewise, a simple contract creditor has been denied an injunction to restrain the corporation from dealing with assets *ultra vires*, upon an allegation that thereby the funds available for paying debts would be diminished.<sup>37</sup> On the other hand, the injunction has been granted when a street railroad was laying its tracks *ultra vires* on the street, to plaintiff's injury;<sup>38</sup> where a street railroad was changing its tracks in violation of the rights of a borough, which was plaintiff;<sup>39</sup> where a gas company was laying its pipes in a country highway which passed plaintiff's premises;<sup>40</sup> where a railroad company was about to build over plaintiff's land

at a certain place were sufficiently interested to enjoin the *ultra vires* act of its removal to another location.

<sup>34</sup> Philadelphia W. & B. R. Co. v. Wilmington City R'y Co. (Del.), 38 Atl. 1067.

<sup>35</sup> Moore v. Brooklyn City R. Co., 108 N. Y. 103, 15 N. E. 191.

<sup>36</sup> Erin Tp. v. Detroit & E. Plank Road Co., 115 Mich. 465, 73 N. W. 556.

<sup>37</sup> Mitts v. Northern R'y, L. R. 5 Ch. 621.

<sup>38</sup> Bonaparte v. Baltimore etc. R'y Co., 75 Md. 340, 23 Atl. 784.

<sup>39</sup> Borough of Shamokin v. Shamokin & M. C. Elect. R'y Co., 196 Pa. St. 166, 46 Atl. 382.

<sup>40</sup> Sterling's Appeal, 111 Pa. St. 35, 56 Am. Rep. 246, 2 Atl. 105; and the same rule may apply when a gas company, in excess of charter powers, attempts to lay gas-pipes in the street of a city, whereby plaintiff will suffer special injury; Seattle Gas & Electric Co. v. Citizens' Light & Power Co., 123 Fed. 588.

without authority;<sup>41</sup> and where a turnpike company was attempting to charge tolls to persons exempted by its charter, on the ground of a vested right in the plaintiffs.<sup>42</sup> The injunction, however, will not be granted where the injury is slight,<sup>43</sup> or where it will result in public inconvenience.<sup>44</sup>

§ 1727. (§ 305.) **Suits by Stockholders Against Directors for Wrongful Dealing With Corporate Property.** It is not within the scope of this chapter to attempt any general discussion of the great variety of cases in which equitable relief is sought by stockholders against wrongful dealing with corporate property. Such a discussion should be looked for in treatises on substantive equity,<sup>45</sup> or on the law of corporations. Suits of this character, so far as the form of the remedy is concerned, are usually suits for an accounting. Where, however, the nature of the facts calls for preventive relief, it is usually granted with great freedom.

In this class of suits, since the cause of action exists primarily in behalf of the corporation, the stockholder is not permitted to sue unless he shows, either that the corporation actually refuses to bring the suit, or that a refusal of the managing body, if it had been requested to bring the suit, might be inferred with reasonable certainty.<sup>46</sup> Further, the right of the stockholder to sue

<sup>41</sup> *Western Md. R. R. Co. v. Owings*, 15 Md. 204, 74 *Am. Dec.* 563.

<sup>42</sup> *Louisville & T. Turnpike Co. v. Boss*, 19 Ky. Law Rep. 1954, 44 S. W. 981. As to the right of an individual to enjoin the collection of excessive rates, see *Madison v. Madison Gas & Electric Co.*, 129 Wis. 249, 116 *Am. St. Rep.* 944, 9 *Ann. Cas.* 819, 8 L. R. A. (N. S.) 529, 108 N. W. 65.

<sup>43</sup> *Becker v. Lebanon & M. R'y Co.*, 188 Pa. St. 484, 41 Atl. 612, 43 Wkly. Not. Cas. 229.

<sup>44</sup> *Ware v. Regents' Canal Co.*, 3 De Gex & J. 212.

<sup>45</sup> See 3 Pom. Eq. Jur., §§ 1094, 1095.

<sup>46</sup> *Id.*; in addition to the cases there cited, see the following cases, in which an injunction was sought: *Putnam v. Ruch*, 54 Fed. 216;



in cases where the corporation is the proper party to bring the suit is limited to cases where the acts of the directors or stockholders complained of are either fraudulent, illegal or in breach of trust; in other cases than these a court of equity has no jurisdiction to interfere in the internal management of the affairs of corporations.<sup>47</sup> Subject to these fundamental rules, a stockholder's right to enjoin *infra vires* acts on the part of the corporate authorities has been recognized in an almost unlimited variety of instances, of which the following may serve as illustrations: he may enjoin misappropriation of corporate funds;<sup>48</sup> fraudulent prosecution of suits against the company by the directors;<sup>49</sup> but not, it seems, the auditing of a fraudulent account,

Ball v. Rutland R. Co., 93 Fed. 513 (sufficient demand on the corporation); Memphis & C. R. Co. v. Woods, 88 Ala. 630, 16 Am. St. Rep. 81, 7 L. R. A. 605, 7 South. 108; Mack v. De Bardeleben Coal & I. Co., 90 Ala. 396, 9 L. R. A. 650, 8 South. 150 (demand excused); Harding v. American Glucose Co., 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577; Lewisohn v. Anaconda Copper Min. Co., 26 Misc. Rep. 613, 56 N. Y. Supp. 807; Fitchett v. Murphy, 61 N. Y. Supp. 182, 46 App. Div. 181; Star v. Shepard, 145 Mich. 302, 108 N. W. 709. The text is cited in Hyams v. Calumet & Hecla Mining Co., 221 Fed. 529, 137 C. C. A. 239.

<sup>47</sup> Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827; MacDougall v. Gardiner, L. R. 1 Ch. D. 14; Shaw v. Davis, 78 Md. 314, 23 L. R. A. 294, 28 Atl. 619; Leslie v. Lorillard, 110 N. Y. 519, 1 L. R. A. 456, 18 N. E. 363; Burden v. Burden, 159 N. Y. 287, 54 N. E. 17; Lewisohn v. Anaconda Copper Min. Co., 26 Misc. Rep. 613, 56 N. Y. Supp. 807; Peabody v. Westerly Waterworks, 20 R. I. 176, 37 Atl. 807; Phillips v. Providence Steam Engine Co., 21 R. I. 302, 45 L. R. A. 560, 43 Atl. 598. See, also, White v. Kincaid, 149 N. C. 415, 128 Am. St. Rep. 663, 23 L. R. A. (N. S.) 1177, 63 S. E. 109; Jackson v. Hooper, 76 N. J. Eq. 592, 27 L. R. A. (N. S.) 658, 75 Atl. 568; Bowditch v. Jackson Co., 76 N. H. 351, Ann. Cas. 1913A, 366, L. R. A. 1917A, 1174, 82 Atl. 1014.

<sup>48</sup> People's Sav. Bank v. Colorado Min. etc. Co., 8 Colo. App. 354, 46 Pac. 620.

<sup>49</sup> Birmingham Min. etc. Co. v. Mutual Loan & Trust Co., 96 Ala. 364, 11 South. 368.

since the allowance of the account would not conclude anyone, and no irreparable injury would result;<sup>50</sup> he may enjoin a wrongful lease of the corporate property, amounting to a breach of trust;<sup>51</sup> the payment of illegal dividends, but not of dividends already declared, unless all the shareholders are before the court;<sup>52</sup> the payment of an illegal tax;<sup>53</sup> the fixing of a particular date for holding the general meeting of the company for the purpose of preventing shareholders from exercising their voting powers;<sup>54</sup> the voting of the majority of the stock in the corporation, held by a rival corporation whose interests are in conflict with those of the former;<sup>55</sup> the voting of shares of stock fraudulently transferred or acquired, under various circumstances;<sup>56</sup> winding up the

<sup>50</sup> *Rogers v. Lafayette Agricultural Works*, 52 Ind. 296. The correctness of this decision may well be doubted.

<sup>51</sup> *Pond v. Vermont etc. R. R. Co.*, 12 Blatchf. 280, Fed. Cas. No. 11,265.

<sup>52</sup> Since each shareholder has a right of action to recover a dividend that has been declared: *Carlisle v. South Eastern R'y*, 1 Maen. & G. 689.

<sup>53</sup> *Dodge v. Woolsey*, 18 How. (59 U. S.) 331, 15 L. Ed. 401; *Mechanics & Traders' Bank v. Debolt*, 18 How. (59 U. S.) 380, 15 L. Ed. 458; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 39 L. Ed. 759, 15 Sup. Ct. 673 (the question of the adequacy of the legal remedy was waived); but see *Corbus v. Treadwell Gold Min. Co.*, 99 Fed. 334.

<sup>54</sup> *Cannon v. Trask*, L. R. 20 Eq. 669. But that the directors will not be restrained from holding an irregular meeting, when all the acts of such meeting will be void for want of a quorum, see *Sullivan v. Venner*, 63 Hun, 634, 18 N. Y. Supp. 398.

<sup>55</sup> *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 16 Am. St. Rep. 81, 7 L. R. A. 605, 7 South. 108, and cases cited; *George v. Central R. R. & B. Co.*, 101 Ala. 607, 14 South. 752.

<sup>56</sup> *Campbell v. Poultney*, 6 Gill & J. (Md.) 94, 26 Am. Dec. 559; *Webb v. Ridgely*, 38 Ind. 364; *Hilles v. Parrish*, 14 N. J. Eq. 380. But one who was induced to subscribe for stock of a corporation upon the assurance of a stockholder that a particular business would not be engaged in, cannot enjoin such stockholder from voting to take up such business: *Converse v. Hood*, 149 Mass. 471, 4 L. R. A. 521, 21 N. E. 878.

affairs of the corporation and disposing of its assets in a manner inconsistent with good faith toward the minority stockholders,<sup>57</sup> or at variance with the statutes on the subject.<sup>58</sup>

It has been held that a *bona fide* minority stockholder in a substantial amount is not precluded from enjoining the majority stockholders from voting to make a certain disposition of the corporate property merely because his principal motive is to protect another corporation and his interest therein.<sup>59</sup>

In a very important recent case it was held that a dissenting stockholder may sue in behalf of himself and other stockholders to prevent the corporation and its officers from carrying out an agreement to convey its property to another corporation whose purpose was to create a monopoly prohibited by statute; the stockholder's right to sue was maintained, not on the ground of protecting the public interests, but because the creation of the monopoly would expose the corporation to a forfeiture of its charter rights, and the value of the complainant's stock would thereby be destroyed.<sup>60</sup>

<sup>57</sup> *Hayden v. Official Hotel etc. Co.*, 42 Fed. 875 (preliminary injunction refused); *Treadwell v. United Verde Copper Co.*, 62 N. Y. Supp. 708, 47 App. Div. 613 (preliminary injunction granted; a history of outrageous fraud by a notorious public character). An injunction may issue to restrain the majority from wrongfully using their powers to the prejudice of the minority: *Davidson v. American Blower Co.*, 243 Fed. 167, 156 C. C. A. 33.

<sup>58</sup> *Hunt v. American Grocery Co.*, 81 Fed. 532.

<sup>59</sup> *Lewisohn v. Anaconda Copper Min. Co.*, 26 Misc. Rep. 613, 56 N. Y. Supp. 807, 50 N. Y. Supp. 253, 23 Misc. Rep. 31. Compare *ante*, § 303, at note 27.

<sup>60</sup> *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577; distinguishing *Coquard v. Oil Co.*, 171 Ill. 480, 49 N. E. 563, where the stockholder sought the forfeiture of the corporation's charter for injury to the public rights, a relief that could only be enforced by the state; and also distinguishing *Cope v. District Fair Ass'n*, 99 Ill. 489, 39 Am. Rep. 30, where no pecuniary injury to the company or the complainants from the alleged illegal acts was shown.

§ 1728. (§ 306.) **Other Suits by Stockholders.**—Injunction is sometimes an appropriate remedy where the stockholder's individual rights, as distinguished from those of the corporation, are invaded.<sup>61</sup> Thus, an injunction is allowed in some cases to restrain the enforcement, by sale of the complainant's stock, of the corporation's lien thereon for a debt or liability incurred to the corporation by the stockholder;<sup>62</sup> or to restrain the forfeiture and sale by the company of non-assessable shares, when there would probably be no way of accurately estimating their market value, and irreparable injury might result;<sup>63</sup> against assessing stock beyond its par value;<sup>64</sup> but not to restrain an action to recover dues imposed under a by-law, on the ground of its invalidity, when that would constitute a perfect defense at law.<sup>65</sup>

It is well settled that a suit will lie by a holder of common stock to enjoin any unlawful or unauthorized issue of preferred stock, to the prejudice of the stockholder's vested individual right in his proportionate share of the corporate property and of the profits of the business.<sup>66</sup>

In Ohio, injunction is held to be the proper remedy to enforce the stockholder's right to inspect the books and records of the corporation, although in other states

<sup>61</sup> For injunction in connection with suits to procure the transfer of stock upon the company's books, see *post*, Vol. II.

<sup>62</sup> See *Elliott v. Sibley*, 101 Ala. 344, 13 South. 500, for requisite pleading in such cases.

<sup>63</sup> *San Antonio St. R'y Co. v. Adams* (Tex. Civ. App.), 25 S. W. 639.

<sup>64</sup> *Redkey v. Citizens' Natural Gas etc. Co.*, 27 Ind. App. 1, 60 N. E. 716.

<sup>65</sup> *Kinnan v. Sullivan County Club*, 26 App. Div. 213, 50 N. Y. Supp. 95.

<sup>66</sup> *Ernst v. Elmira Municipal Improvement Co.*, 24 Misc. Rep. 583, 54 N. Y. Supp. 116; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159; *Campbell v. Zylonite Co.*, 122 N. Y. 455, 11 L. R. A. 596, 25 N. E. 853.



the remedy is usually by *mandamus*;<sup>67</sup> and the latter, and not injunction, is the proper remedy to compel the corporation to post for the public benefit a copy of their by-laws and financial statement.<sup>68</sup>

§ 1729. (§ 307.) **No Injunction to Determine Title to Corporate Office.**—A court of equity will not primarily take jurisdiction to determine the legality of an election of directors, or to remove a director who is in possession of the office. The court will inquire into the regularity of the election, or the right of the person to the office, only when the question arises incidentally and collaterally, in a suit of which the court has rightful jurisdiction on other grounds,<sup>69</sup> such as fraud and breach of trust.<sup>70</sup> The remedy to determine the right to corporate office is by *quo warranto* or special statutory proceeding, and these are at least as adequate as the remedy by injunction would be.<sup>71</sup> When a court of equity

<sup>67</sup> The Ohio rule depends on the wording of the statute defining the writ of *mandamus*: *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 **Am. St. Rep.** 707, 48 **L. R. A.** 732, 56 N. E. 1033.

<sup>68</sup> *Boardman v. Marshalltown Grocery Co.*, 105 Iowa, 445, 75 N. W. 343.

<sup>69</sup> *Perry v. Oil Mill Co.*, 93 Ala. 364, 9 South. 217; *Elliott v. Sibley*, 101 Ala. 344, 13 South. 500; *Carmel Natural Gas etc. Co. v. Small*, 150 Ind. 427, 47 N. E. 11, 50 N. E. 476; *Sherman v. Clark*, 4 Nev. 138, 97 **Am. Dec.** 516; *Kean v. Union Water Co.*, 52 N. J. Eq. 813, 46 **Am. St. Rep.** 538, 31 Atl. 282, reversing 52 N. J. Eq. 111, 27 Atl. 1015; *Owen v. Whitaker*, 20 N. J. Eq. 122; *Mickles v. Rochester City Bank*, 11 Paige (N. Y.), 118, 42 **Am. Dec.** 103; *Ciancimino v. Man*, 48 N. Y. St. Rep. 697, 20 N. Y. Supp. 702; *Model Building & L. Ass'n v. Patterson*, 34 N. Y. Supp. 241, 12 Misc. Rep. 400; *Mozley v. Alston*, 1 Phill. Ch. 790; *Bedford Springs Co. v. McMeen*, 161 Pa. St. 639, 29 Atl. 99; *Hayes v. Burns*, 25 App. Cas. (D. C.) 242, 4 **Ann. Cas.** 704. But see *Haskell v. Read* (Neb.), 93 N. W. 997.

<sup>70</sup> *Johnston v. Jones*, 23 N. J. Eq. 216. Cases in support of the doctrine laid down in the text are collected in 4 **Am. & Eng. Ann. Cas.** 707, note.

<sup>71</sup> *Carmel Natural Gas etc. Co. v. Small*, 150 Ind. 427, 47 N. E. 11, 50 N. E. 476; *Kean v. Union Water Co.*, 52 N. J. Eq. 813, 46 **Am.**

takes jurisdiction on other grounds, and the title to corporate office is incidentally involved, its judgment cannot go to the extent of ousting a *de facto* officer.<sup>72</sup> The court may protect by injunction the possession of *de facto* trustees against rival claimants of their office, until their title can be properly adjudicated upon in a legal proceeding, for the purpose of preventing an unseemly struggle for possession between the rival boards of trustees.<sup>73</sup>

§ 1730. (§ 308.) **Existence of a Corporation cannot be Challenged by Injunction — Injunction in Connection With Receivership.**—A court of equity has no inherent jurisdiction, either at the suit of the state or of a private person, to challenge or question the legal existence of a *de facto* corporation, or to take away its chartered privileges, even though the purpose for which it was organized may have been unlawful; the remedy is by *quo warranto*.<sup>74</sup> There is a clear distinction between an injunction directed against acts outside the scope of the charter privileges of a corporation, and an injunction against *infra vires* acts, resting upon the conduct of the incorporators preceding and leading up to the incorporation of the company.<sup>75</sup> An injunction cannot be

**St. Rep.** 538, 31 Atl. 282; *Mickles v. Rochester City Bank*, 11 Paige (N. Y.), 118, 42 **Am. Dec.** 103; *Ciancimino v. Man*, 48 N. Y. St. Rep. 697, 20 N. Y. Supp. 702.

<sup>72</sup> *Ciancimino v. Man*, 48 N. Y. St. Rep. 697, 20 N. Y. Supp. 702, and cases cited.

<sup>73</sup> *Model Building & L. Ass'n v. Patterson*, 12 Misc. Rep. 400, 34 N. Y. Supp. 241.

<sup>74</sup> *Stockton v. American Tobacco Co.*, 55 N. J. Eq. 352, 36 Atl. 971; affirmed *sub nom.* *Miller v. American Tobacco Co.*, 42 Atl. 1117; *National Docks R. Co. v. Central R'y Co.*, 32 N. J. Eq. 755; *Elizabethtown Gas-Light Co. v. Green*, 46 N. J. Eq. 117, 18 Atl. 844; affirmed 49 N. J. Eq. 329, 24 Atl. 560; *Harrison v. Hebbard*, 101 Cal. 152; *Bayless v. Orne*, 1 Freem. Ch. (Miss.) 173.

<sup>75</sup> *Stockton v. American Tobacco Co.*, *supra*.

allowed which would strike at the authority of the corporation to act at all as a corporation; and a decree restraining the officers and agents of a corporation from executing corporate acts is the same as a decree enjoining the corporation itself.<sup>76</sup> Nor does the rule laid down in the last paragraph, that the legality of an election of corporate officers may be questioned when the matter arises incidentally in connection with some recognized ground for equitable jurisdiction, apply by analogy, so as to enable a court of equity to determine collaterally a question of corporate existence.<sup>77</sup>

When a receiver is appointed under the statutes providing for the dissolution of corporations, an injunction depriving the officers of the corporation of control over the corporate property is appropriate and customary; such injunction is frequently authorized by the terms of the statute.<sup>78</sup>

<sup>76</sup> *Stockton v. American Tobacco Co.*, *supra*.

<sup>77</sup> *Stockton v. American Tobacco Co.*, *supra*.

<sup>78</sup> See *Morgan v. New York & A. R. R. Co.*, 10 Paige, 290, 40 Am. Dec. 244. As to injunction restraining creditors from enforcing their demands against the corporation, when proceedings have been begun for its voluntary dissolution, see *In re Binghamton General Electric Co.*, 143 N. Y. 261, 38 N. E. 297; *In re French Mfg. Co.*, 12 Hun, 488.

## CHAPTER XV.

## INJUNCTIONS RELATING TO VOLUNTARY ASSOCIATIONS AND NON-STOCK CORPORATIONS.

## ANALYSIS.

- § 309. In general.
- § 310. Expulsion of members.
- § 311. Same—Injury to property.
- § 312. Expulsion from religious organizations.
- § 313. Expulsion from other societies.
- § 314. Protection of church property rights.
- § 315. Same—When rights depend upon decision of superior church tribunal.

§ 1731. (§ 309.) **In General.**—The jurisdiction of equity over voluntary associations and corporations not organized for profit is of a very limited character. So long as the organization acts in accordance with its valid rules, equity will not interfere at the suit of members;<sup>1</sup> nor will relief be given when proper redress can be obtained within the body itself.<sup>2</sup> But when powers are exceeded and rules are disregarded, equity may enjoin at the suit of injured members.<sup>3</sup> The ground of the

<sup>1</sup> *Bateman v. Hollinger* (N. J. Eq.), 30 Atl. 1107; *Francis v. Taylor*, 31 Misc. Rep. 187, 65 N. Y. Supp. 28.

<sup>2</sup> *Grand Castle of the Golden Eagles v. Bridgeton Castle* (N. J. Eq.), 40 Atl. 849.

<sup>3</sup> *Supreme Lodge, Order of Golden Chain v. Simering*, 88 Md. 276, 71 Am. St. Rep. 409, 41 L. R. A. 720, 40 Atl. 723; *State v. Bankers' Union of the World* (Neb.), 99 N. W. 531; *German Mut. Fire Ins. Co. v. Schwarzwald* (N. J. Eq.), 44 Atl. 769; *Kalbitzer v. Goodhue*, 52 W. Va. 435, 44 S. E. 264; *Flaherty v. Portland etc. Ben. Ass'n* (Me.), 58 Atl. 58 (unwarranted use of funds of mutual benefit society).



jurisdiction is that there is a contract between the organization and its members, for a violation of which an injunction is a proper remedy.

§ 1732. (§ 310.) **Expulsion of Members.**—Courts of equity have often been called upon of late to enjoin the illegal expulsion of members of unincorporated associations and benevolent corporations. Persons becoming members of these organizations usually subscribe to and are bound by certain by-laws; and so long as the association keeps strictly within its rules, the court will not generally interfere. The cases calling for the aid of equity arise when the rules are exceeded, and in rare cases, when the rules are themselves illegal.

It is generally asserted to be a fundamental principle of equity that only substantial property rights will be protected. Therefore, it would seem that an injunction should be granted in cases of this kind only where some such right is involved. In cases of social clubs, however, the courts have sometimes gone further. "In all these cases the suit in law or equity has been sustained upon the ground that the relations of a member to such society were contractual, and, if the relation had been severed in violation of the law regulating membership enacted by themselves, that there was a breach of contract."<sup>4</sup> Thus, it has been said that "in every proceeding before a club, society, or association, having for its object the expulsion of a member, the member is entitled to be fully and fairly informed of the charge, and to be fully and fairly heard"; and if such hearing is not allowed, he is entitled to an injunction.<sup>5</sup> "In the absence of defined

<sup>4</sup> *Nance v. Busby*, 91 Tenn. 303, 15 L. R. A. 801, 18 S. W. 874.

<sup>5</sup> *Fisher v. Keane*, L. R. 11 Ch. D. 353; *Labouchere v. Earl of Wharfedale*, 13 Ch. D. 346. In *Harington v. Sendall*, [1903] 1 Ch. 921, expulsion was enjoined, of a member who had violated a resolution raising the annual dues, which resolution was not authorized by the rules governing the club.

regulations as to the causes for expulsion, the ordinary principles of justice govern. Offenses against the tenets of the order justify action. Caprice and malice do not."<sup>6</sup> Accordingly, it has been held that an injunction may issue when no just cause for expulsion is shown, even though the outward forms of procedure have been followed.<sup>7</sup> Before resorting to equity, however, the injured party should first exhaust his remedy within the

Equity will not enjoin an association from trying a member, as prescribed by its rules. The presumption is that he will get a fair trial. If he does not, it will be time enough to go into court after he has exhausted his remedies within the association; *Smith v. Merriott*, 130 Md. 447, 100 Atl. 731.

**Labor Unions.**—Relief was granted in *Schneider v. Local Union No. 60*, 116 La. 270, 114 Am. St. Rep. 549, 7 Ann. Cas. 868, 5 L. R. A. (N. S.) 891, 40 South. 700; *Holmes v. Brown*, 146 Ga. 402, 91 S. E. 408. Relief was denied in *Engel v. Walsh*, 258 Ill. 98, 45 L. R. A. (N. S.) 353, 101 N. E. 222; *Shinsky v. Tracey*, 226 Mass. 21, L. R. A. 1917C, 1053, 114 N. E. 957. Compare *Bachman v. Harrington*, 184 N. Y. 458, 77 N. E. 657. For a collection of authorities, see 45 L. R. A. (N. S.) 353, note.

<sup>6</sup> *Heaton v. Hull*, 28 Misc. Rep. 97, 59 N. Y. Supp. 281.

<sup>7</sup> *Id.* In this case the court said: "I should therefore hold that, even if the outward forms of the society had been observed in degrading this chapter and its members, still such a blow was struck to the vital principles of the order and the rights of its members that no formalities could justify such destructive action, and any one aggrieved could appeal to the only resource left,—the benign, yet powerful, protection of the law. And it is a mistake to rest upon the assertion that law recognizes only material property injuries, and has no care for wounded emotions or character. Even in the cruder days of the common law, it gave to the lost service of a daughter or wife pence, while it gave to the hurt sensibilities of the father or husband hundreds of pounds. It atoned for injury to character and wounded feeling by exemplary damages. And courts of equity, such as the one now appealed to, grasp jurisdiction of other than property injuries, where equitable considerations require action to prevent hurt to standing or character which damages may not compensate."

organization, especially where no property right is directly involved.<sup>8</sup>

§ 1733. (§ 311.) **Same—Injury to Property.**—Where an illegal expulsion works a direct injury to property rights, the jurisdiction of equity is clear, and the injunction will be granted without question. The only inquiry in such cases is whether the expulsion is illegal; and when that is determined, the injunction follows as a matter of course. Thus, when a suspension will necessarily result in affecting a member's financial standing, as well as deprive him of the use of property that is common to the whole association, the court will enjoin action under an illegal by-law.<sup>9</sup> In the case just cited in the note, the plaintiff was a member of a local Board of Fire Underwriters, and was threatened with suspension for employing more agents than the rules allowed. The court held that the rules were void because in restraint of trade, and that therefore a suspension would be invalid. The injury consisted in loss of business and inconvenience resulting from denial of a membership right to consult fire maps. Likewise, a suspension from a Merchants' Exchange for violating a rule which does not warrant suspension,<sup>10</sup> or an expulsion from a Board

<sup>8</sup> Mead v. Stirling, 62 Conn. 586, 23 L. R. A. 227, 27 Atl. 591; Thomas v. Musical Mut. Pro. Union, 121 N. Y. 45, 8 L. R. A. 175, 24 N. E. 24 (reversing 49 Hun, 171, 2 N. Y. Supp. 195); O'Brien v. Musical Mut. P. & B. Union, 64 N. J. Eq. 525, 54 Atl. 150; Carter v. Papineau, 222 Mass. 464, Ann. Cas. 1918C, 620, L. R. A. 1916D, 371, 111 N. E. 358 (not an injunction case); Brown v. Harris County Medical Society (Tex. Civ. App.), 194 S. W. 1179. It is not necessary to seek redress within the organization when its constitution and by-laws make no provision therefor: Schneider v. Local Union No. 60, 116 La. 270, 114 Am. St. Rep. 549, 7 Ann. Cas. 868, 5 L. R. A. (N. S.) 891, 40 South. 700.

<sup>9</sup> Huston v. Rentlinger, 91 Ky. 333, 34 Am. St. Rep. 225, 15 S. W. 867.

<sup>10</sup> Albers v. Merchants' Exchange, 39 Mo. App. 583.

of Trade without opportunity to make a defense which the by-laws permit members to make,<sup>11</sup> will be enjoined at the suit of the injured party. It has been held, however, in a similar case that there can be no injunction after the expulsion has taken place.<sup>12</sup> The reason given is that the writ of injunction is preventive only, and will not issue to redress past wrongs. It would seem that a sufficient answer to this line of argument is that where the proceedings are illegal there is not an expulsion which the courts will recognize. Hence, the injunction should issue to protect the plaintiff's present right of membership. The injunction will not be granted, in the absence of any other ground, when the property injury is conjectural only, as, for instance, where the punishment is a fine which may lead to suspension if not paid, or if the offense is repeated;<sup>13</sup> nor will relief be awarded on the ground that due notice of the hearing has not been given, when, as a matter of fact, the member has known of the proceeding and is therefore not injured;<sup>14</sup> nor when the association itself is an illegal one.<sup>15</sup>

11 *Ryan v. Cudahy*, 157 Ill. 108, 48 *Am. St. Rep.* 305, 49 *L. R. A.* 353, 41 *N. E.* 760; *Bartlett v. L. Bartlett & Son Co.*, 116 *Wis.* 450, 93 *N. W.* 473. See, also, *Moffatt v. Board of Trade* (*Mo. App.*), 111 *S. W.* 894. An injunction has been allowed to restrain the expulsion of a member from a news association: *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 75 *Am. St. Rep.* 184, 48 *L. R. A.* 568, 56 *N. E.* 822.

12 *Fisher v. Board of Trade*, 80 Ill. 85 ("If appellant has been improperly expelled by proceedings contrary to the constitution and by-laws or rules of the board, a court of chancery cannot restore him"). In *Wilson v. Pine Knot Council No. 54*, 175 *Ky.* 502, 194 *S. W.* 537, a mandatory injunction issued to compel reinstatement of a member of a lodge which provided sick benefits.

13 *Thomas v. Musical Mut. Pr. Union*, 121 *N. Y.* 45, 8 *L. R. A.* 175, 24 *N. E.* 24 (reversing 49 *Hun*, 171, 2 *N. Y. Supp.* 195).

14 *Grand Com. of Mass. United Order of the Golden Cross v. Stewart*, 177 *Mass.* 235, 58 *N. E.* 689.

15 *Greer v. Payne*, 4 *Kan. App.* 153, 46 *Pac.* 190.



In determining whether or not the expulsion is wrong, the court will generally inquire only into the regularity of the proceedings, and sometimes, as stated above, into the legality of the rules. "Proceedings for expulsion from a beneficiary association must be in accordance with its constitution and by-laws, to the extent that the member expelled shall have notice and shall be tried on a charge within the jurisdiction of the tribunal trying him."<sup>16</sup>

§ 1734. (§ 312.) **Expulsion from Religious Organizations.**—An injunction will not ordinarily issue to restrain expulsion from a church or religious organization, for generally there is no property right involved. "Church relationship stands upon an altogether higher plane, and church membership is not to be compared to that resulting from connection with mere human associations for profit, pleasure or culture. The church undertakes to deal only with the spiritual state of man. It does not appeal to his purely human and temporal interests. . . . No property rights of a personal kind depend upon membership. No pecuniary right, or civil right of any character" is affected by expulsion.<sup>17</sup> Therefore, a minister cannot be enjoined from striking plaintiff's name from the roll of church communicants.<sup>18</sup>

<sup>16</sup> *Women's Catholic Order of Foresters v. Haley*, 86 Ill. App. 330. *Gregg v. Massachusetts Med. Soc.*, 111 Mass. 185, 15 *Am. Rep.* 24, is apparently *contra*.

<sup>17</sup> *Nance v. Busby*, 91 Tenn. 303, 18 S. W. 874. And a court of equity will not in an action for an injunction try title to a church office: *Dayton v. Carter*, 206 Pa. St. 491, 56 Atl. 30. But see *Hendryx v. People's United Church*, 42 Wash. 336, 7 *Ann. Cas.* 764, 4 *L. R. A. (N. S.)* 1154, 84 *Pac.* 1123, where an injunction was allowed. The plaintiff belonged to an organization whose rules permitted expulsion without trial; but plaintiff showed that a number of members had been expelled for the purpose of effecting a disposition of the church property, and the court interfered because of the fraud.

<sup>18</sup> *Waller v. Howell*, 23 Misc. Rep. 236, 45 N. Y. Supp. 790.

In the case cited, the court said: "All questions of faith, doctrines, and discipline belong exclusively to the church and its spiritual officers; and the courts will neither review their determination on the facts, nor their decision on the question of jurisdiction." "The question of church membership is purely ecclesiastical." Likewise, it is held that a minister cannot enjoin a church court from proceeding with a trial against him.<sup>19</sup> It was urged that a minister has a vested right in his office and the salary and emoluments attached to it; but in answer it was held that the right to salary depended upon the continued performance of duties as rector, and that the contract must be construed and enforced by reference to the canons. Whether an exemption from taxation and performance of certain civil duties are such property rights as would give the court jurisdiction is more of a question; but granting that they are, the court will determine only whether the tribunal had power to act.<sup>20</sup> It cannot inquire into the truth of the charges.

A distinction is made in at least one case between expulsion of a member by a properly organized tribunal and by one not authorized. The "court will have nothing to do with the charge of a spiritual offense. That is an ecclesiastical question purely. But the inquiry whether or not the tribunal has been organized in conformity with the constitution of the church is not ecclesiastical. It is the same question, and that only, that may arise with respect to any voluntary association, such as fraternal orders and social clubs. The assertion of jurisdiction in such a case is not an interference with the control of the society over its own members; but, on the contrary, it assumes that the constitution was intended to be mutually binding upon all, and it protects the society in fact by recalling it to a recognition of its

<sup>19</sup> *Chase v. Cheney*, 58 Ill. 509, 11 Am. Rep. 95.

<sup>20</sup> *Walker v. Wainwright*, 16 Barb. 486.

own organic law.”<sup>21</sup> There apparently is no property right here, and consequently the case seems difficult to reconcile with the doctrines laid down above.

§ 1735. (§ 313.) **Expulsion from Other Societies.**—Because there is no property right involved, it has been held that an injunction will not issue to restrain expulsion from a temperance society,<sup>22</sup> nor from a purely political organization.<sup>23</sup> In both of these cases the right of membership is entirely distinct from any right of property.

§ 1736. (§ 314.) **Protection of Church Property Rights.**—While equity is not concerned with matters purely ecclesiastical, it will interfere by injunction to protect the illegal impairment of vested rights in church property.<sup>24</sup> In a leading case on the subject, the questions which may arise were divided into three groups, viz.:

“1. The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which property is held, by the express terms of the instrument devoted to

<sup>21</sup> *Hatfield v. De Long*, 156 Ind. 207, 83 Am. St. Rep. 194, 51 L. R. A. 751, 59 N. E. 483; S. C., 31 Ind. App. 210, 67 N. E. 551. In *Bonacum v. Murphy* (Neb.), 98 N. W. 1030, an injunction was said to be proper pending an appeal to a higher church tribunal; but see S. C., 104 N. W. 180.

<sup>22</sup> *Hussey v. Gallagher*, 61 Ga. 86.

<sup>23</sup> *Kearns v. Howley*, 188 Pa. St. 116, 68 Am. St. Rep. 852, 42 L. R. A. 235, 41 Atl. 273; *McKane v. Adams*, 123 N. Y. 609, 20 Am. St. Rep. 785, 25 N. E. 1057.

<sup>24</sup> Equity may enjoin a minority member from trespassing upon the church property and creating a disturbance; but will not enjoin him from insulting the rabbi of the congregation on a public street: *Ashinsky v. Levenson*, 256 Pa. St. 14, L. R. A. 1917D, 994, 100 Atl. 491. A deposed pastor may be enjoined from interfering with the church property: *Morris St. Baptist Church v. Dart*, 67 S. C. 338, 100 Am. St. Rep. 727, 45 S. E. 753.

the teaching, support or spread of some specific form of religious doctrine or belief.

"2. The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority.

"3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete in some supreme judicatory over the whole membership of that general organization."<sup>25</sup> The cases will nearly all fall into this classification, and therefore will be discussed according to it.

(1) The rule in regard to the first class is so well expressed in the same case that it is unnecessary to add to it. "In regard to the first of these classes it seems hardly to admit of a rational doubt that an individual or an association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting and propagating definite religious doctrines or principles, provided that in doing so they violate no law of morality, and give to the instrument by which their purpose is evidenced, the formalities which the laws require. And it would seem also to be the obvious duty of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust which is thus attached to its use. So long as there are persons qualified within the meaning of the original dedication, and who are also willing to teach the doctrines or principles prescribed in the act of dedication, and so long as there is anyone so interested in the execution of the trust as to have a standing in court, it must be that they can

<sup>25</sup> *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666.



prevent the diversion of the property or fund to other and different uses. This is the general doctrine of courts of equity as to charities, and it seems equally applicable to ecclesiastical matters."<sup>26</sup>

(2) In the second class, the ordinary rules as to voluntary associations apply. The property must be managed and controlled according to the rules of the organization. As a general rule, the majority may deal with the property as it sees fit, subject only to the restriction that the regular method of procedure must be followed. Therefore, the majority may enjoin the minority from unlawful interference with the church property where the ordinary equitable rules permit such a remedy.<sup>27</sup> But if the majority attempts to act without regard to the rights of the minority, as where it attempts without authority to make a change in the customs of the church by installing an organ in the house of worship,<sup>28</sup> an injunction will issue upon the petition of the minority. Where the majority decides upon a course of action at a meeting of which due notice is not given, it cannot enjoin interference with such plans.<sup>29</sup> The majority may determine the rules of discipline, and may expel members for violations thereof. After such expulsion, the rights of the former member as to the church property have ceased, and, therefore, he can be enjoined from interfering.<sup>30</sup> But, of course, the mi-

<sup>26</sup> *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666. See, also, *Cape v. Plymouth Congregational Church*, 117 Wis. 150, 93 N. W. 449.

<sup>27</sup> *Trustees etc. German Evangelical Cong. v. Hoessli*, 13 Wis. 388. A deposed pastor may be enjoined from using the church property: *Morris St. Baptist Church v. Dart*, 67 S. C. 338, 100 Am. St. Rep. 727, 45 S. E. 753.

<sup>28</sup> *Hackney v. Vawter*, 39 Kan. 615, 18 Pac. 699.

<sup>29</sup> *Long v. Harvey*, 177 Pa. St. 473, 55 Am. St. Rep. 733, 34 L. R. A. 169, 35 Atl. 869.

<sup>30</sup> *Shannon v. Frost*, 42 Ky. (3 B. Mon.) 253. Likewise an excommunicated member cannot enjoin diversion of property: *Nance v. Busby*, 91 Tenn. 303, 18 S. W. 874.

nority cannot expel the majority, and if such a thing is attempted, the rights of the majority in the property will be protected by injunction.<sup>31</sup>

§ 1737. (§ 315.) **Same — When Rights Depend upon Decision of Superior Church Tribunal.**—(3) In the third class, where the congregation is but a subordinate member of some general church organization, the rights of any faction to the control of the property depend upon the decision of the church tribunals. “Whenever the questions of discipline or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.”<sup>32</sup> Therefore, the trustees of every local church must hold the property for the use of the party decided by such judicatory to be the real representative of the denomination. In the leading case from which the foregoing abstract is taken, the question arose as to the respective rights of two factions of the Presbyterian Church. The General Assembly, the highest court of the church, expressed views on the subject of slavery, which led to the secession of a large number of members from the Southern churches. The result was a dispute as to the rights to the property. The court held that the questions of discipline and of slavery, under the circumstances, were matters of ecclesiastical cognizance alone; that the decision of the General Assembly was final; that therefore the party acceding to its decision was entitled

<sup>31</sup> *Bouldin v. Alexander*, 15 Wall. 131, 21 L. Ed. 69.

<sup>32</sup> *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666. See, also, *First Presbyterian Church v. First Cumberland Presbyterian Church*, 245 Ill. 74, 19 Ann. Cas. 275, 91 N. E. 761; *St. Vincent's Parish v. Murphy*, 83 Neb. 630, 35 L. R. A. (N. S.) 919, 120 N. W. 187; *Parish of the Immaculate Conception v. Murphy*, 89 Neb. 524, 35 L. R. A. (N. S.) 926, 131 N. W. 946.

to the property, and could enjoin interference therewith by the other faction.<sup>33</sup>

The action of the supreme judicatory being final on all such matters, it follows that a determination by such a body of the validity of the appointment of a pastor

<sup>33</sup> *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666. Similar questions arose in a line of decisions which for convenience may be called the United Brethren cases. The constitution of this religious organization provided: "There shall be no alteration of the foregoing constitution unless by request of two-thirds of the whole society." "No rule or ordinance shall at any time be passed to change or do away with the confession of faith as it now stands, nor to destroy the itinerant plan." At a general conference it was decided to amend the constitution in such a way as to add to the clearness of expression without a change of meaning. The proposition was submitted to the members and was carried by a vote of more than two-thirds of those voting, but not by two-thirds of all the members. Thereupon a minority withdrew, set up a claim to be the true church, alleged that the majority, by its action, had withdrawn, and claimed the right to control the different congregations. The result was a number of injunction suits to determine the rights of different congregations in the several states. In some instances it was held that the question whether the old confession of faith had been superseded was ecclesiastical, that the courts would not inquire into it, and that therefore the majority was entitled to the aid of the court: *Kuns v. Robertson*, 154 Ill. 394, 40 N. E. 343; *Brundage v. Dear-dorf*, 92 Fed. 214, 34 C. C. A. 304; *Lamb v. Cain*, 129 Ind. 486, 14 L. R. A. 518, 29 N. E. 13 (not an injunction case). In one case it was held that the change was valid, and that therefore the majority was entitled to an injunction: *Schlichter v. Keiter*, 156 Pa. St. 119, 22 L. R. A. 161, 27 Atl. 45. And in another it was held that the action of the conference was legislative rather than judicial; that it was subject to review; that while the change was illegal, it was not so great as to change the identity, and that therefore the majority was entitled to control: *Philomath College v. Wyatt*, 27 Or. 390, 26 L. R. A. 68, 37 Pac. 1022 (see, also, 31 Pac. 206). See as to the general proposition, *Bonacum v. Harrington*, 65 Neb. 831, 91 N. W. 886.

**Union of Cumberland Presbyterian Church and Presbyterian Church in U. S. A.**—Holding the decision of the church courts final and denying injunctions: *Sanders v. Baggerly*, 96 Ark. 117, 131 S. W.

cannot be questioned in an injunction suit.<sup>34</sup> It is for the church court to determine upon the validity of such proceedings.<sup>35</sup> And it would seem the better rule to refuse an injunction to restrain a party from preaching, for that is a mere naked trespass;<sup>36</sup> but there is authority for such relief.<sup>37</sup>

49; Permanent Committee of Missions v. Pacific Synod, 157 Cal. 105, 106 Pac. 395; Maek v. Kime, 129 Ga. 1, 24 L. R. A. (N. S.) 675, 58 S. E. 184; First Presbyterian Church v. First Cumberland Presbyterian Church, 245 Ill. 74, 19 Ann. Cas. 275, 91 N. E. 761; Ramsey v. Hicks, 174 Ind. 428, 30 L. R. A. (N. S.) 665, 91 N. E. 344, 92 N. E. 164; Wallace v. Hughes, 131 Ky. 445, 115 S. W. 684; Brown v. Clark, 102 Tex. 323, 24 L. R. A. (N. S.) 670, 116 S. W. 360. *Contra*: Boyles v. Roberts, 222 Mo. 613, 121 S. W. 805; Landrith v. Hudgins, 121 Tenn. 556, 120 S. W. 783, 784.

<sup>34</sup> Gross v. Wieand, 151 Pa. St. 639, 25 Atl. 50.

<sup>35</sup> Wehmer v. Fokenga, 57 Neb. 510, 78 N. W. 28.

<sup>36</sup> German Evangelical Luth. Church v. Maschop, 10 N. J. Eq. 57.

<sup>37</sup> Perry v. Shipway, 4 De Gex & J. 353; Cooper v. Gordon, L. R. 8 Eq. 249.



## CHAPTER XVI.

## INJUNCTIONS BETWEEN MORTGAGOR AND MORTGAGEE.

## ANALYSIS.

- § 316. Injunction against sale under power in mortgage or trust deed.  
§ 317. Same; in case of usury.  
§ 318. Same; payment by the mortgagor, or necessity for an accounting.  
§ 319. Injunction on behalf of the mortgagee.  
§ 320. Injunctions relating to chattel mortgages.

§ 1738. (§ 316.) **Injunction Against Sale Under Power in Mortgage or Trust Deed.**—A court of equity will enjoin the execution of a power of sale in a mortgage when it appears that the mortgagee is proceeding in an improper or oppressive manner, or is perverting the power from its legitimate purpose;<sup>1</sup> as where, having refused repeated tender, he files a bill to foreclose, dismisses it without prejudice when the cause is ready for hearing, and advertises the land for sale under a power in the

<sup>1</sup> *McCalley v. Otey*, 99 Ala. 584, 42 Am. St. Rep. 87, 12 South. 406; *S. C.*, 90 Ala. 302, 8 South. 157; *Struve v. Childs*, 63 Ala. 473. But an injunction will not issue against a sale upon the ground that the note secured by the mortgage has become barred by the statute of limitations: *House v. Carr*, 185 N. Y. 453, 113 Am. St. Rep. 936, 7 Ann. Cas. 185, 6 L. R. A. (N. S.) 510, 78 N. E. 171. For other authorities in support of this proposition, see 7 Ann. Cas. 189, note. The jurisdiction will be exercised only when, because of fraud, or a want of illegality or consideration, or for other sufficient reasons, the enforcement of the collection is against good conscience, and would work great and irreparable injury: *Caldwell v. Caldwell*, 166 Ala. 406, 139 Am. St. Rep. 48, 52 South. 323.

mortgage with the avowed purpose of compelling the payment of another claim which is disputed.<sup>2</sup> And in a suit for cancellation<sup>3</sup> or redemption<sup>4</sup> of a mortgage, a motion for a temporary injunction restraining the exercise of a power of sale may be granted, when it appears that less inconvenience and injustice will thereby be caused to the defendant than would result to the complainant from refusing the motion. A sale under a mortgage given by a married woman may be enjoined until a hearing is had on the question of her power to execute the mortgage.<sup>5</sup> But a sale under a power in a mortgage cannot be enjoined upon the mere ground that the time of the sale is unpropitious, if there is no fraud or collusion on the part of the mortgagee.<sup>6</sup>

<sup>2</sup> *McCalley v. Otey*, *supra*.

<sup>3</sup> *New England Mtg. Sec. Co. v. Powell*, 97 Ala. 483, 12 South. 55. See, also, *Hodge v. McMahon*, 137 Ala. 171, 34 South. 185 (chattel mortgage).

<sup>4</sup> *Whitley v. Lumber Co.*, 89 Ala. 493, 7 South. 810.

<sup>5</sup> *Strom v. American Freehold Land Mort. Co.*, 42 S. C. 97, 20 S. E. 16.

<sup>6</sup> *Warner v. Jacob*, L. R. 20 Ch. D. 220.

**Injunction for the Purpose of Obtaining a Set-off.**—"Without averment of insolvency, or other special equity, a power of sale will not be enjoined for the purpose of enabling the mortgagor to have ascertained and set off against the mortgage debt an uncertain balance that may be due him on a settlement of partnership accounts, or other claim in controversy between him and the mortgagee, though the cross-demands may be mutual. Such is not a case where the great and irreparable injury will result, which authorizes the court to exercise its extraordinary jurisdiction": *Glover v. Hembree*, 82 Ala. 324, 8 South. 251. See, also, *Sidney Land & Colony Co. v. Milner, Caldwell & F. L. Co.*, 138 Ala. 185, 35 South. 48, where an injunction to prevent the sale for a debt of \$35,000 on account of a claim of \$10, was denied.

**Conflicting Liens.**—In some cases, a court of equity will enjoin a sale when the property is subject to conflicting liens, the priority or validity of which is undetermined: *Hart v. Larkin*, 66 W. Va. 227, 135 Am. St. Rep. 1027, 1029, 66 S. E. 331. See, also, cases cited in note in *Ann. Cas.* 1917D, 125. But the uncertainty constitutes

Sales under trust deeds in the nature of mortgages come under the general jurisdiction of equity to compel trustees to perform their duties, and to interfere by injunction to restrain the improper exercise of their powers. The trustee, in such cases, is the agent of both parties, bound to act impartially between them, and ought of his own motion to apply to the court to remove an impediment to a proper execution of the trust; and if he should fail to do this, the party injured by his default has a right to make such application, and to enjoin the sale under the trust until such impediment is removed.<sup>7</sup>

§ 1739. (§ 317.) **Same; in Case of Usury.**—Relief by injunction is freely granted to restrain the sale under

no impediment to a sale unless such as to deter bidders: *George v. Zinn*, 57 W. Va. 15, 110 *Am. St. Rep.* 721, 49 S. E. 904. And a court of equity will not interfere to allow unrelated matters to be litigated between the parties: *Mankin v. Dickinson*, 76 W. Va. 128, *Ann. Cas.* 1917D, 120, 85 S. E. 74.

<sup>7</sup> *Hartman v. Evans*, 38 W. Va. 669, 18 S. E. 810, and cases cited; *Hudson v. Barham*, 101 Va. 63, 99 *Am. St. Rep.* 849, 43 S. E. 189. Thus, where a trust deed was given to secure the payment of the purchase-money of land, and an adverse claim to the land was afterward discovered, a sale under the trust deed was enjoined until such adverse claim should be regularly decided: *Gay v. Hancock*, 1 *Rand. (Va.)* 72; *Miller v. Argyle's Ex'r*, 5 *Leigh (Va.)*, 460; but see *Morgan v. Glendy*, 92 Va. 86, 22 S. E. 854, where the defendant offered to correct the defect in the title. See, also, *George v. Derby Lumber Co.*, 81 *Miss.* 725, 33 *South.* 496.

An injunction should not issue on account of defects in advertising, etc., when it appears that the complainant could prevent a sale by paying the amount admitted to be due: *Meetz v. Mohr*, 141 *Cal.* 667, 75 *Pac.* 298. In *Smith v. Parker*, 131 *N. C.* 470, 42 S. E. 910, a temporary injunction was issued to restrain a sale under a deed of trust given by sureties, who claimed that they had been released by an extension of time given to the principal. In *Dunaway v. O'Reilly (Mo. App.)*, 79 S. W. 1004, an injunction was issued on the ground that the time had been extended and that the sum secured was therefore not due.

power in a mortgage or trust deed of land mortgaged to secure a usurious debt, until an accounting is had of the amount legally due.<sup>8</sup> It is a familiar application, in such cases, of the maxim, "He who seeks equity must do equity," that relief will be refused when the mortgagor has not paid or offered to pay the amount of the principal and legal interest that is due.<sup>9</sup> When, however, the complaint leaves the mortgage unimpeached, to stand for the full balance of the principal lent upon it, and legal interest, and seeks only to restrain the sale of the mortgaged premises for a greater amount, no tender is necessary of the principal and interest admitted to be equitably due on the mortgage.<sup>10</sup> It is

<sup>8</sup> *Alston v. Morris*, 113 Ala. 506, 20 South. 950; *Edmund's Ex'rs v. Bruce*, 88 Va. 1007, 14 S. E. 840; *Marks v. Morris*, 2 Munf. (Va.) 407, 5 Am. Dec. 481; *Hartman v. Evans*, 38 W. Va. 669, 18 S. E. 810; *Smith v. McMillan*, 46 W. Va. 577, 33 S. E. 283. Statutes in some states expressly provide for an injunction to prevent such sale, pending suit to determine the existence of the usury: *Code W. Va.* (1891), c. 96, p. 713. Where the court, by its final decree, ascertains the amount legally due, after deducting the usurious interest, and orders a foreclosure under direction of the court unless payment is made, it is error to dissolve a preliminary injunction which had been granted restraining a sale under the power: *Alston v. Morris, supra*. In *Rorer v. Holston Nat. B. & L. Ass'n* (W. Va.), 46 S. E. 1018, relief was granted at suit of a grantor in a trust deed who had sold his interest in the land.

**Other Illegality.**—An injunction may issue to restrain a sale when the consideration for the mortgage is illegal. Thus, in Alabama, where the sale of a liquor license without consent of the authorities is illegal, a mortgage given to secure the price of such a sale is illegal, and sale thereunder may be enjoined: *Greil Bros. Co. v. McLain*, 197 Ala. 136, 72 South. 410.

<sup>9</sup> *Stanley v. Gadsby*, 10 Pet. (35 U. S.) 521, 9 L. Ed. 518; *Ward v. Bank of Abbeville*, 130 Ala. 597, 30 South. 341. By statutes in some states all interest is forfeited, and payment of the principal only can be made a condition of relief: *Southern Home B. & L. Ass'n v. Toney*, 78 Miss. 916, 29 South. 825. See *Pom. Eq. Jur.*, § 391.

<sup>10</sup> *Haggerson v. Phillips*, 37 Wis. 364.



held that the defense of failure to make tender of the legal amount, if not taken advantage of by answer, will be deemed to be waived.<sup>11</sup>

§ 1740. (§ 318.) **Same; Payment by the Mortgagor, or Necessity for an Accounting.**—Payment of the mortgage indebtedness is a sufficient ground for restraining a sale under the power in the mortgage or trust deed;<sup>12</sup> or a tender of the amount to the trustee, followed by his refusal to execute a release in proper form, and a payment of the amount into court.<sup>13</sup>

Where there is a controversy as to the amount due on the mortgage, arising out of numerous transactions between the parties, and an accounting is therefore necessary to ascertain the sum still due, a proper case is presented for an injunction to suspend the proposed sale under the power until the balance due is ascertained and declared by a decree of the court.<sup>14</sup> When it is

<sup>11</sup> Price v. Empire Loan Ass'n, 75 Mo. App. 551.

<sup>12</sup> Dockery v. French, 69 N. C. 308, under a statute (Maryland, Code, art. 66, § 16), providing that no injunction to stay a sale of mortgaged property shall be granted unless the party praying the injunction shall on oath allege payment in whole or in part, and that the mortgagee refuses to credit the same, the court has jurisdiction, on a bill to enjoin such sale, to determine not only that the mortgage debt was unpaid, but that the persons named in the mortgage had power to make the sale: Barriek v. Horner, 78 Md. 253, 44 Am. St. Rep. 283, 27 Atl. 1111.

<sup>13</sup> Chappell v. Clarke, 92 Md. 98, 48 Atl. 36.

<sup>14</sup> Bridgers v. Morris, 90 N. C. 32; Capehart v. Biggs, 77 N. C. 261; Purnell v. Vaughan, 77 N. C. 268; Harrison v. Bray, 92 N. C. 488; Faison v. Hardy, 114 N. C. 58, 19 S. E. 91; Farmers' Savings & B. & L. Ass'n v. Kent, 117 Ala. 624, 23 South. 757; Henson v. Brooks, 67 Ala. 491; Martin v. Kester, 46 W. Va. 438, 33 S. E. 238; Sandusky v. Faris, 49 W. Va. 150, 38 S. E. 563. In the last case it is said: "When, from any cause, the amount due and to be raised from a sale is uncertain, such uncertainty is an impediment to the proper execution of the trust, and application may be made by the trustee, the grantor, or any of the beneficiaries of the trust, to a

found that the debt due is less than the amount called for by the deed of trust, the court may, in its discretion, either dissolve the injunction as to the amount due, and dismiss the bill, or may retain the case, and have the trust executed under its own supervision.<sup>15</sup>

§ 1741. (§ 319.) **Injunction on Behalf of the Mortgagee.**—The jurisdiction to restrain waste of mortgaged premises is treated elsewhere.<sup>16</sup> Injunction is sometimes sought to restrain a sale of the mortgaged property under subsequent liens. It is held that a mortgagee in possession, whose mortgage is duly recorded, cannot enjoin a sale under execution issued upon a junior judgment against the mortgagor, simply because his mortgage is a prior lien upon the property; since any sale under the execution can only pass the title to the mortgaged property subject to the mortgage if valid.<sup>17</sup>

court of equity to have it removed. But, to sustain an injunction upon the ground of such uncertainty, the complainant must sufficiently allege it, and, if it be denied in the answer, he must prove it." In this case the deed of trust amounted to a general assignment for the benefit of creditors, and the grantee was not permitted to enjoin a sale thereunder, because of uncertainty as to the amounts of his debts, etc. In Minnesota, a sale under a notice which substantially overstates the indebtedness may be temporarily enjoined, pending a final determination of the true amount of the indebtedness. The legal remedy in such a case is said to be inadequate: *Ekeberg v. Mackay*, 114 Minn. 501, *Ann. Cas.* 1912C, 568, 35 *L. R. A. (N. S.)* 909, 131 *N. W.* 787. The cases supporting the text are collected in *Ann. Cas.* 1912C, 572, note; and in 35 *L. R. A. (N. S.)* 909, note.

<sup>15</sup> *Fry v. Old Dominion B. & L. Ass'n*, 48 *W. Va.* 61, 35 *S. E.* 842; *Crenshaw v. Seigfried*, 24 *Gratt.* 272.

<sup>16</sup> See chapter XXII. That a mortgagee in possession under the mortgage may enjoin the removal of crops by one claiming under the mortgagor, see *Bagnall v. Villar*, *L. R.* 12 *Ch. D.* 812.

<sup>17</sup> *American Freehold Land & M. Co. v. Maxwell*, 39 *Fla.* 489, 22 *South.* 751. "If the real estate is sold, it cannot be removed, nor is it rendered less valuable by a rule under execution. If a prior

Whether a prior mortgagee whose mortgage has been canceled of record by mistake is entitled to the same relief against a junior lienholder is a question which, upon the authorities, is open to doubt.<sup>18</sup>

§ 1742. (§ 320.) **Injunctions Relating to Chattel Mortgages.**—In suits to restrain the foreclosure of chattel mortgages the question usually arises of the adequacy of the legal remedy or defense. It has been held that a chattel mortgagor, having both the title to and possession of the mortgaged property, may have a temporary injunction to restrain its sale, without seizure, by the mortgagee, on a complaint showing a tender rendering the mortgage null and void (under the terms of a statute); in such case the plaintiff, obviously, could neither bring an action of replevin nor an action for damages for an unlawful seizure of the property.<sup>19</sup> On

mortgagee were allowed to enjoin sales by subsequent lienholders, it would, at his election, as against the demands of other creditors, place in his hands a perpetual shield, and incase the mortgaged property in impenetrable armor.”

<sup>18</sup> Compare *Merchants & Mechanics' Bank v. Tillman*, 106 Ga. 55, 31 S. E. 794, with *Wiedner v. Thompson*, 66 Iowa, 283, 23 N. W. 670.

Temporary injunction against enforcement of a subsequent tax lien. In *Allison v. Corson*, 88 Fed. 581, 32 C. C. A. 12, a first mortgagee brought an action to enjoin the assignee of a tax certificate from taking a deed to the mortgaged premises, alleging that the taxes, a part of which were illegal, were levied after his mortgage was made; that until after the hearing in a suit to foreclose his mortgage, to which the second mortgagee was a party, the certificate was held by the second mortgagee, and then assigned. It was held that, it not being clear that the complainant might not succeed upon the merits, a temporary injunction should issue pending the final hearing.

<sup>19</sup> *Seabrook v. Mostowitz*, 51 S. C. 433, 29 S. E. 202. See, also, that a chattel mortgagor in possession, on a complaint alleging that nothing is due on the mortgage, may have an injunction against foreclosure by extra-judicial proceedings: *Badgett v. Frick*, 28 S. C. 176, 5 S. E. 355; *Mayrant v. Dickerson*, Rich. Eq. Cas. (S. C.) 201.

the other hand, one who has obtained the legal title to the mortgaged chattels cannot enjoin a sale on foreclosure by a mortgagee who is in possession of them, for the purpose of testing the validity of the mortgage, since the complainant has a full remedy by action of replevin or tort;<sup>20</sup> and a mortgagor who is sued in replevin for the recovery of mortgaged property for the purpose of foreclosure may in such action interpose any defense to the mortgage debt, such as usury, and cannot, therefore, maintain an independent suit to enjoin the foreclosure.<sup>21</sup> Where a chattel mortgage gives the mortgagee the right to take possession and sell the property at any time when he feels insecure, such sale will not be enjoined.<sup>22</sup>

Where the chattel mortgage does not transfer the right to the immediate possession of the mortgaged property, the mortgagee, pending foreclosure,<sup>23</sup> or even before the mortgage debt is due, may, as against the mortgagor or purchasers from him with notice or without consideration, restrain by injunction the destruction or disposal of the mortgaged chattels, their removal from the jurisdiction, and other acts done, with a view to defeating his lien.<sup>24</sup> The mortgagor, however, is not to

<sup>20</sup> *Jersey City Milling Co. v. Blackwell*, 58 N. J. Eq. 122, 44 Atl. 153, 49 Cent. L. J. 441.

<sup>21</sup> *Treanor v. Sheldon Bank*, 90 Iowa, 575, 58 N. W. 914. But see *Smith v. Werkheiser*, 152 Mich. 177, 125 Am. St. Rep. 406, 15 L. R. A. (N. S.) 1092, 115 N. W. 964, where an injunction was allowed to prevent the mortgagee from seizing the property upon a showing of fraud. The court held the legal remedy to be inadequate, enjoined the seizure, and gave complete relief by canceling the mortgage.

<sup>22</sup> *Cline v. Libby*, 46 Wis. 123, 32 Am. Rep. 700, 49 N. W. 832.

<sup>23</sup> *Schoonover v. Condon*, 12 Wash. 475, 41 Pac. 195.

<sup>24</sup> *Walker v. Radford*, 67 Ala. 446; *Clagett v. Salmon*, 5 Gill & J. (Md.) 314; *Bank of Ukiah v. Moore*, 106 Cal. 673, 39 Pac. 1071; *McCormick v. Hartley*, 107 Ind. 248, 6 N. E. 357 (to restrain foreclosure of mortgage subsequent to plaintiff's, executed in fraud of mortgagor's creditors), citing *Pom. Eq. Jur.*, § 1345.



be thus hindered in the legitimate use of the property; and a mere temporary removal of the property out of the state, accompanied by an honest intention to return it before the law day of the mortgage, and without any intention to affect, embarrass, or impair the rights of the mortgagee, will not authorize an injunction to prevent the removal of the property.<sup>25</sup> In Iowa it is held that one chattel mortgagee cannot enjoin the foreclosure of another chattel mortgage, whether prior or subsequent, as the legal remedies are adequate.<sup>26</sup>

<sup>25</sup> Walker v. Radford, *supra*.

<sup>26</sup> McCormick Harvesting Machine Co. v. De La Mater, 114 Iowa, 382, 86 N. W. 365; Rankin v. Rankin, 67 Iowa, 322, 25 N. W. 263.

## CHAPTER XVII.

### INJUNCTIONS AGAINST PUBLIC OFFICERS.

#### ANALYSIS.

- § 321. Public officers—In general.
- § 322. Same—When relief granted.
- § 323. Same—When not granted.
- § 324. Political acts.
- § 325. Federal officers.
- § 326. State officers—Tax-payers' suits.
- § 327. No relief when, in effect, against state.
- § 328. Injunctions against executive officers.
- § 329. Discretionary acts.
- § 330. Suits by officers against other officers.
- § 331. Elections.
- § 332. Same—Continued.
- § 332a. Same—Contrary view.
- § 333. Title to public office.
- § 334. Same—Continued.
- § 335. Possession of office protected.
- § 336. Payment of salaries.
- § 337. Removal of officers.
- § 338. Action of *de facto* officers.

§ 1743. (§ 321.) **Public Officers—In General.**—In general, a public officer may be restrained, in a case coming under some recognized head of equity jurisdiction, from acting illegally to the injury of individuals. The mere fact that he is an officer and is acting illegally, is not sufficient to warrant equitable interference.<sup>1</sup> There

<sup>1</sup> This section is cited in *State v. District Court*, 17 N. D. 285, 15 L. R. A. (N. S.) 331, 115 N. W. 675. This rule is well stated in *People v. Canal Board*, 55 N. Y. 390: "A court of equity exercises its peculiar jurisdiction over public officers to control their action only to prevent a breach of trust affecting public franchises, or some

must, in addition, be an injury to a property right of the party applying for relief. Equity does not concern itself with political affairs, as such.

§ 1744. (§ 322.) **Same—When Relief Granted.**—When a violation of a plain official duty, requiring no exercise of discretion, is threatened, one who will sustain injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.<sup>2</sup> Therefore, when, in such a case, there is irreparable injury

illegal act under color or claim of right affecting injuriously the property rights of individuals. A court of equity has, as such, no supervisory power or jurisdiction over public officials or public bodies, and only takes cognizance of actions against or concerning them when a case is made coming within one of the acknowledged heads of equity jurisdiction. To entitle plaintiff to prohibition by injunction from a court of equity, either provisional or perpetual, he must not only show a clear legal and equitable right to the relief demanded or to some part of it, and to which the injunction is essential, but also that some act is being done by the defendant, or is threatened and imminent, which will be destructive of such right, or cause material injury to him." In *La Chapelle v. Bubb*, 69 Fed. 481, however, a contrary doctrine seems to be laid down. The court in that case said: "Under ordinary circumstances this court would not grant an injunction to prevent a trespass; but the defendant Bubb justifies his proposed action on the ground that he is an officer of the United States government, acting only in obedience to orders from his superior officers in the Indian department, and for that reason, I deem it entirely proper to restrain him from committing a tort while assuming to act in his official capacity."

<sup>2</sup> *Louisiana Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623; *Mizner v. School District (Neb.)*, 96 N. W. 128; *Trustees of Burroughs School Dist. v. Board of Control*, 62 S. C. 68, 39 S. E. 793. In *School Township v. Wiggins*, 122 Iowa, 602, 98 N. W. 490, a school township was allowed to maintain the action. See, also, *School Dist. No. 44 v. Turner*, 13 Okl. 71, 73 Pac. 952. But mandatory injunction is not the proper remedy to enforce the performance of a plain official duty. There is an adequate legal remedy by *mandamus*: *Hager v. New South Brewing Co.*, 28 Ky. Law Rep. 895, 90 S. W. 608.

and no adequate remedy at law, an injunction is proper. Thus, it will issue to restrain a board of pilot commissioners from revoking a license for an act which the statute does not make cause for forfeiture;<sup>3</sup> or to restrain an insurance commissioner from illegally refusing a license to do business in the state, when the statute does not give an absolute discretion;<sup>4</sup> or to restrain a state board of health from interfering with one in the practice of his profession as an osteopath, when such board has no jurisdiction.<sup>5</sup> Likewise, it is proper where health officers impose unlawful quarantine regulations, the property right in such a case being the right to travel to different parts of the state;<sup>6</sup> or where a postmaster improperly refuses to deliver mail to the complainant;<sup>7</sup> or where the Secretary of the Interior attempts without authority to annul the action of his predecessor in approving the location of a railroad's right of way over the public lands;<sup>8</sup> or where a state official attempts to deprive an individual of his real property without due process of law under an unconstitutional enactment.<sup>9</sup> And in general, whenever such

<sup>3</sup> *Morris v. Board of Pilot Commissioners*, 7 Del. Ch. 136, 30 Atl. 667. The revocation of a teacher's license on other than statutory grounds may be enjoined: *Stone v. Fritts*, 169 Ind. 361, 14 Ann. Cas. 295, 15 L. R. A. (N. S.) 1147, 82 N. E. 792.

<sup>4</sup> *Mutual Life Ins. Co. v. Boyle*, 82 Fed. 705. It may likewise issue to restrain him from compelling the use of a uniform policy, in excess of authority: *Phenix Ins. Co. v. Perkins* (S. D.), 101 N. W. 1110. An injunction is proper to restrain a Secretary of State from issuing an illegal proclamation forbidding a telegraph company to do a local business within the state: *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146, 54 L. Ed. 423, 30 Sup. Ct. 280.

<sup>5</sup> *Nelson v. State Board of Health*, 108 Ky. 769, 22 Ky. Law Rep. 438, 50 L. R. A. 383, 57 S. W. 501.

<sup>6</sup> *Wong Wai v. Williamson*, 103 Fed. 1.

<sup>7</sup> *Fairfield Floral Co. v. Bradbury*, 87 Fed. 415.

<sup>8</sup> *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 13 Sup. Ct. 271.

<sup>9</sup> *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447.



acts will do great harm to the plaintiff's business,<sup>10</sup> or make him liable to heavy penalties, he is entitled to this relief.<sup>11</sup>

An injunction is the proper remedy when wrongful acts, involving no discretion, amount to a trespass which is either continuous in its nature or of such a character as to be a permanent injury to the freehold.<sup>12</sup> Thus, where inspectors acting under a claim of right exceed their powers in providing for the drainage of swamp-lands,<sup>13</sup> or where canal commissioners threaten to make an illegal appropriation of land for canal purposes, an injunction will issue.<sup>14</sup> It will also issue when the illegal acts amount to a nuisance,<sup>15</sup> cast a cloud upon the title to real estate<sup>16</sup> or will necessitate a multiplicity of

10 *Cotting v. Kansas City Stock Yards Co.*, 82 Fed. 850; *Union Terminal R. Co. v. Board of R. R. Comm'rs*, 54 Kan. 352, 38 Pac. 290. Upon this theory, national banks have been allowed an injunction to restrain the enforcement of an invalid state bank guaranty law: *Larabee v. Dolley*, 175 Fed. 365. A party who will be injured by the enforcement of an invalid pure food law may enjoin such enforcement, in order to prevent a multiplicity of suits and because there is no adequate remedy at law: *Jewett Bros. & Jewett v. Smail*, 20 S. D. 232, 105 N. W. 738. See, also, *State v. District Court*, 17 N. D. 285, 15 L. R. A. (N. S.) 331, 115 N. W. 675. An injunction may issue to prevent a state oil inspector from detaining oil in transit into the state on account of non-payment of illegal fees: *Bartles Northern Oil Co. v. Jackman*, 29 N. D. 236, 150 N. W. 576. In general, see *Van Deman & Lewis Co. v. Rast*, 214 Fed. 827; *Grand Union Tea Co. v. Evans*, 216 Fed. 791.

11 *Briggs v. Buckingham*, 6 Del. Ch. 267, 23 Atl. 858; *Van Lear v. Eisele*, 126 Fed. 823; *Buster v. Wright* (Ind. Ter.), 69 S. W. 882.

12 *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154; *Raleigh v. Goshens*, [1898] 1 Ch. 73. An owner of land may enjoin state officials from leasing part of the land, as it would be an unlawful interference with his private rights: *Taylor Sands Fishing Co. v. State Land Board* (Benson), 56 Or. 157, 108 Pac. 126.

13 *Belknap v. Belknap*, 2 Johns. Ch. 463, 7 Am. Dec. 548.

14 *McArthur v. Kelly*, 5 Ohio, 139.

15 *Sels v. Greene*, 88 Fed. 129.

16 *Kirwan v. Murphy*, 83 Fed. 275, 28 C. C. A. 348.

suits.<sup>17</sup> Thus, where a failure to obey an order unauthorized and void would subject a plaintiff in his daily business to large numbers of individual actions and heavy penalties, an injunction is the only efficacious remedy.<sup>18</sup> Likewise, it has been held in the federal courts that when a state insurance commissioner by an unauthorized act attempts to keep a great number of companies out of the state, an injunction is proper because of the great number of suits which would be necessary at law.<sup>19</sup>

§ 1745. (§ 323.) **Same — When not Granted.**—An injunction will not be granted, however, where the case is not brought under some recognized head of equity jurisdiction,<sup>20</sup> nor where there is a complete and adequate remedy at law.<sup>21</sup> Thus, it will be refused where there is an adequate remedy by *mandamus*,<sup>22</sup> as where

<sup>17</sup> *Kirwan v. Murphy*, 83 Fed. 275, 28 C. C. A. 348; *Pacific Express Co. v. Cornell*, 59 Neb. 364, 81 N. W. 377.

<sup>18</sup> *Dinsmore v. Southern Express Co.*, 92 Fed. 714. Thus, where a state statute imposed severe penalties upon a railroad company which violates rates fixed by a state commission, a federal court may enjoin the enforcement of the rates pending a determination of their validity, at the suit of a stockholder of a corporation affected thereby: *Ex parte Young*, 209 U. S. 123, 14 Ann. Cas. 764, 13 L. R. A. (N. S.) 932, 52 L. Ed. 714, 28 Sup. Ct. 441. This case contains a full discussion of the principle.

<sup>19</sup> *Liverpool & London & Globe Ins. Co. v. Clunie*, 88 Fed. 160.

<sup>20</sup> *Balogh v. Lyman*, 6 App. Div. 271, 39 N. Y. Supp. 780.

<sup>21</sup> It is believed that this statement is borne out by the cases cited in illustration. However, it has been held that an injunction will issue to restrain a trespass by a public officer acting under a claim of right in cases where it will not issue against individuals: *La Chapelle v. Bubb*, 69 Fed. 481; *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154 (*dictum*).

<sup>22</sup> *Nassau Electric R. Co. v. White*, 12 Misc. Rep. 631, 34 N. Y. Supp. 960; *Barber v. West Jersey Title & Guar. Co.*, 53 N. J. Eq. 158; 32 Atl. 222, 371; *Coquard v. Indian Grave Drainage Dist.*, 69 Fed. 867, 16 C. C. A. 530, 34 U. S. App. 169.

a county clerk denies a searcher of records access to the records of a particular title.<sup>23</sup> Likewise, it will be refused where full relief can be obtained by *certiorari*.<sup>24</sup> And in many cases ample satisfaction can be obtained in a suit to recover damages.<sup>25</sup> Thus, where an inspector, acting under an unconstitutional law, threatens to sell oyster grounds for non-payment of rent,<sup>26</sup> or where a commissioner of highways unlawfully threatens to remove a house encroaching on a highway,<sup>27</sup> there is said to be an adequate remedy at law, and equitable relief will be refused. Mere unconstitutionality affords no ground for such relief.<sup>28</sup> Again, an injunction will not issue to prevent the misappropriation of money by an officer of another court, for ordinarily there is an adequate remedy there.<sup>29</sup>

It is necessary to show irreparable injury to a substantial property right, and if such injury is not clearly made out, relief will be refused.<sup>30</sup> Therefore, when it is not apparent that irreparable injury will result therefrom, an injunction will not issue to restrain a board from taking testimony preparatory to fixing telephone

<sup>23</sup> Barber v. West Jersey Title & Guar. Co., 53 N. J. Eq. 158, 32 Atl. 222, 371.

<sup>24</sup> Pennsylvania R. Co. v. N. D. & N. J. J. C. R'y Co., 56 Fed. 697.

<sup>25</sup> Coquard v. Indian Grave Drainage Dist., 69 Fed. 867, 16 C. C. A. 530, 34 U. S. App. 169.

<sup>26</sup> Thomas v. Rowe (Va.), 22 S. E. 157.

<sup>27</sup> Flood v. Van Wormer, 147 N. Y. 284, 41 N. E. 569, affirming 70 Hun, 415, 24 N. Y. Supp. 460.

<sup>28</sup> State ex rel. Kenamore v. Wood, 155 Mo. 425, 48 L. R. A. 596, 56 S. W. 474; People v. District Court, 29 Colo. 182, 68 Pac. 242. But where the enforcement of an unconstitutional statute will interfere with property rights, an injunction may issue: Moneyweight Scale Co. v. McBride, 199 Mass. 503, 85 N. E. 870.

<sup>29</sup> Johnson v. Gilmer, 113 Ga. 1146, 39 S. E. 469.

<sup>30</sup> Seccomb v. Wurster, 83 Fed. 856; Business Men's League v. Waddill, 143 Mo. 495, 40 L. R. A. 501, 45 S. W. 262.

rates,<sup>31</sup> nor to restrain a board of arbitration from hearing a dispute when its jurisdiction is questioned,<sup>32</sup> nor to prevent the enforcement of a statute regulating street-car fares.<sup>33</sup> Again, where it is doubtful whether any injury whatever will result, no relief will be granted.<sup>34</sup>

Where the legality of the officer's action is doubtful, but it is not clearly illegal, a court of equity will not interfere.<sup>35</sup> Therefore, an injunction will not issue to prevent interference with Sunday baseball games, when the legality of such games is in doubt.<sup>36</sup> And even though the officer may be exceeding his authority, a party who does not come into court with clean hands will be refused relief.<sup>37</sup> When an injunction against an officer will be really against another individual, it will not be granted until such other party is brought into court.<sup>38</sup> It is also held that an injunction will be denied when the injury to the people in general from its issuance will overshadow the benefit to the complainants.<sup>39</sup>

§ 1746. (§ 324.) **Political Acts.**—As equity deals with property rights alone, an injunction will not issue to restrain political acts of public officers. Thus, the Secretary of War will not be enjoined from taking action which might destroy the government of a state, for only

<sup>31</sup> *Nebraska Tel. Co. v. Cornell*, 58 Neb. 823, 80 N. W. 43.

<sup>32</sup> *N. O. City & L. R. Co. v. State Board of Arbitration*, 47 La. Ann. 874, 17 South. 418.

<sup>33</sup> *Ahern v. Newton & B. St. R'y Co.*, 105 Fed. 702.

<sup>34</sup> *New York Cent. & H. R. R. Co. v. Haffen*, 90 Hun, 260, 35 N. Y. Supp. 806.

<sup>35</sup> *Glaze v. Bogle*, 97 Ga. 340, 22 S. E. 969.

<sup>36</sup> *Capital City v. Police Comm'rs*, 9 Misc. Rep. 189, 29 N. Y. Supp. 804.

<sup>37</sup> *Weiss v. Herlihy*, 23 App. Div. 608, 49 N. Y. Supp. 81.

<sup>38</sup> *Union Terminal R. Co. v. Board of R. R. Comm'rs*, 52 Kan. 680, 35 Pac. 224.

<sup>39</sup> *People v. District Court*, 29 Colo. 182, 68 Pac. 242.



a political question is involved.<sup>40</sup> Likewise, a Secretary of State will not be enjoined from issuing a city charter;<sup>41</sup> nor will an injunction issue in that class of cases, considered later, where title to office or questions relating to elections are involved.<sup>42</sup> This rule prevails although a state by its election law deprives a person of rights to vote guaranteed by the fifteenth amendment.<sup>43</sup>

§ 1747. (§ 325.) **Federal Officers.**—An injunction cannot be issued by a state court to restrain a federal officer or any subordinate in the discharge of his duties as a government officer.<sup>44</sup> To allow such a jurisdiction

40 *Georgia v. Stanton*, 6 Wall. 50, 18 L. Ed. 721.

41 *Lareom v. Olin*, 160 Mass. 102, 35 N. E. 113.

42 *Tupper v. Dart*, 104 Ga. 179, 30 S. E. 624; *State v. Gibbs*, 13 Fla. 55, 7 Am. Rep. 233; *Hardesty v. Taft*, 23 Md. 513, 87 Am. Dec. 584; *Melody v. Goodrich*, 70 N. Y. Supp. 568, 35 Misc. Rep. 138.

43 *Green v. Mills*, 69 Fed. 852, 30 L. R. A. 90, 16 C. C. A. 516; *Gowdy v. Green*, 69 Fed. 865. And equity will not compel an officer to place an applicant's name upon the polling list: *Giles v. Harris*, 189 U. S. 475, 47 L. Ed. 909, 23 Sup. Ct. 639.

**Matters Relating to Constitutional and Political Conventions.**—A member of a political party is not entitled to an injunction to prevent a convention of that party being called: *McDonald v. Lyon*, 43 Tex. Civ. App. 484, 95 S. W. 67 (citing the text of this section). The chairman of a county committee of a political party, who rents premises for the purpose of holding a convention, has no property right which would justify a court from excluding from the premises by injunction persons claiming the right to attend the convention: *People v. McWeeney*, 259 Ill. 161, 102 N. E. 233. An injunction will not issue to restrain the performance of legislative powers and functions by a constitutional convention; nor to restrain the submission of a constitution or any proposition therein contained to the people: *Frantz v. Autry*, 18 Okl. 561, 91 Pac. 193. But see *Ellingham v. Dye*, 178 Ind. 336, Ann. Cas. 1915C, 200, 99 N. E. 1. The court held that the legislature had no right to propose a new constitution, and enjoined its submission to the people for vote at the suit of a tax-payer.

44 *In re Turner*, 119 Fed. 231, applying the principle laid down in *In re Neagle*, 135 U. S. 1, 34 L. Ed. 55, 10 Sup. Ct. 658, and in *Ohio*

would result in conflict between the state and federal authorities. It might result in an army officer, for instance, being dismissed from the service if he refused to obey the commands of his superiors, or being thrown into a county jail for contempt if he did obey.

§ 1748. (§ 326.) **State Officers—Tax-payers' Suits.**—  
'The right of a tax-payer to enjoin acts of an officer of a municipal corporation which involve waste and improper expenditure of public funds is considered in the chapter on Municipal Corporations. A different question arises, however, when a tax-payer seeks to enjoin a state officer. "The principle upon which the doctrine in regard to municipal, or *quasi* municipal, corporations is based, flows from its analogy to a well-settled doctrine in equity governing private corporations, where each stockholder has an interest in the property of the corporation, and may interfere to protect the corporate funds from the illegal or fraudulent acts of its officers. But this reasoning cannot apply to a state government. The county is a *quasi* corporation; the state is a sovereignty. The county only possesses such powers as the legislature of the state confers upon it. Its revenues, its property, its very existence, depend upon statutory enactment. It can be enlarged, dismembered, or annihilated, at the will of the state. The state, on the contrary, has all the powers not relinquished to the general government by the articles of federation and, subject to these relinquishments, its sovereignty is supreme. One of the necessary attributes of sovereignty is the protection of the sovereign power and the maintenance of the state organization."<sup>45</sup> Hence it would seem that an injunction should not issue against a state officer unless

v. Thomas, 173 U. S. 276, 43 L. Ed. 699, 19 Sup. Ct. 453. See, also, Sheriff v. Turner, 119 Fed. 782.

<sup>45</sup> Jones v. Reed, 3 Wash. 57, 27 Pac. 1067.

some special and direct injury to the plaintiff is shown.<sup>46</sup> It is clear that it should not issue to restrain state officers from erecting a public building at a place other than that prescribed by law, where no special injury is shown and the burden of taxation is not increased;<sup>47</sup> nor to restrain a state grain inspector from employing deputies under an unconstitutional law, when this is not shown to cause any injury to the plaintiff.<sup>48</sup> As in the case of purely municipal corporations, however, the rules are not in harmony. In Pennsylvania, for in-

<sup>46</sup> *Gibbs v. Green*, 54 Miss. 592; *Thompson v. Canal Fund Comm'rs*, 2 Abb. Pr. 248; *City of Tacoma v. Bridges*, 25 Wash. 221, 65 Pac. 186. See, also, *Taylor v. Montreal Harbor Comm'rs*, 17 Rap. Jud. Que. C. S. 275. The attorney-general is the proper party to sue when a state officer misappropriates funds. The action cannot be maintained by a tax-payer: *Bilger v. State*, 63 Wash. 457, 116 Pac. 19. See, also, *Harrington v. Demaris*, 46 Or. 111, 1 L. R. A. (N. S.) 756, 77 Pac. 603, 82 Pac. 14. See, also, *Duncan v. State Board of Education (Heyward)*, 74 S. C. 560, 54 S. E. 760; *Sutton v. Birie*, 136 La. 234, L. R. A. 1915D, 178, 66 South. 956; *Schieffelin v. Komfort*, 212 N. Y. 520, L. R. A. 1915D, 485, 106 N. E. 675. In *Commissioners of Barber Co. v. Smith*, 48 Kan. 331, 29 Pac. 565, the rule as to county officers is laid down as follows: "This court has always held that, before a private citizen can be allowed to maintain an action of this character, he must allege and show some interest, personal and peculiar to himself, that is not shared by or does not affect the general public; and it is not enough that his damages are greater than those sustained by the general public, thus differing only in degree, but they must be different in kind."

Under the New York statute, it is held that a tax-payer's suit cannot be maintained against a state officer: *Hutchinson v. Skinner*, 21 Misc. Rep. 729, 49 N. Y. Supp. 360. But in Illinois, a tax-payer may restrain payment from the state treasury of money appropriated unconstitutionally: *Fergus v. Russel*, 270 Ill. 304, Ann. Cas. 1916B, 1120, 110 N. E. 130.

<sup>47</sup> *Sherman v. Bellows*, 24 Or. 553, 34 Pac. 549; *State v. Lord*, 28 Or. 498, 31 L. R. A. 473, 43 Pac. 471; *State v. Pennoyer*, 23 Or. 205, 25 L. R. A. 862, 37 Pac. 906, 41 Pac. 1104.

<sup>48</sup> *Birmingham v. Cheetham*, 19 Wash. 657, 54 Pac. 37.

stance, it is held that the governor may be enjoined from enforcing a law exempting a railroad from taxation and thus increasing the burden upon other taxpayers.<sup>49</sup>

§ 1749. (§ 327.) **No Relief When, in Effect, Against State.**—The eleventh amendment to the federal constitution denies to individuals the right to sue a state. Consequently, when a bill for an injunction against a public officer is in effect a suit against a state, and no statute authorizes such suit, relief will be denied. In determining whether the state is a party, the courts will look beyond the parties to the record and decide according to the real effect.<sup>50</sup> “Where it is manifest upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the state, which alone is to be affected by the judgment or decree, the question then arising whether the suit is not substantially a suit against the state, is one of jurisdiction.”<sup>51</sup> “It is not enough that the state should have a mere interest in the vindication

<sup>49</sup> *Mott v. Pennsylvania R. Co.*, 30 Pa. St. (6 Casey) 9, 72 Am. Dec. 664. And apparently a tax-payer's suit against a state officer may be maintained in Illinois: *Burke v. Snively*, 208 Ill. 328, 70 N. E. 327. And in North Dakota: *State v. Hall*, 25 N. D. 85, 141 N. W. 124.

<sup>50</sup> See *Manchester Fire Ins. Co. v. Herriott*, 91 Fed. 711. A good illustration is found in suits to enjoin state officers from prosecuting violators of state statutes. The state is said to be the real party in interest: *Union Trust Co. v. Stearns*, 119 Fed. 790; *Arbuckle v. Blackburn*, 113 Fed. 616, 51 C. C. A. 122. In California, the courts are forbidden by statute to issue an injunction to prevent the execution of a public statute: *Reclamation District No. 1500 v. Superior Court*, 171 Cal. 672, 154 Pac. 845.

<sup>51</sup> *Ex parte Ayers*, 123 U. S. 443, 31 L. Ed. 216, 8 Sup. Ct. 164. In *Sperry-Hutchinson Co. v. Kuhn*, 212 Fed. 555, the bill was filed against the attorney-general of a state to enjoin the enforcement of a statute. The bill failed to show that that official was charged with



of her laws, or in their enforcement as affecting the public at large, or as they affect the rights of individuals or corporations, but it must be an interest of value to herself as a distinct entity,—of value in a material sense.”<sup>52</sup> In case of contracts, moreover, the acts of

any duty to enforce the statute complained of, or that he had made any threat to do so. It was held that the suit was in effect against the state and could not be maintained.

<sup>52</sup> *McWhorter v. Pensacola & A. R. R. Co.*, 24 Fla. 417, 12 Am. St. Rep. 220, 2 L. R. A. 508, 3 South. 129. In *Ex parte Young*, 209 U. S. 123, 14 Ann. Cas. 761, 13 L. R. A. (N. S.) 932, 52 L. Ed. 714, 28 Sup. Ct. 441, the court sustained an injunction restraining an attorney-general of a state from taking action to enforce railroad rates. The court said: “It is also argued that the only proceeding which the attorney-general could take to enforce the statute, so far as his office is concerned, was one by *mandamus*, which would be commenced by the court in its sovereign and governmental character, and that the right to bring such action is a necessary attribute of a sovereign government. It is contended that the complainants do not complain and that they care nothing about any action which Mr. Young might take or bring as a private individual, but that he was complained of as an officer, to whose discretion is confided the use of the name of the state of Minnesota so far as litigation is concerned, and that when or how he shall use it is a matter resting in his discretion, and cannot be controlled by any court.

“The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the state to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney-general seeks to enforce be a violation of the federal constitution, the officer in proceeding under such enactment comes in conflict with the superior authority of that constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart

the officers are wrongful only as they are considered to be the acts of the state. As individuals, the officers are not capable of committing a breach, for they are not parties to the contract.<sup>53</sup> The state, therefore, is clearly the real party in interest.

In accordance with these principles, it has been held that an injunction will not issue against the executive officer of a state in order to give relief to bondholders who claim that the state has not lived up to its agreement;<sup>54</sup> nor to restrain a state officer from carrying out a contract made in the name of the state.<sup>55</sup> But, on the other hand, where officers acting under an unconstitutional law will injure substantial property rights, an injunction will not be refused merely because they are state officers;<sup>56</sup> and the same is true when they threaten to act in excess of authority.<sup>57</sup>

to him any immunity for responsibility to the supreme authority of the United States.''

A suit against a state Secretary of State to restrain him from issuing a proclamation forbidding a telegraph company to do a local business within a state is not a suit against the state: *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146, 54 L. Ed. 423, 30 Sup. Ct. 280. For a good summary of the rules as to what constitutes a suit against a state, see *Western Union Tel. Co. v. Andrews*, 154 Fed. 95.

<sup>53</sup> *Ex parte Ayers*, 123 U. S. 443, 31 L. Ed. 216, 8 Sup. Ct. 164.

<sup>54</sup> *Louisiana v. Jumel*, 107 U. S. 711, 27 L. Ed. 448, 2 Sup. Ct. 128.

<sup>55</sup> *Peoples v. Byrd*, 98 Ga. 688, 25 S. E. 677.

<sup>56</sup> *Scott v. Donald*, 165 U. S. 107, 41 L. Ed. 648, 17 Sup. Ct. 262; *Pabst Brewing Co. v. Crenshaw*, 120 Fed. 144 (state beer inspector restrained from interfering with interstate commerce under authority of state statute); *Union Pac. R. Co. v. Alexander*, 113 Fed. 347; *Starr v. Chicago R. I. & P. R'y Co.*, 110 Fed. 3; *Cobb v. Clough*, 83 Fed. 604; *President etc. of Yale College v. Sanger*, 62 Fed. 177; *Ellingham v. Dye*, 178 Ind. 336, *Ann. Cas.* 1915C, 200, 99 N. E. 1 (an officer of a state executing an unconstitutional law is not acting by authority of the state, and therefore an injunction may issue against him). And see *Simpson v. Union Stockyards Co.*, 110 Fed. 799.

<sup>57</sup> *Metropolitan Life Ins. Co. v. McNall*, 81 Fed. 888.

§ 1750. (§ 328.) **Injunctions Against Executive Officers.**—An injunction will not issue against an executive officer of the government, nor against one acting under him, to restrain the performance or execution of administrative acts and orders within the scope of his authority. This is based upon the principle which governs also the legal remedy of *mandamus*. It would be contrary to our theory of government for the judicial department to interfere with the reasonable discretion of the executive. Hence, courts of law and of equity refuse the remedies of *mandamus* and injunction when they will have the effect of controlling a reasonable discretion. Where no question of discretion is involved, both law and equity will interfere without hesitation. It is generally stated that *mandamus* may issue in a proper case to compel the performance of a ministerial act. The corresponding statement as to injunction is that it may issue in a proper case to restrain an act in excess of the officer's authority.<sup>58</sup>

In accordance with these principles, it is held that an injunction will not issue to restrain the Secretary of the Interior or the Register of the Land Office from canceling entries for land, receiving and acting upon applications and making surveys.<sup>59</sup> Likewise, no injunction will issue against the execution of an authorized discretionary order of the postmaster-general in excluding

<sup>58</sup> This portion of the text is quoted in *Sanderson v. City of Texarkana*, 103 Ark. 529, 146 S. W. 105.

<sup>59</sup> *Gaines v. Thompson*, 74 U. S. (7 Wall.) 347, 19 L. Ed. 62; *City of New Orleans v. Paine*, 147 U. S. 261, 37 L. Ed. 162, 13 Sup. Ct. 303; *Litchfield v. Richards*, 9 Wall. 577, 19 L. Ed. 681; *Kirwan v. Murphy*, 189 U. S. 35, 47 L. Ed. 698, 23 Sup. Ct. 599. It has been held that an injunction will not issue to enjoin a proceeding in the United States Land Office. Such tribunal has limited jurisdiction, and if it exceeds its authority, there is an adequate remedy at law: *Cameron v. Weedon (Ariz.)*, 226 Fed. 44.

certain matter from the mails.<sup>60</sup> The same principle applies to the executive officers of a state.<sup>61</sup>

On the other hand, where officers of the Interior Department are about to make a resurvey or to do other acts which under the circumstances do not rest in discretion, and some ground for equity jurisdiction appears, an injunction is proper.<sup>62</sup> Likewise, it is proper to enjoin the enforcement of an order of the postmaster-general excluding from the mails matter not authorized to be excluded;<sup>63</sup> and to restrain a state railroad com-

60 *Public Clearing-House v. Coyne*, 194 U. S. 497, 48 L. Ed. 1092, 24 Sup. Ct. 789; *Enterprise Sav. Ass'n v. Zumstein*, 67 Fed. 1000, 11 C. C. A. 153, 37 U. S. App. 71.

61 *Frost v. Thomas*, 26 Colo. 222, 77 Am. St. Rep. 259, 56 Pac. 899; *Coleman v. Glenn*, 103 Ga. 458, 68 Am. St. Rep. 108, 30 S. E. 297; *Mott v. Pennsylvania R. Co.*, 30 Pa. St. (6 Casey) 9, 92 Am. Dec. 664. See, also, *Delaware Surety Co. v. Layton* (Del. Ch.), 50 Atl. 378. As to the power of federal courts to enjoin the governor of a state, see *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447.

62 *Caldwell v. Robinson*, 59 Fed. 658; *Noble v. Union River Logging Co.*, 147 U. S. 165, 37 L. Ed. 123, 13 Sup. Ct. 271; *Smith v. Reynolds*, 9 App. D. C. 261. An injunction may issue to restrain the Secretary of War from injuring plaintiff's property by an improper establishment of harbor lines. And such an injunction has extra-territorial effect: *Philadelphia Co. v. Stimson*, 223 U. S. 605, 56 L. Ed. 570, 32 Sup. Ct. 340. To the effect that, in a proper case, an injunction may issue against a governor of a state, see *Ellingham v. Dye*, 178 Ind. 336, Ann. Cas. 1915C, 200, 99 N. E. 1. In general, as to injunctions against executive officers, see *Cooke v. Iverson*, 108 Minn. 388, 52 L. R. A. (N. S.) 415, 122 N. W. 251 (state auditor).

63 *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. Ed. 90, 23 Sup. Ct. 33. In *Brooklyn Daily Eagle v. Voorhies*, 181 Fed. 579, the plaintiff sought an injunction to restrain post-office officials from excluding a paper from the second-class mails. It was held that the federal court had jurisdiction to determine whether the postmaster-general was acting within the authority of the United States statutes, and whether the statute as a matter of law covered the facts of the particular case. In *Appleby v. Cluss*, 160 Fed. 984, it was held that the court had no power to restrain a



mission from fixing railroad rates for interstate commerce, in excess of authority.<sup>64</sup>

§ 1751. (§ 329.) **Discretionary Acts.**—When a public officer is vested with discretion, an injunction will not issue to restrain acts coming within the discretionary power unless fraud or corruption is shown, or it is clear that the discretion has been abused. The distinction between discretionary and ministerial acts should be carefully noted, however, for if the act is of a ministerial nature it may be freely enjoined.<sup>65</sup> This distinction has been explained in the preceding section.

According to the principle as stated, an injunction will not issue to restrain a railroad or arbitration commission from taking testimony as to rates and earnings;<sup>66</sup> nor to restrain commissioners appointed to appraise and sell Indian lands from carrying out their powers;<sup>67</sup> nor

postmaster from obeying a fraud order issued by the postmaster-general where there was no proof of some legal error on the part of the executive officer. Where, pending the suit, the paper is restored to second-class privileges, the court will leave the plaintiff to his remedy at law to recover the excess paid, and will not retain the case for an accounting: *Lewis Pub. Co. v. Wyman*, 182 Fed. 13, 104 C. C. A. 453.

<sup>64</sup> *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617, 47 L. Ed. 333, 23 Sup. Ct. 214. And it will likewise issue to prevent other interference with interstate commerce by such a board: *Southern R'y Co. v. Greensboro Ice & Coal Co.*, 134 Fed. 82.

<sup>65</sup> This portion of the text is quoted in *Sanderson v. City of Texarkana*, 103 Ark. 529, 146 S. W. 105. See, also, *Graham v. Treadway*, 166 Ky. 768, 179 S. W. 1029.

<sup>66</sup> *New Orleans City & L. R. Co. v. State Board of Arbitration*, 47 La. Ann. 874, 17 South. 418; *Higginson v. Chicago, B. & I. R. Co.*, 102 Fed. 197, 42 C. C. A. 254; *Southern Pac. Co. v. Bartine*, 170 Fed. 725; *Chicago, B. & Q. R. Co. v. Winnett*, 162 Fed. 242, 89 C. C. A. 222. See, also, *McChord v. Cincinnati etc. R. Co.*, 183 U. S. 483, 46 L. Ed. 289, 22 Sup. Ct. 165. In general, see *Sayers v. Montpelier & W. R. R. R.*, 90 Vt. 201, *Ann. Cas.* 1918B, 1050, 97 Atl. 660.

<sup>67</sup> *Lane v. Anderson*, 67 Fed. 563.

to regulate the discretion of canal commissioners as to the amount of water to be used,<sup>68</sup> nor of commissioners appointed to condemn rights of way as to the land to be taken,<sup>69</sup> nor of prison commissioners as to the letting of contracts.<sup>70</sup> Likewise, it will not be granted to restrain the exercise of a ferry franchise on the ground that the officers erred in judgment in granting it.<sup>71</sup>

Where, however, there is a clear abuse of discretion, the court may interfere.<sup>72</sup> Cases of this sort frequently arise when state commissions attempt to lower the rates of *quasi*-public corporations. The officers are bound to act within reason, and in such a manner that their action will not amount to confiscation. Therefore, when state commissioners fix rates which are so unreasonable that the property of the corporation is made of little value, or which are so low that expenses and dividends cannot be earned, courts of equity will interfere by injunction.<sup>73</sup> A private individual, however, cannot

<sup>68</sup> *Cooper v. Williams*, 4 Ohio (4 Ham.) 253, 22 Am. Dec. 745.

<sup>69</sup> *Pennsylvania R. Co. v. National Docks & N. J. J. C. R'y Co.*, 56 Fed. 697.

<sup>70</sup> *Southern Min. Co. v. Lowe*, 105 Ga. 352, 31 S. E. 191.

<sup>71</sup> *Hudspeth v. Hall*, 113 Ga. 4, 84 Am. St. Rep. 200, 38 S. E. 358. See the following miscellaneous cases where relief was denied: *Scotfield v. Perkerson*, 46 Ga. 350; *Henkel v. Millard*, 97 Md. 24, 54 Atl. 657; *Union Transp. Co. v. Bassett*, 118 Cal. 604, 50 Pac. 754.

<sup>72</sup> In general, see *Shanks v. Pearson*, 66 Kan. 168, 71 Pac. 252; *Sayers v. Montpelier & W. R. R. R.*, 90 Vt. 201, Ann. Cas. 1918B, 1050, 97 Atl. 660; *Virden v. Board of Pilot Comm'rs*, 8 Del. Ch. 1, 67 Atl. 975; *Fredenberg v. Whitney*, 240 Fed. 819.

<sup>73</sup> *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418; *Prout v. Starr*, 188 U. S. 537, 47 L. Ed. 584, 23 Sup. Ct. 398; *Southern Pac. R. Co. v. Board of R. R. Comm'rs*, 78 Fed. 236; *Chicago & N. W. R. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744; *Louisville & N. R. Co. v. Brown*, 123 Fed. 946; *Western Union Tel. Co. v. Myatt*, 98 Fed. 335; *San Joaquin etc. Co. v. Stanislaus County*, 90 Fed. 516; *Cotting v. Kansas City Stockyards Co.*, 79 Fed. 679; *Ex parte Young*, 209 U. S. 123, 14 Ann. Cas. 764, 13 L. R. A. (N. S.) 932, 52 L. Ed. 714, 28 Sup.

enjoin the enforcement of the rates on the ground that they discriminate against him.<sup>74</sup>

§ 1752. (§ 330.) **Suits by Officers Against Other Officers.**—When the state as plaintiff invokes the aid of a court of equity, it is not exempt from the rules applicable to ordinary suitors; that is, it must establish a case of equitable cognizance, and a right to the particular relief demanded.<sup>75</sup> In some jurisdictions, however, local or state officers are allowed injunctive relief in order to restrain inferior or other officers from failing to properly perform the duties of their offices.<sup>76</sup> And a county

Ct. 441. Upon the same principle, when a state railroad commission is given power to require the erection and maintenance of a depot, and makes an unreasonable and unjust order in regard thereto, the railroad company involved may enjoin its enforcement: *Railroad Commission v. Chicago, R. I. & G. R'y Co.* (Tex. Civ. App.), 114 S. W. 192, 193. But see *Louisville & Nashville R. Co. v. Railroad Comm'rs*, 63 Fla. 491, 44 L. R. A. (N. S.) 189, 58 South. 543, where it was held that plaintiff had an adequate remedy by defense to an action brought to enforce obedience to the order, and an injunction was denied. An injunction may issue to prevent the enforcement of a statute fixing rates: *Central of Georgia R. R. Co. v. Railroad Commission*, 161 Fed. 925.

<sup>74</sup> *Board of R. R. Comm'rs v. Symms Grocer Co.*, 53 Kan. 207, 35 Pac. 217.

<sup>75</sup> *People v. Canal Board*, 55 N. Y. 390; *State v. Pennoyer*, 23 Or. 205, 25 L. R. A. 862, 37 Pac. 906, 41 Pac. 1104; *State v. Lord*, 28 Or. 498, 31 L. R. A. 473, 43 Pac. 471. Compare *Board of County School Comm'rs v. Breeding*, 126 Md. 83, 94 Atl. 328.

<sup>76</sup> *Hornaday v. State*, 62 Kan. 822, 62 Pac. 329; *Catlin v. Christie*, 15 Colo. App. 291, 63 Pac. 328. The governor of a state, suing as such and also as a tax-payer, citizen and elector, is a proper plaintiff in a suit to enjoin the Secretary of State from performing an alleged illegal ministerial act, in which the interests of the people are involved: *Crawford v. Gilchrist*, 64 Fla. 41, Ann. Cas. 1914B, 916, 59 South. 963. The attorney-general may enjoin a board of supervisors from paying a printing and advertising bill contracted *ultra vires*, although the bill was contracted in good faith: *Brown v. State*, 73 Kan. 69, 84 Pac. 549. The state may enjoin a county treasurer

has been allowed an injunction to restrain a commissioner of the general land office from re-establishing its boundary.<sup>77</sup>

§ 1753. (§ 331.) **Elections.**—An injunction will not issue, as a general rule, for the purpose of restraining the holding of an election, or of directing or controlling

from depositing county moneys in a bank not lawfully designated as a depository, although other remedies may be open and he may have given a bond. The state “has an interest in the will of the legislature being carried out, and need not, as an individual plaintiff must, show grounds of fearing more specific injury”: *State v. Lawrence*, 80 Kan. 707, 103 Pac. 839. The supreme court of North Dakota, in the exercise of its original jurisdiction, at the suit of the attorney-general, may enjoin an alleged county and those assuming to act as its officers from exercising jurisdiction over the territory until a proceeding pending in the district court to determine the validity of the election at which the organization of the county was submitted is decided: *State v. Miller*, 21 N. D. 324, 131 N. W. 282. The state may enjoin a justice of the peace from acting as such in a borough other than that for which he was appointed: *Commonwealth ex rel. Hunter v. Smail*, 238 Pa. St. 106, *Ann. Cas.* 1914C, 326, 85 Atl. 1088.

A novel situation is presented in the case of *Santa Cruz County v. Burgoon*, 12 Ariz. 295, 100 Pac. 792. The statute authorized counties to enjoin the unlawful expenditure of public money under improper orders of boards of supervisors. It was held that such an action cannot be maintained prior to the time such an order is made. The statute gives an adequate remedy at law by injunction, and consequently no action can be maintained under the general principles of equity. A remedy at law by injunction is unique. In general, see *State v. Huston*, 27 Okl. 606, 34 L. R. A. (N. S.) 380, 113 Pac. 190; *Friendly v. Olcott*, 61 Or. 580, 123 Pac. 53; *Wilson v. State Water Supply Commission*, 84 N. J. Eq. 150, 93 Atl. 732.

<sup>77</sup> *Kaufman Co. v. McGaughey*, 3 Tex. Civ. App. 655, 21 S. W. 261. An opposite result was reached in *Comm’rs of Chatham Co. v. Thorne*, 117 N. C. 211, 23 S. E. 184, on the ground that it was within the power of the legislature to change the boundary. A county is not entitled to an injunction against another county when there is an adequate remedy at law: *Houston County v. Henry County*, 162 Ala. 488, 50 South. 311.



the mode in which, or of determining the rules of law in pursuance of which, an election shall be held.<sup>78</sup> An election is a political matter, with which courts of equity have nothing to do. Moreover, the effect of interference in such matters might often result in the destruction of the government. This is especially so when the relief is sought to prevent the holding of an election. "The attempt to check the free expression of opinion—to forbid the peaceable assemblage of the people—to obstruct the freedom of elections—if successful, would result in the overthrow of all liberty regulated by law.

<sup>78</sup> Fletcher v. Tuttle, 151 Ill. 41, 42 **Am. St. Rep.** 220, 25 **L. R. A.** 143, 37 N. E. 683; Morgan v. Wetzel County Court, 53 W. Va. 372, 44 S. E. 182; Market v. Sumter County, 60 Fla. 328, **Ann. Cas.** 1912C, 690, 691, 53 South. 613; Galey v. Board of Comm'rs, 174 Ind. 181, **Ann. Cas.** 1912C, 1090, 91 N. E. 593; Duggan v. Emporia, 84 Kan. 429, **Ann. Cas.** 1912A, 719, 114 Pac. 235; City Council of McAlester v. Milwee, 31 Okl. 620, 40 **L. R. A. (N. S.)** 576, 122 Pac. 173; Copeland v. Olsmith, 33 Okl. 106, 124 Pac. 33; McDonald v. Lyon, 43 Tex. Civ. App. 484, 95 S. W. 67 (citing this section); Scott v. James, 114 Va. 297, 76 S. E. 283 (citing this section); Mann v. Wright, 81 Wash. 358, 142 Pac. 697; Parler v. Fogle, 78 S. C. 570, 59 S. E. 707; Mann v. Mercer County Court, 58 W. Va. 651, 52 S. E. 776.

In Parler v. Fogle, *supra*, it was said that the power to enjoin an election, if it exists at all, should be exercised with the greatest caution, and only where, under the well-recognized rule of equity, there is no other adequate legal remedy, and it is made clear that an irreparable wrong will result from the holding of the election. Ordinarily the writ of *certiorari* is adequate in such cases. Hence it was held that the mere fact that the election officers have not taken the proper steps to have qualified voters ready to cast their ballots, or that certain electors will be deprived of their right to vote, will not authorize an injunction.

A tax-payer has no such interest that he can enjoin the holding of an election for the recall of a mayor of a city: City Council of McAlester v. Milwee, 31 Okl. 620, 40 **L. R. A. (N. S.)** 576, 122 Pac. 173; nor the holding of a referendum election: Power v. Ratliff, 112 Miss. 88, 72 South. 864; nor will equity interfere to control a political party in its management of a primary election: Winnett v. Adams (Neb.), 99 N. W. 681.

The mere effort to assume such power is dangerous to the rights of the citizen. If the courts can dictate to the officers of the people that they shall not hold an election from fear of some imaginary wrong, then people and officers are entirely subservient to the courts, and the consequences are too fearful to contemplate."<sup>79</sup> Thus, an injunction will not issue to restrain the holding of an election although it is alleged that it is without authority of law,<sup>80</sup> or that the act authorizing it or providing for apportionment is unconstitutional.<sup>81</sup> And the mere fact that the cost of the election will have to be borne by the state and indirectly by the tax-payers, is no ground for an injunction at the relation of a tax-payer, for the injury is too trifling.<sup>82</sup>

§ 1754. (§ 332.) **Same—Continued.**—Likewise, an injunction will not be issued to forbid any of the steps in the proceedings.<sup>83</sup> Thus, it is not proper to restrain

<sup>79</sup> Walton v. Develing, 61 Ill. 201.

<sup>80</sup> Walton v. Develing, 61 Ill. 201; Darst v. People, 62 Ill. 306; Harris v. Schryock, 82 Ill. 119; Kerr v. Riddle (Tex. Civ. App.), 31 S. W. 328.

<sup>81</sup> Fletcher v. Tuttle, 151 Ill. 41, 42 Am. St. Rep. 220, 25 L. R. A. 143, 37 N. E. 683; Fesler v. Brayton, 145 Ind. 71, 32 L. R. A. 578, 44 N. E. 37. But see *contra*, State v. Cunningham, 81 Wis. 440, 15 L. R. A. 561, 51 N. W. 724; State v. Cunningham, 83 Wis. 90, 35 Am. St. Rep. 27, 17 L. R. A. 145, 53 N. W. 35; Gile v. Stegner (Minn.), 100 N. W. 101.

<sup>82</sup> State v. Thorson, 9 S. D. 149, 33 L. R. A. 582, 68 N. W. 202; City Council of McAlester v. Milwee, 31 Okl. 620, 40 L. R. A. (N. S.) 576, 122 Pac. 173.

<sup>83</sup> In general, see People v. Barrett, 203 Ill. 99, 96 Am. St. Rep. 297, 67 N. E. 742; Anthony v. Burrow, 129 Fed. 783. Inasmuch as the right to vote is a political right, pure and simple, the courts will not interfere with the purchase of voting machines on the ground that they are defective, where the contract of purchase provides that there is no liability until the utility of the machines is demonstrated: Shoemaker v. City of Des Moines, 129 Iowa, 244, 3 L. R. A. (N. S.) 382, 105 N. W. 520. See, also, United States Standard Voting Machine

officers from returning a list of voters on the ground that it is illegal;<sup>84</sup> nor to restrain the county clerk from putting on the ballot the candidates of one faction under the party designation;<sup>85</sup> nor to compel election officers to admit certain representatives to the polling places;<sup>86</sup>

*Co. v. Hobson*, 132 Iowa, 38, 119 **Am. St. Rep.** 539, 10 **Ann. Cas.** 972, 7 **L. R. A. (N. S.)** 512, 109 N. W. 458. The text is cited in *McDonald v. Lyon*, 43 Tex. Civ. App. 484, 95 S. W. 67.

**Election Contest.**—Equity has no jurisdiction over an election contest: *Walls v. Brundidge*, 109 Ark. 250, **Ann. Cas.** 1915C, 980, 160 S. W. 230. But see *Cerini v. De Long*, 7 Cal. App. 398, 94 Pac. 582.

<sup>84</sup> *Hardesty v. Taft*, 23 Md. 513, 87 **Am. Dec.** 584; *Ex parte Lumsden*, 41 S. C. 553, 19 S. E. 749.

<sup>85</sup> *State v. Johnson*, 18 Mont. 556, 46 Pac. 440. See, also, *Mayor etc. of Annapolis v. Gadd* (Md.), 57 Atl. 941. Nor will an injunction issue to restrain the clerk from certifying and having printed, and the printer from printing, ballots with certain names: *Sherlock v. District Court*, 39 Colo. 41, 88 Pac. 396; nor to enjoin the Secretary of State from putting certain words on the ballots: *State v. Dunbar*, 48 Or. 109, 85 Pac. 337. A party asking an injunction has the burden of showing that he would in some manner be injured or deprived of some lawful right without the aid of such injunction, and that by the granting of such injunction he would obtain the desired relief. Hence a Republican elector cannot enjoin the Secretary of State from certifying nominations for Republican electors elected by a Republican state convention, on a showing that the persons nominated were not Republicans, would not vote for the Republican candidate, and that a fraud would result: *State v. Olsen*, 30 S. D. 57, 137 N. W. 561. But see *Gilmore v. Waples* (Tex.), 188 S. W. 1037; *Meagher v. Howell*, 171 Ky. 238, 188 S. W. 373. But it is held in Montana, following the Wisconsin cases, that an injunction will issue to restrain the county clerk from printing an unauthorized ticket on the ballot. Thus, an injunction has been awarded against printing names of candidates nominated by petition under a party designation: *State v. Moran*, 24 Mont. 433, 63 Pac. 390; *State v. Reek*, 18 Mont. 557, 46 Pac. 438; *State v. Rotwitt*, 18 Mont. 502, 46 Pac. 370; *State v. Tooker*, 18 Mont. 540, 34 **L. R. A.** 315, 46 Pac. 530; *State v. Johnson*, 18 Mont. 548, 46 Pac. 533; *State v. Bailey*, 18 Mont. 554, 46 Pac. 1116; *State v. Fisher*, 18 Mont. 560, 46 Pac. 1117.

<sup>86</sup> *Weaver v. Toney*, 107 Ky. 419, 50 **L. R. A.** 105, 54 S. W. 732.

nor to prevent the publication of the result as required by law,<sup>87</sup> nor the canvassing of the vote,<sup>88</sup> nor the certification of the result to the governor,<sup>89</sup> nor the delivery of the sealed returns to the speaker of the lower house of the legislature.<sup>90</sup> And a Secretary of State will not be enjoined from publishing proposed amendments to the state constitution, although such amendments, if adopted, might be invalid.<sup>91</sup>

<sup>87</sup> Robinson v. Wingate (Tex. Civ. App.), 80 S. W. 1067; Ex parte Mayes (Tex.), 44 S. W. 831; Ogburn v. Elmore (Ga.), 48 S. E. 702; Tolbert v. Long, 134 Ga. 292, 137 **Am. St. Rep.** 222, 67 S. E. 826. Hence equity will not enjoin the publication of the result of a local option election on the ground of irregularity, at the suit of liquor dealers who allege that their property rights will be jeopardized and destroyed by the enforcement of local option: Townsen v. Mersfelder, 49 Tex. Civ. App. 289, 109 S. W. 420; Merrill v. Savage, 49 Tex. Civ. App. 292, 109 S. W. 408. But see *dictum* in Sweeney v. Webb (Tex. Civ. App.), 76 S. W. 766. Compare L. Epstein & Son v. Webb (Tex. Civ. App.), 75 S. W. 337.

<sup>88</sup> Willeford v. State, 43 Ark. 63; Weil v. Calhoun, 25 Fed. 865; State v. Carlson (Neb.), 101 N. W. 1004; Mendenhall v. Denham, 35 Fla. 250, 17 South. 561; Vickery v. Wilson, 40 Colo. 490, 90 Pac. 1034 (mere fact that result of canvassing vote might be the illegal construction of poles in street is no ground for injunction). The mere fact that an initiative proposition is unconstitutional is no ground for injunction. After the ordinance is adopted is the time to determine its constitutionality: City of Dallas v. Dallas Consolidated St. R'y Co., 105 Tex. 337, 148 S. W. 292. But see People v. Tool, 35 Colo. 225, 117 **Am. St. Rep.** 198, 6 **L. R. A. (N. S.)** 822, 86 Pac. 224, 229, 231 (injunction may issue to restrain officers from canvassing fraudulent returns); Marsden v. Harlocker, 48 Or. 90, 120 **Am. St. Rep.** 786, 85 Pac. 328 (injunction may be granted to restrain canvass of result of local option election where election invalid and there is no provision in law for a contest).

<sup>89</sup> Alderson v. Commissioners, 32 W. Va. 640, 25 **Am. St. Rep.** 840, 5 **L. R. A.** 334, 9 S. E. 868.

<sup>90</sup> Fleming v. Guthrie, 32 W. Va. 1, 25 **Am. St. Rep.** 792, 3 **L. R. A.** 53, 9 S. E. 23; Smith v. Myers, 109 Ind. 1, 58 **Am. Rep.** 375, 9 N. E. 692.

<sup>91</sup> People v. Mills, 30 Colo. 262, 70 Pac. 322; Crawford v. Gilchrist, 64 Fla. 41, **Ann. Cas.** 1914B, 916, 59 South. 963. See, also,



§ 1755. (§ 332a.) **Same — Contrary View.**—In some states, however, the jurisdiction of equity has been so broadened as to permit the issuance of an injunction to prevent the holding of certain classes of elections. In England, under the Judicature Act authorizing the issuance of an injunction to protect any right which could be asserted either at law or in equity, an injunction may issue to prevent an election to office.<sup>92</sup> There are few cases in this country where the courts have adopted so broad a rule. In Wisconsin, however, an injunction has issued to prevent the Secretary of State from calling an election where the apportionment act was illegal.<sup>93</sup> In several states it is held that an injunction is proper to restrain the holding of a county seat election.<sup>94</sup> And

*State v. Osborn*, 16 Ariz. 247, 143 Pac. 117. This portion of the section is quoted in *Scott v. James*, 114 Va. 297, 76 S. E. 283.

<sup>92</sup> *Richardson v. Michby School Board*, [1893] 3 Ch. 510; *Aslatt v. Corporation of Southampton*, 16 Ch. D. 143; *North London R'y Co. v. Great Northern R'y Co.*, 11 Q. B. D. 30.

<sup>93</sup> *State v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561, 51 N. W. 724; *State v. Cunningham*, 83 Wis. 90, 35 Am. St. Rep. 27, 17 L. R. A. 145, 53 N. W. 35.

<sup>94</sup> *Solomon v. Fleming*, 34 Neb. 40, 51 N. W. 304; *Streissguth v. Geib*, 67 Minn. 360, 69 N. W. 1097; *Oden v. Barbee*, 103 Tex. 449, 129 S. W. 602. Where a legislative act is complete, but provides for an election to be held in a municipality to determine whether a change of a county line shall be made in accordance with its provisions, such an election is not legislative in character, and an injunction to prevent its being held or carried into effect will not be denied on the ground that it is an attempt to enjoin legislation: *De Kalb County v. City of Atlanta*, 132 Ga. 727, 65 S. E. 72. For other instances of relief granted, see *Cascaden v. City of Waterloo*, 106 Iowa, 673, 77 N. W. 333; *City of Macon v. Hughes*, 110 Ga. 795, 36 S. E. 247; *Layton v. City of Monroe*, 50 La. Ann. 121, 23 South. 99. In *Ellingham v. Dye*, 178 Ind. 336, **Ann. Cas.** 1915C, 200, 99 N. E. 1, the court enjoined the improper submission of a new constitution to a vote of the people. In *Wilton v. Pierce County*, 61 Wash. 386, 112 Pac. 386, an injunction was issued to restrain the canvassing of returns of a void annexation election.

it has been held that such an action may be maintained by a tax-payer.<sup>95</sup> In Mississippi the courts may enjoin the holding of an election which is in violation of the constitution or statutes of the state; but they will not take jurisdiction in other cases.<sup>96</sup> In Colorado it is held that the state may enjoin a conspiracy to commit election frauds.<sup>97</sup> And in Kentucky a mandatory injunction has issued to compel an election board to meet and canvass the returns.<sup>98</sup> It is difficult to reconcile these cases with any proper theory of equity jurisdiction; and they can be supported only upon the general ground that the injunction is the most available remedy. An injunction may issue to preserve property rights, although to ascertain those rights may require the determination of the validity of an election. Thus, a village has been allowed an injunction to prevent a city, claiming annexation, from seizing its property.<sup>99</sup> And, of course, where authorized by statute, equity may test the legality and regularity of an election.<sup>100</sup> In Colorado it has been held that where there is no statute authorizing any

<sup>95</sup> *De Kalb County v. City of Atlanta*, 132 Ga. 727, 65 S. E. 72. Thus, where the municipal authorities for purposes of influencing the results of an election attempt to change the division lines of the county, under an act which has no application, a resident, tax-payer and voter may have an injunction: *Town of Roswell v. Ezzard*, 128 Ga. 43, 57 S. E. 114.

<sup>96</sup> *Conner v. Gray*, 88 Miss. 489, 9 Ann. Cas. 120, 41 South. 186.

<sup>97</sup> *People v. Tool*, 35 Colo. 225, 117 Am. St. Rep. 198, 6 L. R. A. (N. S.) 822, 86 Pac. 224, 229, 231.

<sup>98</sup> *Potter v. Campbell*, 155 Ky. 784, 160 S. W. 763; *Riddell v. Grinstead*, 156 Ky. 319, 160 S. W. 1069.

<sup>99</sup> *Village of Morgan Park v. City of Chicago*, 255 Ill. 190, Ann. Cas. 1913D, 399, 99 N. E. 388. Where an election is for the purpose of authorizing a tax, a person against whom such a tax is assessed and sought to be enforced may raise the question as to the validity of the tax, and the court will then inquire into the validity of the election: *Coleman v. Board of Education*, 131 Ga. 643, 63 S. E. 41.

<sup>100</sup> *H. W. Metcalf Co. v. Orange Co.*, 56 Fla. 829, 47 South. 363.

contest, equity may take jurisdiction to determine the validity of an election and may issue such injunctions as may be necessary to give effect to its decree.<sup>101</sup> In Alabama, equity will restrain the issuance of improvement bonds where the election authorizing them is invalid, although there is a method for contesting such elections provided by statute.<sup>102</sup>

§ 1756. (§ 333.) **Title to Public Office.**—It is a principle of universal application that an injunction will not issue when its object is to try title to public office.<sup>103</sup> The reasons for this rule are that such cases involve political rights, with which equity has nothing to do, and that generally there is an adequate remedy at law. In case of contested elections this legal remedy is often of statutory origin, but in most cases the relief by the common-law writ of *quo warranto* is ample.

It may be laid down as a general rule that a claimant out of possession will not be awarded an injunction against the party in possession of a public office.<sup>104</sup>

<sup>101</sup> Thus, under such circumstances, equity took jurisdiction of a local option election to purge it of fraud, and an injunction issued to restrain the issuance of liquor licenses until the court decided as to the legality of the election. It was further held that if the court reversed the result, it could direct cancellation of licenses already issued: *Pagosa Springs v. People* (*Patterson v. People ex rel. Parr*), 23 Colo. App. 479, 130 Pac. 618.

<sup>102</sup> *Coleman v. Town of Eutaw*, 157 Ala. 327, 47 South. 703.

<sup>103</sup> The text is cited in *Gladish v. Lovewell*, 95 Ark. 618, 130 S. W. 579. In general, see *Beebe v. Robinson*, 52 Ala. 66; *Moulton v. Reid*, 54 Ala. 320; *Hutchinson v. Miller*, 158 Ky. 363, 164 S. W. 961; *Hill v. Anderson*, 122 Ky. 87, 90 S. W. 1071; *In re Reynolds*, 202 N. Y. 430, 96 N. E. 87, 416; *Welker v. Lathrop*, 210 N. Y. 434, 104 N. E. 938; *State ex rel. Garrison v. Brough*, 94 Ohio St. 115, 113 N. E. 683; *Brown v. Baldwin*, 112 Va. 536, 72 S. E. 143. In Kentucky, it has been held that where officers have abandoned their offices, and there is no legal remedy, equity may interfere to declare the offices vacant: *City of Williamsburg v. Weesner*, 164 Ky. 769, 176 S. W. 224.

<sup>104</sup> *Cochran v. McCleary*, 22 Iowa, 75; *Neeland v. State*, 39 Kan. 154, 18 Pac. 165; *State v. Rost*, 47 La. 53, 16 South. 776; *Washington*

In such a case the only question involved is the title to the office; and often the effect of an injunction would be to render an office vacant, to the injury of the public. Likewise, it will not be issued when both parties are out of possession;<sup>105</sup> nor when the suit is brought against the appointing body and in effect is for reinstatement.<sup>106</sup> And the same result is reached although the application for relief is made in the name of the state at the relation of the claimant.<sup>107</sup>

Co. Comm'rs v. Board of County School Comm'rs, 77 Md. 283, 26 Atl. 115; Arnold v. Henry, 155 Mo. 48, 78 **Am. St. Rep.** 556, 55 S. W. 1089; People v. Draper, 24 Barb. 265; Patterson v. Hubbs, 65 N. C. 119; State v. Wolfenden, 74 N. C. 103; Harding v. Eichinger, 57 Ohio St. 371, 49 N. E. 306; Hagner v. Heyberger, 7 Watts & S. 104, 42 **Am. Dec.** 220; Gilroy's Appeal, 100 Pa. St. 5; Kilpatrick v. Smith, 77 Va. 347; Mullen v. City of Tacoma, 16 Wash. 82, 47 Pac. 215; Huels v. Hahn, 75 Wis. 468, 44 N. W. 507; State v. Rice, 67 S. C. 236, 45 S. E. 153; Brower v. Kantner, 190 Pa. St. 182, 43 Atl. 7; McAllen v. Rhodes, 65 Tex. 348. But see Ehlinger v. Rankin, 9 Tex. Civ. App. 424, 29 S. W. 240. See, also, in support of the text, People v. District Court of Elbert County, 46 Colo. 1, 101 Pac. 777; Holbrook v. Smedley, 79 Ohio St. 391, 16 **Ann. Cas.** 155, 87 N. E. 269; Hayes v. Sturges, 215 Pa. St. 605, 64 Atl. 828; Sanders v. Belue, 78 S. C. 171, 58 S. E. 762; Ekern v. McGovern, 154 Wis. 157, 46 **L. R. A. (N. S.)** 796, 142 N. W. 595. Equity will not interfere although it appear that the plaintiff is the officer *de jure* when the defendant is in possession of the office: Vette v. Byington, 132 Iowa, 487, 109 N. W. 1073. An injunction will not be granted to an officer out of possession although he alleges that possession was obtained by force and trickery: Barendt v. McCarthy, 160 Cal. 680, 118 Pac. 228.

<sup>105</sup> State v. Rost, 47 La. Ann. 53, 16 South. 663; People v. District Court of Lake County, 29 Colo. 277, 93 **Am. St. Rep.** 61, 68 Pac. 224.

<sup>106</sup> Callan v. Fire Dept. Comm'rs, 45 La. Ann. 673, 12 South. 834; McNiece v. Sohmer, 29 Misc. Rep. 238, 61 N. Y. Supp. 193.

<sup>107</sup> State v. Herreid, 10 S. D. 16, 71 N. W. 319; State v. Alexander, 107 Iowa, 177, 77 N. W. 841; State v. Wolfenden, 74 N. C. 103; State v. Duffel, 32 La. Ann. 649.



§ 1757. (§ 334.) **Same — Continued.**—For the same reasons an injunction will not issue at the suit of a member of the appointing body, to restrain a person alleged to have been illegally appointed;<sup>108</sup> nor at the suit of a tax-payer or elector;<sup>109</sup> nor at the suit of a local body or municipal corporation.<sup>110</sup>

Again, it will not issue in aid of an election contest to restrain canvassing of the votes,<sup>111</sup> the issuance of a certificate of election,<sup>112</sup> nor to determine which party is entitled to the office.<sup>113</sup> Nor will it issue to restrain the issuance of a commission to a person alleged to be illegally appointed.<sup>114</sup> And the fact that an election

<sup>108</sup> *Goldsworthy v. Boyle*, 175 Pa. St. 246, 34 Atl. 630; *Updegraf v. Crans*, 47 Pa. St. 103.

<sup>109</sup> *State v. Aloe*, 152 Mo. 466, 54 S. W. 494; *State v. Van Beek*, 87 Iowa, 569, 43 Am. St. Rep. 397, 54 N. W. 525; *Fahy v. Johnstone*, 21 App. Div. 154, 47 N. Y. Supp. 402; *Brumley v. Boyd*, 28 Tex. Civ. App. 164, 66 S. W. 874. Thus, a tax-payer cannot maintain a suit in equity to oust a tax collector: *Gladish v. Lovewell*, 95 Ark. 618, 130 S. W. 579; nor to determine whether defendants properly hold the office of commissioners of the port: *Bennett Trust Co. v. Sengstacken*, 58 Or. 333, 113 Pac. 863.

<sup>110</sup> *State v. Withrow*, 154 Mo. 397, 55 S. W. 460; *District Tp. v. Barrett*, 47 Iowa, 110; *District Tp. v. Myles*, 109 Iowa, 541, 80 N. W. 544. Members of a board who contend that it should consist of three members and not five cannot enjoin two of the alleged members from acting: *Lawson v. Hays*, 39 Colo. 250, 89 Pac. 968.

<sup>111</sup> *Ex parte Wimberley*, 57 Miss. 437; *Wilder v. Underwood*, 60 Kan. 859, 57 Pac. 965.

<sup>112</sup> *Coleman v. Glenn*, 103 Ga. 458, 68 Am. St. Rep. 108, 30 S. E. 297; *Ward v. Sweeney*, 106 Wis. 44, 82 N. W. 169; *People v. McClees*, 20 Colo. 403, 26 L. R. A. 646, 38 Pac. 468.

<sup>113</sup> *Dickey v. Reed*, 78 Ill. 261; *Updegraf v. Crans*, 47 Pa. St. 103. In general, to the effect that equity will not issue an injunction in aid of an election contest where title to office is involved, see *Harrison v. Stroud*, 129 Ky. 193, 16 Ann. Cas. 1050, 110 S. W. 828; *Link v. Karb*, 89 Ohio St. 326, 104 N. E. 632; *Richardson v. Young*, 122 Tenn. 471, 125 S. W. 664.

<sup>114</sup> *Coleman v. Glenn*, 103 Ga. 458, 68 Am. St. Rep. 108, 30 S. E. 297.

authorizing the change of a township organization is illegal is not sufficient to warrant an injunction against the appointment of commissioners, for the remedy by *quo warranto* after the office is assumed will be adequate.<sup>115</sup>

§ 1758. (§ 335.) **Possession of Office Protected.**—

While the title to public office will not be determined in an injunction proceeding the possession of a *de facto* officer will be protected against interference of an adverse claimant whose title is in dispute, until the latter shall establish his title at law.<sup>116</sup> In such a case the

<sup>115</sup> Fort v. Thompson, 49 Neb. 772, 69 N. W. 110.

<sup>116</sup> Rhodes v. Driver, 69 Ark. 606, 86 Am. St. Rep. 215, 65 S. W. 106; State v. Superior Court of Snohomish County, 17 Wash. 12, 61 Am. St. Rep. 893, 48 Pac. 741; Appeal of Town Council (Pa.), 15 Atl. 730; Parsons v. Durand, 150 Ind. 203, 49 N. E. 1047; City of Huntington v. Cast, 149 Ind. 255, 48 N. E. 1025; Guillothe v. Poiney, 41 La. Ann. 333, 5 L. R. A. 403, 6 South. 507; Poyntz v. Shackelford, 107 Ky. 546, 54 S. W. 855; Hopkins v. Swift, 100 Ky. 14, 37 S. W. 155; Brady v. Sweetland, 13 Kan. 41; Palmer v. Foley, 45 How. Pr. 110; Kerr v. Trego, 47 Pa. St. 292; Reemelin v. Mosby, 47 Ohio St. 570, 26 N. E. 717; Wheeler v. Fire Comm'rs, 46 La. Ann. 731, 15 South. 179; Stenglein v. Beach, 128 Mich. 440, 8 Detroit Leg. N. 721, 87 N. W. 449. But see Osgood v. Jones, 60 N. H. 543. In such an action the title to the office cannot be tried: Scott v. Sheehan, 145 Cal. 691, 79 Pac. 353. See, also, in support of the text, Lucas v. Futrall, 84 Ark. 540, 106 S. W. 667; Arnold v. Hills, 52 Colo. 391, Ann. Cas. 1913E, 724, 121 Pac. 753; Hollar v. Cornett, 144 Ky. 420, 138 S. W. 298; Blain v. Chippewa Circuit Judge, 145 Mich. 59, 108 N. W. 440; Hotchkiss v. Keck, 86 Neb. 322, 125 N. W. 509; Palmer v. Zeigler, 76 Ohio St. 210, 81 N. E. 234; Hardy v. Reamer, 84 S. C. 487, 66 S. E. 678; Lefevre v. Belsterling (Tex. Civ. App.), 137 S. W. 1159; Stamps v. Tittle (Tex. Civ. App.), 167 S. W. 776; Callaghan v. Irvin, 40 Tex. Civ. App. 453, 90 S. W. 335; Callaghan v. Tobin, 40 Tex. Civ. App. 441, 90 S. W. 328; Callaghan v. McGown (Tex. Civ. App.), 90 S. W. 319; Ware v. Welch (Tex. Civ. App.), 149 S. W. 263; Ekern v. McGovern, 154 Wis. 157, 46 L. R. A. (N. S.) 796, 142 N. W. 595. But see, State v. Seehorn, 143 Mo. App. 182, 128 S. W. 240. It has been held that when equity

right to the office is not considered. "The welfare and good order of society and government require that those engaged in the discharge of public duties should not be disturbed by claimants whose right to discharge their functions is as yet uncertain. Equity will protect the possession of the incumbents from any unlawful intrusion. The public welfare requires that such protection should not be left to the totally inadequate remedy of an action for trespass."<sup>117</sup> But in order to warrant this relief it must appear that there has been some act or threat indicating an intent to interfere with possession. If this is not present the injunction will be refused, for only the title to office is involved.<sup>118</sup> For the same reason, a party in possession cannot enjoin the appointing power from naming his successor on the ground that the incumbent fears that the new appointee may interfere with his possession.<sup>119</sup> And in all cases the court should require the strongest showing before interfering.<sup>120</sup>

It has been held that while it is proper for the court to take cognizance of a case where the facts upon which the title to the office depends are disputed and uncertain, "it would seem anomalous for a court of equity to exercise its preventive jurisdiction in favor of one

takes jurisdiction to restrain interference with possession, it may retain the case for complete relief and try title to the office: *Ekern v. McGovern*, 154 Wis. 157, 46 L. R. A. (N. S.) 796, 142 N. W. 595.

<sup>117</sup> *City of Huntington v. Cast*, 149 Ind. 255, 48 N. E. 1025.

<sup>118</sup> *Jones v. Commissioners of Granville*, 77 N. C. 280; *State v. Judge*, 48 La. Ann. 1501, 21 South. 94.

<sup>119</sup> *Reemelin v. Mosby*, 47 Ohio St. 570, 26 N. E. 717; *Delahanty v. Warner*, 75 Ill. 185, 20 Am. Rep. 237. But see *Callaghan v. Irvin*, 40 Tex. Civ. App. 453, 90 S. W. 335. An incumbent of an office is not entitled to an injunction to prevent a person appointed to succeed him from taking the oath of office: *Price v. Collins*, 122 Md. 109, 89 Atl. 383.

<sup>120</sup> *Goldman v. Gillespie*, 43 La. Ann. 83, 8 South. 880; *Ward v. Sweeney*, 106 Wis. 44, 82 N. W. 169.

who, upon the undisputed facts had no right to retain possession of an office against one who, upon the equally undisputed facts, was entitled to it."<sup>121</sup>

§ 1759. (§ 336.) **Payment of Salaries.**—An injunction will not issue to restrain the payment of salary or fees to a *de facto* officer whose title is questioned.<sup>122</sup> "The public welfare demands that a public office be filled by some person; and if compensation is withheld from the incumbent pending litigation over his right thereto,

<sup>121</sup> *School District v. Waseca Co.*, 77 Minn. 167, 79 N. W. 668. It has been said that plaintiff must show that he is not a mere intruder, and that he must establish, by proof, his right to the office: *Stamps v. Tittle* (Tex. Civ. App.), 167 S. W. 776. The fact that a third party is contesting the election of the defendant is no ground for granting an injunction in favor of the party in possession of the office. It is necessary that plaintiff show a *prima facie* right to the office, or that there is no other person entitled to it: *Casey v. Bryce*, 173 Ala. 129, 55 South. 810. In *Hubbell v. Armijo*, 13 N. M. 482, 85 Pac. 1046, plaintiff, a county treasurer, sought an injunction against one appointed by the governor to succeed him. Plaintiff claimed that the governor had no power to remove him from office. It was held that he was not entitled to relief. "Where one has received an appointment to a public office from the authority invested with power to make such appointment, and has duly qualified in accordance with statutory requirements, the court will presume, in the first instance, that the appointment was legal, and that the appointee is the rightful incumbent of the office designated in the appointment."

It has been held that, where there is a dispute as to the fact of possession, equity will not determine which of the claimants is in actual possession of the office: *Vette v. Byington*, 132 Iowa, 487, 109 N. W. 1073. But see, *contra*, *Lucas v. Futrall*, 84 Ark. 540, 106 S. W. 667.

<sup>122</sup> *Greene v. Knox*, 175 N. Y. 432, 67 N. E. 910; *Tappan v. Gray*, 9 Paige, 507; *Stone v. Wetmore*, 42 Ga. 601; *McAllen v. Rhodes*, 65 Tex. 348; *Lawrence v. Leidigh*, 58 Kan. 676, 50 Pac. 889; *Burgess v. Davis*, 138 Ill. 578, 28 N. E. 817. See, also, *Colton v. Price*, 50 Ala. 424. Thus, a tax-payer cannot maintain such a bill: *Lavin v. Cook County Comm'rs*, 245 Ill. 496, 92 N. E. 291.



much of the inducement to an efficient discharge of the duties of the position is withdrawn, and in many cases the ability to continue the discharge of such duties prevented. Equity, therefore, will not jeopardize the due performance of an important public trust in order merely to secure to one of the claimants the fees and emoluments pertaining to it, in the event he should finally succeed in establishing his claim."<sup>123</sup> And this rule prevails although it may be perfectly apparent that the incumbent is not legally entitled to the position.<sup>124</sup> In case the claimant succeeds at law, he may recover from the incumbent the amount of the salary or fees collected; but the mere fact that the incumbent is insolvent and cannot therefore respond at law is not sufficient to warrant equitable relief.<sup>125</sup>

§ 1760. (§ 337.) **Removal of Officers.**—An officer in possession cannot, however, enjoin other officers from removing him.<sup>126</sup> The right to an office is said not to

<sup>123</sup> *Lawrence v. Leidigh*, 58 Kan. 676, 50 Pac. 889.

<sup>124</sup> *Tappan v. Gray*, 9 Paige, 507.

<sup>125</sup> *Lawrence v. Leidigh*, 58 Kan. 676, 50 Pac. 889.

<sup>126</sup> This section is cited in *Gladish v. Lovewell*, 95 Ark. 618, 130 S. W. 579. See, also, *In re Sawyer*, 124 U. S. 200, 31 L. Ed. 402, 8 Sup. Ct. 482; *White v. Berry*, 171 U. S. 366, 43 L. Ed. 199, 18 Sup. Ct. 917; *Page v. Moffett*, 85 Fed. 38; *Couper v. Smyth*, 84 Fed. 757; *Morgan v. Nunn*, 84 Fed. 551; *Dudley v. James*, 83 Fed. 345; *Carr v. Gordon*, 82 Fed. 373; *Taylor v. Kereheval*, 82 Fed. 497; *Palmer v. Board of Education*, 47 App. Div. 547, 62 N. Y. Supp. 485; *Muhler v. Hedekin*, 119 Ind. 481, 20 N. E. 700; *Heffran v. Hutchins*, 160 Ill. 550, 52 Am. St. Rep. 353, 43 N. E. 709 (affirming 56 Ill. App. 581); *Marshall v. Board of Managers*, 201 Ill. 9, 66 N. E. 314; *Cozart v. Fleming*, 123 N. C. 547, 31 S. E. 822; *Howe v. Dunlap*, 12 Okl. 467, 72 Pac. 365; *Riggins v. Thompson*, 30 Tex. Civ. App. 242, 70 S. W. 578.

And it follows that a mandatory injunction will not issue to compel reinstatement: *McNiece v. Sohmer*, 29 Misc. Rep. 238, 61 N. Y. Supp. 193. It has been held that an injunction will not issue to

be a property right. An action to enjoin removal raises a political question as to the title to the office, for only by determining the right can the court decide the question. Hence this line of cases is distinguishable from that in which the injunction is granted to prevent intrusion pending dispute. Moreover, the courts hesitate to interfere with the executive branch of the government in matters affecting the performance of its functions.

In recent years the federal courts have been called upon frequently to restrain the removal of officers whose tenure is supposed to be protected by civil service rules. But it has been held, with one or two exceptions, that such relief is not proper.<sup>127</sup> In some instances the decisions are rested on the ground that the regulations as to removal are mere rules of the executive, and that therefore there is no vested right to protect. But generally, the judges have come back to the fundamental

restrain city officers from recognizing the new appointee: *Howe v. Dunlap*, 12 Okl. 467, 72 Pac. 365, 895.

There is a slight dissent from the rule of the text. In *Armatage v. Fisher*, 74 Hun, 167, 26 N. Y. Supp. 364 (affirming 4 Misc. Rep. 315, 24 N. Y. Supp. 650), it was held that a president of a city council might enjoin his colleagues from removing him without authority from his position as president; and in *Stahlhut v. Bauer*, 51 Neb. 64, 70 N. W. 496, it was held that an injunction will issue to restrain a city council from removing a mayor when it has absolutely no jurisdiction in the matter. And in *Aslatt v. Corporation of Southampton*, L. R. 16 Ch. D. 143, the relief was granted under the "just and convenient" section of the Judicature Act.

<sup>127</sup> *White v. Berry*, 171 U. S. 366, 43 L. Ed. 199, 18 Sup. Ct. 917; *Page v. Moffett*, 85 Fed. 38; *Couper v. Smyth*, 84 Fed. 757; *Morgan v. Nunn*, 84 Fed. 551; *Carr v. Gordon*, 82 Fed. 373; *Taylor v. Kercheval*, 82 Fed. 497. In *Priddie v. Thompson*, 82 Fed. 186, and *Butler v. White*, 83 Fed. 578, the opposite conclusion was reached. Speaking of an officer as entitled to the protection of equity, Jackson, J., in the latter case said: "Has not a person who holds and is in possession of an office to which there is a fair salary attached, to remunerate him for his services, a right to the protection of the law

principle, and have placed their decisions squarely upon the ground that equity has no jurisdiction over political matters.

Since the court will not enjoin the executive from removing an officer, it follows as a matter of course that it will not enjoin a trial on charges preferred.<sup>128</sup> And this rule will be adhered to although it is alleged that the body of triers is prejudiced and will abuse its discretion.<sup>129</sup>

Upon the same principle, the enforcement of a municipal ordinance will not be enjoined merely on the ground that it will deprive the complainant of his office.<sup>130</sup>

§ 1761. (§ 338.) **Action of De Facto Officers.**—An injunction will not issue to restrain *de facto* public officers from performing certain acts on the ground that they are powerless because not legally qualified.<sup>131</sup>

to prevent an injury to him by the doubtful assertion of the rights of another as to his office? Has he not a material interest in the possession of the office and the salary attached to it? If he has such an interest in the office and emoluments, is there not a right which should be recognized and protected by the law in the employment of it? The fact that another party desires and seeks the office is evidence of its value to him, and, if it is valuable to the one seeking it, surely it must be to the one holding it." "Equity alone furnishes that remedy, and, if this remedy does not exist, then there is a case of an alleged wrong without a remedy."

<sup>128</sup> *White v. Wahlenberg*, 113 Iowa, 236, 84 N. W. 1026; *Cox v. Moores*, 55 Neb. 34, 75 N. W. 35.

<sup>129</sup> *Cox v. Moores*, 55 Neb. 34, 75 N. W. 35.

<sup>130</sup> *Sheridan v. Colvin*, 78 Ill. 237.

<sup>131</sup> *Graeff v. Felix*, 20 Pa. St. 137, 49 Atl. 758; *Hardesty v. Taft*, 23 Md. 513, 87 Am. Dec. 584; *School Dist. No. 116 v. Wolf*, 78 Kan. 805, 20 L. R. A. (N. S.) 358, 98 Pac. 237; *Hotehkiss v. Keck*, 84 Neb. 545, 121 N. W. 579; *State v. Armstrong*, 27 Okl. 810, 117 Pac. 332. Thus, majority members of a board cannot enjoin a minority on the ground that the board is legally composed of three members instead of five: *Lawson v. Hays*, 39 Colo. 250, 89 Pac. 968; nor will a teacher be enjoined from teaching because not legally

Where, however, a legislative body, by the vote of persons not legally entitled, directs an officer to do an act which will be valid only if the authorization is proper, an injunction will issue against the performance. Thus, where a board of supervisors, by a vote in which a person not legally entitled to office had the deciding voice, ordered the clerk to submit the question of changing a county seat to the electors, an injunction was allowed.<sup>132</sup>

appointed: *School Dist. No. 77 v. Cowgill*, 76 Neb. 317, 107 N. W. 584. An injunction cannot be used in an election contest to prevent the one holding the certificate of election from qualifying and discharging the duties of the office pending the contest: *Harrison v. Stroud*, 129 Ky. 193, 16 **Ann. Cas.** 1050, 110 S. W. 828.

<sup>132</sup> *Williams v. Boynton*, 147 N. Y. 426, 42 N. E. 184; *Buck v. Fitzgerald*, 21 Mont. 482, 54 Pac. 942.



## CHAPTER XVIII.

## INJUNCTIONS AGAINST MUNICIPAL CORPORATIONS AND THEIR OFFICERS.

## ANALYSIS.

- §§ 339-343. Limitations on the exercise of the remedy.
  - § 339. Injunction against legislative acts—Cases examined.
  - § 340. Same—Injunctions generally refused.
  - § 341. Same—Exceptions to the general rule.
  - § 342. Second limitation; acts within discretionary powers not interfered with.
  - § 343. No injunction to test the validity of municipal organization.
- §§ 344-353. Tax-payers' suits.
  - § 344. General principle.
  - § 345. *Rationale* of the doctrine.
  - § 346. New York rule.
  - § 347. The rule in Massachusetts.
  - § 348. The rule in Ohio.
- §§ 349-353. Illustrations of the general principle.
  - § 349. Municipal aid bonds.
  - § 350. Injunctions against exceeding constitutional or statutory limits of indebtedness.
  - § 351. Awarding contracts—"Lowest bidder"—Discriminating in favor of union labor.
  - § 352. Injunctions against removal of county seats.
  - § 353. Miscellaneous illustrations.
  - § 354. Relief against ordinances injuring the individual in a capacity other than that of tax-payer.
  - § 355. Injunctions against wrongful acts in general.

§ 1762. (§ 339.) **Limitations on the Exercise of the Remedy—Injunctions Against Legislative Acts; Cases Examined.**<sup>1</sup>—"Has equity the power to enjoin the passage

<sup>1</sup> The opinion of Magruder, J., in *Stevens v. St. Mary's Training School*, 144 Ill. 336, 36 Am. St. Rep. 438, 18 L. R. A. 832, 32 N. E.

of ordinances, by-laws, resolutions, and orders by municipal corporations, or is its power confined to the issuance of injunctions against the enforcement and execution of such ordinances, by-laws, resolutions, and orders, after the same have been passed? . . . There are cases which hold, or seem to hold, that where a municipal corporation is about to pass a resolution or ordinance which is void, as being *ultra vires*, a court of chancery will enjoin it from so doing.<sup>2</sup> In none of the cases [just] cited, except the first four, was the question now under consideration expressly passed upon, but the facts stated in the opinions seem to warrant the conclusion that injunctions were sustained against the corporate action of the municipalities, as distinguished from the action of agents or officers proceeding under their orders. In the New York cases it was held that a court of chancery could enjoin the board of aldermen of a city from passing an ordinance to construct a railway in one of the streets; that municipal corporations are creatures of

962, 36 Cent. L. J. 275, 27 Am. Law Rev. 618, contains by far the most thorough examination of this question on the authorities, that has come to the present writer's attention; I have, therefore, made it the basis of this and the two following sections.

<sup>2</sup> "Among such cases may be mentioned the following: *Davis v. Mayor etc.*, 1 Duer (N. Y.), 451; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *Davis v. Mayor*, 14 N. Y. 506, 67 Am. Dec. 186; *Spring Valley Waterworks v. Bartlett*, 16 Fed. 615; *Town of Jacksonport v. Watson*, 33 Ark. 704; *State v. Commissioners*, 39 Ohio St. 58; *Page v. Allen*, 58 Pa. St. 338, 98 Am. Dec. 272; *Follmer v. Nuckolls Co.*, 6 Neb. 204; *Peter v. Prettyman*, 62 Md. 566; *Patton v. Stephens*, 14 Bush, 324; *Board of Education v. Arnold*, 112 Ill. 11; *Spilman v. City of Parkersburg*, 35 W. Va. 605, 14 S. E. 279; *City of Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *City of Springfield v. Edwards*, 84 Ill. 626; *Howell v. City of Peoria*, 90 Ill. 104." See, also, *People v. Dwyer*, 90 N. Y. 402, holding that "whether the act enjoined was or was not legislative or discretionary, and if so, whether other facts still justified the interposition of equity, were proper subjects for the consideration of the trial court whose error, if any, could only be corrected by appeal."

limited powers in the appropriation of the funds of the people; that when they attempt to appropriate such funds to purposes not authorized by their charters or by positive law, whether it be done by resolution, ordinance, or under the form of legislation, their acts are void and that, while courts will not attempt to control their discretion, yet if, under pretense of exercising such discretion, they threaten or are about to do what amounts to a gross abuse of power, to the injury and in fraud of the rights of individuals and the public, the courts will interfere to prevent the threatened injury. But later decisions in New York, some of which are referred to hereafter, have taken a different view, refusing to follow the earlier cases above mentioned, as going too far in the direction of subjecting the legislative and political powers of municipal bodies to the control of the courts.<sup>3</sup> In *Spring Valley Waterworks v. Bartlett*, *supra* [in note 2], an injunction against the mayor and supervisors of San Francisco, restraining them from passing an ordinance to fix the price of water furnished to the city, was sustained, over the objection that the defendants were a legislative body, endowed with legislative powers, to be exercised with absolute discretion; and it was held that the board of supervisors of a municipal corporation will be enjoined from passing an ordinance which is not within the scope of their powers, when its passage will work an irreparable injury. The *Bartlett* case, however, seems to have been overruled by the later case of *Alpers v. San Francisco*, *supra*, [in note 3].<sup>4</sup> The last four

<sup>3</sup> “*Alpers v. San Francisco*, 12 Sawy. 631, 32 Fed. 503.”

<sup>4</sup> It is hardly accurate to say that the *Bartlett* case was overruled by the *Alpers* case. Sawyer, J., who delivered the opinion in the *Bartlett* case, concurred in Mr. Justice Field's opinion delivered in the *Alpers* case, with the understanding that the decision in the prior case was not thereby overruled. “I am not prepared to say,” remarks Judge Sawyer (32 Fed. 510), “that the court can, in no instance, or under no circumstances, enjoin the legislative department

cases above cited [in note 2] . . . are cases where cities were enjoined from incurring indebtedness in excess of the constitutional limit, or from entering into contracts which would involve such excess of indebtedness. But in these cases the point to which attention was more especially directed was the meaning of the word 'indebtedness,' and what constitutes a 'debt' within the meaning of the constitution; and it is not altogether clear that 'incurring indebtedness' does not refer as well to the enforcement as to the passage of corporate resolutions.

"A large number of the decisions which uphold the right of equity to interfere with the action of municipal corporations when such an action is in excess of their legal powers, will be found, on examination, to be based upon facts which show that the injunctions were issued against the officers or agents attempting to execute or enforce corporate resolutions, ordinances, by-laws, or orders."<sup>5</sup> . . .

of a municipal corporation from passing an ordinance, which is wholly without its constitutional, or lawful power to enact. . . . I do not understand, that the limitation in the opinion of the circuit justice is broader in its scope, than the principle herein stated." "In what we have said of the want of authority in courts of equity over the action of a municipal corporation," says Mr. Justice Field (32 Fed. 507), "we confine ourselves strictly to such action as is purely legislative, upon a matter which is, by its charter or law, made subject to its legislative discretion."

<sup>5</sup> Citing *New London v. Brainard*, 22 Conn. 553; *Webster v. Town of Harwinton*, 32 Conn. 131; *The Liberty Bell*, 23 Fed. 843; *Harney v. Indianapolis etc. Railroad Co.*, 32 Ind. 244; *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *Willard v. Comstock*, 58 Wis. 565, 46 *Am. Rep.* 657, 17 N. W. 401; *Lynch v. Eastern R'y Co.*, 57 Wis. 430, 15 N. W. 743, 825; *Place v. City of Providence*, 12 R. I. 1; *Austin v. Coggeshall*, 12 R. I. 329, 34 *Am. Rep.* 648; *Sherman v. Carr*, 8 R. I. 431; *Newmeyer v. Missouri etc. R'y Co.*, 52 Mo. 81, 14 *Am. Rep.* 394; *Osterhout v. Hyland*, 27 Hun, 167; *Mayor etc. of Baltimore v. Gill*, 31 Md. 375; *Merrill v. Plainfield*, 45 N. H. 126; *Hospers v. Wyatt*, 63 Iowa, 264, 19 N. W. 204; *Roberts v. Mayor etc.*



§ 1763. (§ 340.) **Same; Injunction Generally Refused.**—"But we are not limited, in the investigation of this subject, to an examination of the facts of the cases which, while sustaining the general power of equity to restrain the action of municipal bodies, do not make any special reference to the mode of exercising such power. There are many decisions which hold, in express and definite terms, that 'the courts will not enjoin the passage of unauthorized ordinances, and will ordinarily act only when steps are taken to make them available.'<sup>6</sup> . . . The weight of authority, and the tendency of the more recent decisions, are in favor of the position, that the restraining power of the courts should be directed against the enforcement, rather than the passage, of unauthorized orders and resolutions or ordinances by municipal corporations.<sup>7</sup> In *Alpers v. San Francisco*,

of New York, 5 Abb. Pr. 41; *Schumm v. Seymour*, 24 N. J. Eq. 143; *List v. Wheeling*, 7 W. Va. 501; *Rutz v. Calhoun*, 100 Ill. 392; *McCord v. Pike*, 121 Ill. 288, 2 *Am. St. Rep.* 85, 12 N. E. 259; *English v. Smock*, 34 Ind. 115, 7 *Am. Rep.* 215; *City of Madison v. Smith*, 83 Ind. 502; *Sackett v. City of New Albany*, 88 Ind. 473, 45 *Am. Rep.* 467; *Wright v. Bishop*, 88 Ill. 302; *Sherlock v. Village of Winnetka*, 59 Ill. 389; *Crampton v. Zabriskie*, 101 U. S. 601, 25 *L. Ed.* 1070. The learned justice then proceeded to examine in some detail the facts in the leading case of *Crampton v. Zabriskie*, *supra*, in *Sherlock v. Village of Winnetka*, and in *Colton v. Hanchett*, 13 Ill. 615, *Perry v. Kinnear*, 42 Ill. 160, *Beauchamp v. Kankakee Co.*, 45 Ill. 274, and *Carter v. City of Chicago*, 57 Ill. 283, and to show that in each case the injunction was directed against the enforcement of, or acts done in pursuance of, the illegal legislation, not against its passage or enactment.

<sup>6</sup> 1 Dill. Mun. Corp., 4th ed., § 308, note on page 387. And as publication of an ordinance is a part of the procedure, it will not be enjoined: *Sullivan v. City of East Grand Forks*, 131 Minn. 424, 155 N. W. 397. Equity has no jurisdiction until an attempt is made to enforce the ordinance: *Board of Comm'rs v. Jewett*, 184 Ind. 63, 110 N. E. 553.

<sup>7</sup> "To this effect are the following authorities: *Des Moines Gas Co. v. City of Des Moines*, 44 Iowa, 505, 24 *Am. Rep.* 756; *Linden*

*supra* [in note 3], Mr. Justice Field, who wrote the opinion in *Crampton v. Zabriskie*, *supra* [in note 16, § 344, and note 5, § 339], says: 'If by either body—the

*v. Case*, 46 Cal. 171; *Merriam v. Board of Supervisors*, 72 Cal. 517, 14 Pac. 137; *City of Chicago v. Evans*, 24 Ill. 52; *Whitney v. Mayor etc.*, 28 Barb. 233; *People v. Mayor*, 32 Barb. 35; *People v. Mayor*, 9 Abb. Pr. 253; *Cincinnati etc. R. R. Co. v. Smith*, 29 Ohio St. 291; *Harrison v. City of New Orleans*, 33 La. Ann. 222, 39 Am. Rep. 272; *Alpers v. San Francisco*, 12 Saw. 631, 32 Fed. 503; 2 High, Inj. (3d ed.), sec. 1243." See, in addition, the following cases: *New Orleans Waterworks Co. v. City of New Orleans*, 164 U. S. 471, 41 L. Ed. 518, 17 Sup. Ct. 161; *Murphy v. East Portland*, 42 Fed. 308; *Lewis v. Denver City Waterworks Co.*, 19 Colo. 236, 41 Am. St. Rep. 248, 34 Pac. 993; *Belington & N. R. Co. v. Town of Alston*, 54 W. Va. 597, 46 S. E. 612 (no relief against repeal of order granting permission to use streets); *State v. Sup. Ct. of Milwaukee Co.*, 105 Wis. 651, 48 L. R. A. 819, 81 N. W. 1086; *Barto v. Board of Supervisors*, 135 Cal. 494, 67 Pac. 758; *Dailey v. Nassau County R. Co.*, 65 N. Y. Supp. 396, 52 App. Div. 272; *McBride v. Newlin*, 129 Cal. 36, 61 Pac. 577 (board acting in a *judicial* capacity, in allowing a claim, not enjoined); *Roby v. City of Chicago (Ill.)*, 74 N. E. 768 (ordinance granting franchise to street railway); *Glide v. Superior Court (Cal.)*, 81 Pac. 225 (ordinance relating to formation of reclamation district). See, also, the following recent cases: *Missouri & Kansas Interurban R'y Co. v. City of Olathe*, 156 Fed. 624; *Gray v. Mayor & Council of Wilmington*, 10 Del. Ch. 39, 83 Atl. 321 (court should wait until last moment so as to give the legislators a chance to do as they ought; it should wait until the ordinance is passed, approved by the mayor, and some effort is made to enforce it); *Glide v. Superior Court*, 147 Cal. 21, 81 Pac. 225 (action on an application for the formation of a legislative district is a legislative act, and cannot be enjoined); *Majestic Theater Co. v. City of Cedar Rapids*, 153 Iowa, 219, Ann. Cas. 1913E, 93, 133 N. W. 117 (no injunction against passing invalid ordinance making it unlawful to conduct a theater on Sunday); *Slade v. City of Lexington (Ky.)*, 121 S. W. 621 (no injunction against passing an ordinance defining and creating a franchise); *Basting v. City of Minneapolis*, 112 Minn. 306, 140 Am. St. Rep. 490, 127 N. W. 1131 (no injunction against passage of ordinance restricting places where certain kinds of business can be conducted); *Chicago, R. I. & P. R'y Co. v. City of Lincoln*, 85 Neb. 733, 19 Ann. Cas. 207, 124 N. W. 142; *Lee v. City of*

legislature or the board of supervisors—an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be

McCook, 82 Neb. 26, 116 N. W. 955 (no injunction against passage of ordinance vacating street); Ewing v. City of Seattle, 55 Wash. 229, 104 Pac. 259 (no injunction against granting street railway franchise).

The courts are not agreed as to when jurisdiction of equity to attack an ordinance arises. Some cases hold that a plaintiff must wait until some attempt is made to enforce the ordinance: Gray v. Mayor & Council of Wilmington, 10 Del. Ch. 39, 83 Atl. 321. In other cases, it has been held that equity may enjoin the publication of an invalid ordinance, the publication being merely a ministerial act: Minneapolis St. R'y Co. v. City of Minneapolis, 155 Fed. 989; Minneapolis General Electric Co. v. City of Minneapolis, 194 Fed. 215.

The importance of the subject may justify some further quotation from well-considered recent cases. "It is a general principle in the governmental system of this country that the judicial department has no direct control over the legislative department. . . . The same principle, with perhaps some exceptions, or seeming exceptions, extends to the local legislative bodies of municipal corporations. A court of equity cannot properly interpose any obstacle to the exercise of their legislative discretion upon a subject within the scope of their delegated powers. A municipal ordinance passed in pursuance of valid authority emanating from the state legislature has the same force and effect, within proper limits, as if passed by the legislature itself. . . . It is true, the municipal legislative body may adopt an illegal ordinance. So the state legislature may enact an unconstitutional statute. The remedy is the same in either case. By proper and timely application to the courts the enforcement of the unconstitutional statute, as well as the enforcement of the illegal ordinance, may be restrained or corrected. In such case, however, the judicial process is executed against some ministerial or administrative officer, or against some individual or corporation, and thus all substantial injury is averted without direct interference with legislative action or discretion." Per Elliott, J., in Lewis v. Denver City Waterworks Co., 19 Colo. 236, 41 Am. St. Rep. 248, 74 Pac. 993.

Of course, an injunction will be denied when the proposed ordinance is merely inexpedient: Wright v. People, 31 Colo. 461, 73 Pac. 869; and also where *infra vires*, but consequences may be injurious: Rico v. Snider, 134 Fed. 953.

reached by the courts, while the legislative body of the state or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraint, and impair the obligation of a contract . . . does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary. . . . The principle that the exercise of legislative power by a municipal body is beyond control is too important, in our institutions, to be weakened by occasional decisions in disregard of it.' In *Des Moines Gas Co. v. City of Des Moines*, *supra* [in note 7], where the city of Des Moines had chartered a gas company, with certain exclusive privileges, and attempted by a subsequent ordinance to repeal said charter, and grant the same privileges to another company, it was sought to enjoin the passage of the repealing ordinance on the ground that it would be a violation of the contract created by the charter, and therefore unconstitutional, but it was held that the court had no power to issue the injunction, under the circumstances; and it was there said: 'The general assembly is a co-ordinate branch of the state government, and so is the law-making power of public municipal corporations, within the prescribed limits. It is no more competent for the judiciary to interfere with the legislative acts of the one than the other. But the unconstitutional acts of either may be annulled. Certainly, the passage of an unconstitutional law by the general assembly could not be enjoined. If so, under the pretense that any proposed law was of that character, the judiciary could arrest the wheels of legislation. . . . After its passage the judiciary may declare the law unconstitutional. But previous to that time judicial powers cannot be invoked. . . . A void law is no law, and this, without doubt, is



true as to an ordinance. . . . While it is not the province of the judiciary to interfere and arrest the passage of the ordinance, yet the doors are open for the purpose of testing its legality.' ”

§ 1764. (§ 341.) **Same; Exceptions to the General Rule.**—“There may be instances when this restriction upon the power of the courts will sometimes be disregarded, as where municipal corporations are exercising mere business or ministerial, rather than legislative, powers,<sup>8</sup> or are wrongfully disposing of property held by them as trustees for the public,<sup>9</sup> or are attempting to

<sup>8</sup> Citing *City of Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; Dill. Mun. Corp. (4th ed.), §§ 473, 474, 927, 1048. See, also, *Board of Commissioners of Henry County v. Gillies*, 138 Ind. 667, 38 N. E. 40 (letting contract a ministerial act).

<sup>9</sup> Citing *Milhau v. Sharp*, 15 Barb. 193; *Sherlock v. Village of Winnetka*, 59 Ill. 389. See, especially, *Roberts v. City of Louisville*, 92 Ky. 95, 36 Am. St. Rep. 449, note, 17 S. W. 216, where an injunction was sustained against a city and its officials, at the suit of a tax-payer, to prevent the passage of an ordinance by the city council, authorizing the mayor to convey certain real property acquired and held by the city under an act of the legislature. The court says in part: “A municipal corporation is created for a double purpose, and consequently has a dual character,—one governmental or public, the other private or proprietary. . . . A municipal corporation, when holding, in its private or proprietary character, property or funds in trust for tax-payers and inhabitants within its limits, occupies towards them a relation like that of a purely private corporation to its *cestuis que trustent*, who are its shareholders. . . . In our opinion, the general proposition, a court of equity may not enjoin passage of a municipal ordinance, must be confined in its application to subjects over which the corporation, in its governmental or public character, has discretionary authority; and, if it be conceded taxable inhabitants have a right to resort to equity at all to restrain a municipal corporation and its officers from making an illegal or wrongful disposition of public property, whereby the plaintiffs will be injuriously affected, it reasonably follows the power exists to enjoin passage of the ordinance authorizing the act whenever irreparable injury will be done to the plaintiffs, and they have

act upon matters not, by their charters or by the law, subject to their jurisdiction,<sup>10</sup> or when it appears that the mere voting on, and formal passage of, a resolution or ordinance, will instantly, without any action or attempt to enforce any right or privilege under it, effect an irremediable private injury."<sup>11</sup> It can hardly be claimed, however, that the foregoing exceptions have met with universal recognition.

no adequate remedy at law. . . . The plain legal duty is imposed upon the general council to hold, control, and manage the wharf property for use of the public, which cannot be evaded by transfer of it, or otherwise," etc. See, also, *People v. Dwyer*, 90 N. Y. 402.

<sup>10</sup> Citing *Alpers v. San Francisco*, 12 Sawy. 631, 32 Fed. 503. See, also, *Wabaska Electric Co. v. City of Wymore*, 60 Neb. 199, 82 N. W. 626 (the injunction should be directed to the mayor and city council, and not to the city, since in attempting to legislate upon matters beyond its jurisdiction the governing body of a city does not represent the city, and does not act as its agent, nor by color of its authority); *International Trading Stamp Co. v. City of Memphis*, 101 Tenn. 181, 47 S. W. 136. In *Poppleton v. Moores*, 62 Neb. 851, 88 N. W. 128, it was held that "where the proposed action on the city's part involves the entering into, or, rather, continuing in, contractual relations materially affecting the interests of citizens, and is an extension of a franchise not only unauthorized, but forbidden, by the city charter, it would seem to warrant the trial court's interposing by injunction," citing *People v. Sturtevant*, 9 N. Y. 263, 59 *Am. Dec.* 536. But the court is without jurisdiction to enjoin the passage of an ordinance granting a franchise to a street railway, when the power of granting such franchise is, by statute, confided to the discretion of the governing body of the city: *State v. Superior Court of Milwaukee County*, 105 Wis. 651, 48 *L. R. A.* 819, 81 N. W. 1046.

<sup>11</sup> Citing *Whitney v. Mayor etc.*, 28 Barb. 233. In general, see *Chicago, R. I. & P. R'y Co. v. City of Lincoln*, 85 Neb. 733, 19 *Ann. Cas.* 207, 124 N. W. 142. See, also, the *dictum* in *Lewis v. Denver City Waterworks Co.*, 10 Colo. 236, 41 *Am. St. Rep.* 248, 34 *Pac.* 993, conceding an exception to the doctrine of non-interference, "if it should be made to appear that the legislative body of a municipality was about to pass some ordinance, resolution, or order, and that its mere passage would immediately occasion or be immediately

§ 1765. (§ 342.) **Second Limitation; Acts Within Discretionary Powers not Interfered With.**—A second limitation is found in the well-settled principle that where municipal authorities are acting within their well-recognized powers, or are exercising a discretionary power, a court of equity has no jurisdiction to interfere, unless their action is tainted with fraud, or the power or discretion is being manifestly abused to the oppression of the citizen.<sup>12</sup> “The court will not interfere

followed by, some irreparable loss or injury beyond the power of redress by subsequent judicial proceedings, a court of equity might, perhaps, extend its strong arm to prevent such loss or injury,” citing *Spring Valley Water Co. v. Bartlett*, 16 Fed. 615, 8 Sawy. 555. In *International Trading Stamp Co. v. City of Memphis*, 101 Tenn. 181, 47 S. W. 136, injunction was allowed before the passage of an illegal ordinance taxing the use of trading stamps, because after its passage a multiplicity of suits would be necessary.

<sup>12</sup> This section is cited in *Whitaker & Ray Co. v. Roberts*, 155 Fed. 882. See *McCarmel v. Shaw*, 155 Ill. 37, 46 *Am. St. Rep.* 311, 27 *L. R. A.* 580, 39 N. E. 584; *Fitzgerald v. Harms*, 92 Ill. 372; *Brush v. City of Carbondale*, 78 Ill. 76; *Andrews v. Board of Supervisors*, 70 Ill. 65; *Mutual Electric Light Co. v. Ashworth*, 118 Cal. 1, 50 Pac. 10; *Dailey v. City of New Haven*, 60 Conn. 314, 14 *L. R. A.* 69, 22 Atl. 945 (no injunction against a city refusing to accept a certain trust); *Whitney v. City of New Haven*, 58 Conn. 450, 20 Atl. 666 (demolition of public building not enjoined); *Mayor v. Camak*, 75 Ga. 429 (sale of stock owned by city not enjoined); *Downing v. Ross*, 1 App. D. C. 251 (letting contracts for public improvements); *Board of Commissioners of Perry County v. Gardner*, 155 Ind. 165, 57 N. E. 908; *Soden v. City of Emporia*, 7 Kan. App. 583, 52 Pac. 461 (manner of constructing sewerage system is within discretionary power); *Sullivan v. Phillips*, 110 Ind. 320, 11 N. E. 300 (same); *Trustees of Hazelgreen v. McNabb*, 23 Ky. Law Rep. 811, 64 S. W. 431 (necessity of street improvements is a question of discretion); *Kelly v. Mayor of Baltimore*, 53 Md. 134 (discretion in awarding contract); *Glasgow v. City of St. Louis*, 107 Mo. 198, 17 S. W. 743 (expediency of vacating a street is a question of discretion); *Atkinson v. Wykoff*, 58 Mo. App. 86 (same); *Lane v. Morrill*, 51 N. H. 422; *Morgan v. Binghampton*, 102 N. Y. 500, 7 N. E. 424 (construction of sewer); *Black v. Commissioners of Buncombe*

to see whether they are acting wisely or judi-

County, 129 N. C. 121, 39 S. E. 818 (discretion in issuing bonds); Delaware County's Appeal, 119 Pa. St. 159, 13 Atl. 62; Linden Land Co. v. Milwaukee Electric R'y & Lighting Co., 117 Wis. 493, 83 N. W. 851 (granting of franchise); Kendall v. Frey, 74 Wis. 26, 17 Am. St. Rep. 118, 42 N. W. 466 (suitableness of site for public building). But gross abuse of discretion, as in the purchase for \$28,000 of waterworks worth only \$10,000, and inadequate and unsuited to the purpose, may be enjoined at the suit of a tax-payer: Avery v. Job, 25 Or. 512, 36 Pac. 293. See People v. Dwyer, 90 N. Y. 402. See the following recent cases: Long v. Shepherd, 159 Ala. 595, 48 South. 675 (mere facts that contract is inexpedient, or not so good as could be made, will not warrant injunction); Cramton v. City of Montgomery, 171 Ala. 478, 55 South. 122 (no injunction against paving street because of want of durability of proposed pavement, its cost, and difficulty or expense of maintenance); Dyer v. Martin, 132 Ga. 445, 64 S. E. 475 (selling pauper farm not enjoined); People v. Grand Trunk Western R'y Co., 232 Ill. 292, 83 N. E. 839 (will not reform nor declare ordinance invalid because of mutual mistake); Murphy v. Chicago, R. I. & P. R'y Co., 247 Ill. 614, 93 N. E. 381; Gardiner v. City of Bluffton, 173 Ind. 454, Ann. Cas. 1912A, 713, 89 N. E. 853, 90 N. E. 898; Wood v. Hall, 138 Iowa, 308, 110 N. W. 270 (no injunction against public work because price is extravagant); Kinney v. Howard, 133 Iowa, 94, 110 N. W. 282 (no injunction against relocation of schoolhouse); Dennis v. Osborn, 75 Kan. 557, 89 Pac. 925 (error in judgment with respect to a plan for repairing a highway, adopted in good faith, of itself gives no ground for enjoining the improvement); Hessin v. City of Manhattan (City of Manhattan v. Hessin), 81 Kan. 153, 25 L. R. A. (N. S.) 228, 105 Pac. 44; Hudlemyer v. Dickinson, 143 Mich. 250, 106 N. W. 885, 108 N. W. 1116; Cox v. Jones, 73 N. H. 504, 63 Atl. 178; Berdan v. Passaic Valley Sewerage Comm'rs, 82 N. J. Eq. 235, 88 Atl. 202; Jones v. Town of North Wilkesboro, 150 N. C. 646, 64 S. E. 866; Pickler v. County Board of Education, 149 N. C. 221, 62 S. E. 902 (no injunction to restrain building of school within three miles of another); Jeffress v. Town of Greenville, 154 N. C. 490, 70 S. E. 919; Carter v. Board of Drainage Comm'rs, 156 N. C. 183, 72 S. E. 380; Newton v. School Committee of City of Charlotte, 158 N. C. 186, 73 S. E. 886 (school site); Trotter v. Town of Franklin, 146 N. C. 554, 60 S. E. 509 (alderman who is also a tax-payer cannot enjoin execution of a resolution of board on mere ground that the expense in-



ously.”<sup>13</sup> “Where legislative power is conferred upon [an incorporated city] by the state, it is necessary that a degree of freedom should be allowed in its exercise; otherwise, the city would be so hampered in the government of its people as would defeat the very ends of its incorporation. Hence it is that the state courts will never interfere with the free exercise of such rights as are left to the discretion of a corporate authority, unless such authority should go beyond the scope of power delegated, or unless the discretion given should be

curred will be unnecessary; his remedy is by appeal to the citizens to elect a new board); *Farrimond v. Coalgate School Dist.*, 25 Okl. 707, 108 Pac. 371 (tax-payer having children of school age cannot maintain an action against the officers of the school district on the ground that the act complained of would make it less convenient to send his children to school); *Burrell v. City of Portland*, 61 Or. 105, 121 Pac. 1 (court cannot control discretion of board as to material, ornamentation or expense of bridge); *Spencer v. Mahon*, 75 S. C. 232, 55 S. E. 321 (equity will not enjoin a city council from revoking a license to do business, when the license is by its terms revocable at the will of the council); *Commissioners' Court of Floyd County v. Nichols* (Tex. Civ. App.), 142 S. W. 37; *Spedden v. Board of Education*, 74 W. Va. 181, 52 L. R. A. (N. S.) 163, 81 S. E. 724. A mandatory injunction should not issue at the suit of a water company to compel a city to construct a sewer, irrespective of the discretion vested by law in the city, to determine the practicability of the sewer, the availability of taxation for the purpose, and like matters: *City of Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 6 Ann. Cas. 253, 50 L. Ed. 1102, 26 Sup. Ct. 660. Before a court of equity will interfere with a matter of discretion, the action must be so unreasonable as to amount to an oppressive and manifest abuse of discretion: *Jones v. Town of North Wilkesboro*, 150 N. C. 646, 64 S. E. 866; *Jeffress v. Town of Greenville*, 154 N. C. 490, 70 S. E. 919; *Newton v. School Committee of City of Charlotte*, 158 N. C. 186, 73 S. E. 886. But it is not necessary to allege moral turpitude: *Jones v. Town of North Wilkesboro*, 150 N. C. 646, 64 S. E. 866.

<sup>13</sup> *Western Union Tel. Co. v. City of New York*, 38 Fed. 552, 3 L. R. A. 449.

abused by an arbitrary exercise thereof, and by a plain and unwarranted violation of private rights.”<sup>14</sup>

§ 1766. (§ 343.) **No Injunction to Test the Validity of Municipal Organization.**—It is a well-established doctrine that *quo warranto*, and not injunction, is the proper remedy to inquire whether a municipal corporation was legally created, as well as to oust persons exercising the privileges and powers of corporate officers when the municipal corporation has no legal existence.<sup>15</sup>

§ 1767. (§ 344.) **Tax-payers’ Suits; General Principle.**—The prevailing doctrine as to equitable relief

<sup>14</sup> *Burekhardt v. City of Atlanta*, 103 Ga. 302, 30 S. E. 32, *per* Lewis, J. (question of necessity of repairs to street). In a leading English case Lord Chancellor Cottenham said, speaking of acts of poor-law commissioners: “The court will not interfere to see whether any alteration or regulation which they may direct is good or bad; but, if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority”: *Frewin v. Lewis*, 4 Mylne & C. 254: See, also, *Lord Auckland v. Westminster Board*, L. R. 7 Ch. 597.

<sup>15</sup> *Osborn v. Village of Oakland*, 49 Neb. 340, 68 N. W. 506, and cases cited (no injunction to prevent the election of officers to manage the affairs of the municipality on the ground that it has no corporate existence); *MacDonald v. Rehner*, 22 Fla. 198, and cases cited; *People v. Clark*, 70 N. Y. 518; *Hughes v. Dobbs*, 84 Tex. 502, 19 S. W. 684; *Earlboro Township v. Howard*, 47 Okl. 455, 149 Pac. 136. See, also, *Harvey v. Kerton* (Iowa), 164 N. W. 888; *Nelson v. Consolidated Independent School District* (Iowa), 164 N. W. 874; *Shriver v. Day*, 276 Ill. 403, 114 N. E. 918. As to injunctions relating to municipal elections and the title to municipal offices, see *ante*, §§ 331-338.

A tax-payer cannot maintain an action to prevent the organization of a new county: *Oden v. Barber* (Tex. Civ. App.), 126 S. W. 676.

against the abuse of power by officers of municipal corporations was formulated in an often-quoted opinion of the supreme court of the United States, speaking by Mr. Justice Field: "Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county [or other municipality], or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere, upon the application of the tax-payers of a county, to prevent the consummation of a wrong, when the officers of these corporations assume, in excess of their powers, to create burdens upon property holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of individual tax-payers should not be entertained to prevent the misuse of corporate power. The courts may be safely trusted to prevent the abuse of their process in such cases."<sup>16</sup>

<sup>16</sup> *Crampton v. Zabriskie* (1879), 101 U. S. 601, 25 L. Ed. 1070. Of innumerable cases affirming the doctrine, the following may be consulted with advantage for their statement of the doctrine and its reasons:

**Alabama.**—*New Orleans, M. & C. R. R. Co. v. Dunn*, 51 Ala. 128 ("the remedy is simple, expeditious, and preventive of the abuse of corporate powers").

**Arkansas.**—*Town of Jacksonport v. Watson*, 33 Ark. 704; *Russell v. Tate*, 52 Ark. 541, 20 Am. St. Rep. 193, 7 L. R. A. 180, 13 S. W. 130.

The suit by the tax-payer has practically superseded, in this country, the remedy of information in chancery

**California.**—*Winn v. Shaw*, 87 Cal. 631, 636, 25 Pac. 968, distinguishing earlier cases; *Bradford v. City and County of San Francisco*, 112 Cal. 537, 44 Pac. 912.

**Colorado.**—*McIntyre v. Board of Commissioners of El Paso County*, 15 Colo. App. 78, 61 Pac. 237.

**Connecticut.**—*Seofield v. Eighth School District*, 27 Conn. 499.

**Florida.**—*Chamberlain v. City of Tampa*, 40 Fla. 74, 23 South. 572.

**Georgia.**—*City of Macon v. Hughes*, 110 Ga. 795, 36 S. E. 247.

**Illinois.**—The Illinois reports abound in well-considered cases applying the general principle of the text. The rule is thus formulated: "A tax-payer of a city has a right to enjoin any intended misappropriation of public money by the council or officers of the city, or payment of such money on an illegal contract or without authority of law, or the execution of such contracts, or the incurring of illegal indebtedness." See *Holden v. City of Alton*, 179 Ill. 318, 53 N. E. 556, and cases cited; *Adams v. Brennan*, 177 Ill. 194, 69 Am. St. Rep. 222, 42 L. R. A. 418, 52 N. E. 314, and cases cited; *City of Chicago v. Nichols*, 177 Ill. 97, 52 N. E. 359; *Stevens v. St. Mary's Training School*, 144 Ill. 336, 36 Am. St. Rep. 438, 18 L. R. A. 832, 32 N. E. 962, 36 Cent. L. J. 275, 27 Am. Law Rev. 618; *McCord v. Pike*, 121 Ill. 288, 2 Am. St. Rep. 85, 12 N. E. 259, and cases in monographic note; *Wright v. Bishop*, 88 Ill. 302; *City of Springfield v. Edwards*, 84 Ill. 626; *Sherlock v. Village of Winnetka*, 59 Ill. 389, 68 Ill. 530; *Perry v. Kinnear*, 42 Ill. 160; *Colton v. Hanchett*, 13 Ill. 615; *Scott v. Allen*, 53 Ill. App. 341; *Gorman v. Tidholm*, 94 Ill. App. 371; *Jones v. O'Connell*, 266 Ill. 443, 107 N. E. 731.

**Indiana.**—*Harney v. Indianapolis etc. R. Co.*, 32 Ind. 244; *English v. Smock*, 34 Ind. 115, 7 Am. Rep. 215; *Board of Commissioners of Henry County v. Gillies*, 138 Ind. 667, 38 N. E. 40; *Miller v. Jackson Township*, 178 Ind. 503, 99 N. E. 102.

**Iowa.**—*Hospers v. Wyatt*, 63 Iowa, 264, 19 N. W. 204; *Anderson v. Orient Fire Ins. Co.*, 88 Iowa, 579, 55 N. W. 348; *Hanson v. Hunter etc. Co.*, 86 Iowa, 722, 48 N. W. 1005, 53 N. W. 84; *Snyder v. Foster*, 77 Iowa, 638, 42 N. W. 506; *Brockman v. City of Creston*, 79 Iowa, 587, 44 N. W. 822.

**Kentucky.**—*Patton v. Stephens*, 14 Bush, 324; *Roberts v. City of Louisville*, 92 Ky. 95, 36 Am. St. Rep. 449, 17 S. W. 216.



by the attorney-general to restrain *ultra vires* acts of

**Louisiana.**—State v. City of New Orleans, 50 La. Ann. 880, 24 South. 666.

**Maryland.**—Mayor etc. of Baltimore v. Gill, 31 Md. 375; Peter v. Prettyman, 62 Md. 566; Mayor of Baltimore v. Keyser, 72 Md. 107, 19 Atl. 706.

**Michigan.**—Savidge v. Village of Spring Lake, 112 Mich. 91, 70 N. W. 425; Black v. Common Council of City of Detroit, 119 Mich. 571, 78 N. W. 660; Curtenius v. Hoyt, 37 Mich. 583.

**Minnesota.**—Hodgman v. Chicago & St. P. R. Co., 20 Minn. 48, 20 Gil. 36 (the tax-payer's "damages" are *special*, affecting his private property and private rights); Sinclair v. Commissioners of Winona County, 23 Minn. 404, 23 Am. Rep. 694 (tax-payer has a "special interest distinct from the public"); Flynn v. Little Falls E. & W. Co., 74 Minn. 180, 77 N. W. 38, 78 N. W. 106; Grannis v. Board of Commissioners of Blue Earth County, 81 Minn. 55, 83 N. W. 495.

**Missouri.**—Newmeyer v. Missouri & M. R. Co., 52 Mo. 81, 14 Am. Rep. 394; Wagner v. Meetz, 69 Mo. 151.

**Montana.**—Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249.

**Nebraska.**—Tukey v. City of Omaha, 54 Neb. 370, 69 Am. St. Rep. 711, 74 N. W. 613; Ackerman v. Thummel, 40 Neb. 95, 58 N. W. 738; City of South Omaha v. Tax-payers' League, 42 Neb. 671, 60 N. W. 957.

**New Hampshire.**—Blood v. Manchester Elect. Lt. Co., 68 N. H. 340, 39 Atl. 335. See Brown v. Reding, 50 N. H. 336.

**North Carolina.**—Vaughn v. Board of Commissioners, 118 N. C. 636, 24 S. E. 425.

**North Dakota.**—Roberts v. City of Fargo, 10 N. D. 230, 86 N. W. 726.

**Ohio.**—Hays v. Jones, 27 Ohio St. 218; Pierce v. Hagans, 79 Ohio St. 9, 15 Ann. Cas. 1170, 36 L. R. A. (N. S.) 1, 86 N. E. 519.

**Oregon.**—Brownfield v. Houser, 30 Or. 534, 49 Pac. 843.

**Pennsylvania.**—Page v. Allen, 58 Pa. St. 338, 98 Am. Dec. 272.

**Rhode Island.**—Ecroyd v. Coggeshall, 21 R. I. 1, 71 Am. St. Rep. 241, 41 Atl. 260.

**South Carolina.**—Mauldin v. City Council of Greenville, 33 S. C. 1, 8 L. R. A. 291, 11 S. E. 434.

**South Dakota.**—Graves v. Jasper School Township, 2 S. D. 414, 50 N. W. 904.

public corporations; still, the right of the state, by the

**Texas.**—Wood v. City of Victoria, 18 Tex. Civ. App. 573, 46 S. W. 284 (no injunction against *ultra vires* municipal act when plaintiff not injured and burden of taxation not increased).

**Virginia.**—Lynchburg & R. St. R'y Co. v. Dameron, 95 Va. 545, 28 S. E. 951.

**Washington.**—Times Publishing Co. v. City of Everett, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. 695.

**Wisconsin.**—Willard v. Comstock, 58 Wis. 565, 46 Am. Rep. 657, 17 N. W. 401; Webster v. Douglas County, 102 Wis. 181, 72 Am. St. Rep. 870, 77 N. W. 885; and see Linden Land Co. v. Milwaukee Electric R'y. & L. Co., 107 Wis. 493, 83 N. W. 851; Warden v. Hart (City of Elroy), 162 Wis. 495, 156 N. W. 466.

**United States.**—Davenport v. Buffington, 97 Fed. 234, 46 L. R. A. 377, 38 C. C. A. 453; Downing v. Ross, 1 App. D. C. 251; Roberts v. Bradfield, 12 App. D. C. 453; Dewey Hotel Co. v. United States Elect. Lighting Co., 17 App. D. C. 356.

The plaintiff's capacity to sue depends on his character as a tax-payer, not on his residence within the municipality: Brockman v. City of Creston, 79 Iowa, 587, 44 N. W. 822; Thomas v. Joplin, 14 Cal. App. 662, 112 Pac. 729; Williams v. School Dist. No. 5, 167 Mo. App. 476, 151 S. W. 506. The fact that the value of his property is inconsiderable, and his taxes therefor are trifling, is immaterial; *Id.*; see, also, Scofield v. Eighth School District, 27 Conn. 499, where injunction was awarded against an illegal use of school property for religious purposes, although the injury to the property was not serious. A corporation tax-payer may maintain the action: Owensboro Waterworks Co. v. City of Owensboro, 29 Ky. Law Rep. 1118, 96 S. W. 867. The right of such a corporation to maintain the action has been sustained on the theory that plaintiff will be pecuniarily injured: Wolff Chemical Co. v. City of Philadelphia, 217 Pa. St. 215, 66 Atl. 344.

The tax-payer's right to an injunction denied when an adequate legal remedy provided by statute: Taylor v. Davey, 55 Neb. 153, 75 N. W. 553; Manly Mfg. Co. v. Broaddus, 94 Va. 547, 27 S. E. 438; Wahl v. School Directors, 78 Ill. App. 403; or by *certiorari*: Jackson v. City of Newark, 53 N. J. Eq. 322, 31 Atl. 233.

The mere fact that an act is illegal does not warrant an injunction at suit of tax-payer, when public funds will not be affected: Strickland v. Knight (Fla.), 36 South. 363 (not against illegal licensing of

proper officer, to maintain proceedings by injunction

saloon); *Clark v. Interstate Ind. Tel. Co.* (Neb.), 101 N. W. 977 (not against granting franchise).

The conclusions arrived at by Judge Dillon in his discussion of the subject have been generally accepted by the courts: Dillon, *Mun. Corp.* (4th ed.), § 922. "Upon a survey of the decisions in Great Britain and the United States, while they exhibit some diversity of opinion, it seems to us, in view of the nature of municipal powers, the danger of abuse, the necessity for prompt remedy on the part of those most interested in the proper administration of municipal affairs,—to wit, the taxable inhabitants,—that the following conclusions rest upon sound reason, and have also the support of the decided preponderance of judicial authority.

"1. The proper parties may resort to equity, and equity will, in the absence of restrictive legislation, entertain jurisdiction of their suit against municipal corporations when these are acting *ultra vires*, or assuming or exercising a power over the property of the citizen, or over corporate property or funds, which the law does not confer upon them, and where such acts affect injuriously the property owner or the taxable inhabitant. But if in these cases the property owners or the taxable inhabitants can have full and adequate remedy at law, equity will not interfere, but leave them to their legal remedy.

"2. That, in the absence of special controlling legislative provision, the proper public officer of the commonwealth, which created the corporation and prescribed and limited its powers, may, in his own name, or in the name of the state, on behalf of residents and voters of the municipality, exercise the authority, in proper cases, of filing an information or bill in equity to prevent the misuse of corporate powers, or to set aside or correct illegal corporate acts.

"3. That the existence of such a power in the state, or its proper public law officer, is not inconsistent with the right of any taxable inhabitant to bring a bill to prevent the corporate authorities from transcending their lawful powers where the effect will be to impose upon *him* an unlawful tax, or to increase *his* burden of taxation. Much more clearly may this be done when the right of the public officer of the state to interfere is not admitted, or does not exist; and in such case it would seem that a bill might properly be brought in the name of one or more of the taxable inhabitants for themselves and all others similarly situated, and that the court should then regard it in the nature of a public proceeding to test the validity of the corporate acts sought to be impeached, and deal with and control it accordingly."

to restrain municipal corporations from doing acts in violation of the constitution and laws of the state has met with abundant recognition in our reports.<sup>17</sup>

It seems that the motive which actuates the tax-payer in bringing suit to enjoin illegal expenditures of public moneys—the fact, for example, that he is interested in preventing the awarding to a business rival of an illegal contract whose execution is sought to be enjoined—is immaterial, if he sues in his representative character as tax-payer.<sup>18</sup>

§ 1768. (§ 345.) **Rationale of the Doctrine.**—“The grounds upon which such suits by tax-payers have been

<sup>17</sup> See *State v. County Court of Saline County*, 51 Mo. 350, 11 *Am. Rep.* 454, and the exhaustive examination of the authorities in the opinions of Shipley, J., and Bliss, J.; *Board of Education v. Territory*, 12 Okl. 286, 70 *Pac.* 792.

<sup>18</sup> *Packard v. Hayes*, 94 Md. 233, 51 *Atl.* 32; *Board of Commissioners of Henry County v. Gillies*, 138 Ind. 699, 38 *N. E.* 40; *Times Publishing Co. v. City of Everett*, 9 Wash. 518, 43 *Am. St. Rep.* 865, 37 *Pac.* 95; *Keen v. City of Waycross*, 101 Ga. 588, 29 *S. E.* 42; *Brockman v. City of Creston*, 79 Iowa, 587, 44 *N. W.* 822; *Owensboro Waterworks Co. v. City of Owensboro*, 29 Ky. Law Rep. 1118, 96 *S. W.* 867; *Engstad v. Dinnie*, 8 *N. D.* 1, 76 *N. W.* 292; but see *Highway Commissioners v. Deboe*, 43 Ill. App. 25, that relief will be refused if it appears that the tax-payer is merely a colorable plaintiff, suing in behalf of other parties in interest. Compare *Kelly v. Mayor etc. of Baltimore*, 53 Md. 134, where relief was refused because the plaintiff did not sue in a representative capacity; *Commissioners' Court of Perry County v. Medical Society of Perry County*, 128 Ala. 257, 29 *South.* 586. The fact that the plaintiff, as an individual, is injured in his business by the competition of the municipality engaging in such business *ultra vires*, does not entitle him to maintain the suit: *Keen v. City of Waycross*, *supra*; *Pudsey Gas Co. v. Corporation of Bradford*, L. R. 15 *Eq.* 167.

It has been said that if the matter is fully presented to the court and is decided upon the merits, a subsequent tax-payer's suit upon the same subject-matter is barred; but where the matter is not fully presented, as where the suit is dismissed by consent, there is no bar: *Lindsay v. Allen* (Tenn.), 82 *S. W.* 171.



held unmaintainable are, that it requires some individual interest distinct from that which belongs to every inhabitant of the town or county to give the party complaining a standing in court, where it is an alleged delinquency in the administration of public affairs which is called in question; and that the ownership of taxable property is not such a peculiarity as to take the case out of the rule; and that the only remedies against an abuse of administrative power tending to taxation is furnished by the elective franchise or a proceeding on behalf of the state, or, in the case of an act without jurisdiction, in treating the attempt to enforce the illegal tax as an act of trespass.”<sup>19</sup> In other words, the courts which have taken a view adverse to the maintenance of such suits by the tax-payer have followed the analogy of the familiar rule as to parties plaintiff in suits to enjoin a public nuisance. It cannot be claimed that there is perfect agreement in the reasons assigned by the courts which uphold the doctrine. Most of the earlier cases are content to rest it upon the ground of urgent public necessity, and of the ultimate injury to tax-payers as a special class, distinct from the general public. “It is certainly well settled that public wrongs cannot be redressed at the suit of individuals, who have no other interest in the matter than the rest of the public. Thus an individual cannot maintain a bill of injunction to prevent a public nuisance, unless he suffered thereby some special damage; and the principle governing cases of that kind has been supposed to be applicable to the present case. But it appears from the averments of the bill, that these complainants, as tax-payers of the city, and others similarly situated, in whose behalf as well as their own the bill is filed, constitute a class specially damaged by the alleged unlawful act of the

<sup>19</sup> *Newmeyer v. Missouri & M. R. Co.* (1873), 52 Mo. 81, 85, 14 Am. Rep. 394, reviewing the earlier cases *pro* and *con*. See, among other cases, *Craft v. Jackson County*, 5 Kan. 518.

corporation, in the alleged increase of the burden of taxation upon their property situated within the city. The complainants have therefore a special interest in the subject-matter of the suit, distinct from that of the general public. The people of the state outside of the city of Baltimore, who are not liable to city taxation, can suffer no damage from the illegal act of the corporation complained of in the bill. Why, then, is it necessary that the state, by the attorney-general, should be a party to the cause?"<sup>20</sup> "The injury charged [illegal issue of county bonds] as the result of the acts complained of is a private injury in which the tax-payers of the county are the individual sufferers, rather than the public. The people out of the county bear no part of the burden; nor do the people within the county, except the tax-payers, bear any part of it."<sup>21</sup> "The jurisdiction is sustained on the ground that the injury would be irreparable. The misappropriation of corporate funds would not render the tax levied to repair the waste or supply the deficiency illegal."<sup>22</sup> "The citizen may not be able to protect himself in any other way. If this is not his remedy, he has none. The money drawn from him by taxation may be squandered by unlawful donations to forward all manner of visionary schemes; other contributions may be wrung from him from year to year, and wasted in the same way, in defiance of laws carefully framed for his protection, and he would nevertheless be helpless. A more proper case for injunction cannot well be conceived

<sup>20</sup> *Mayor etc. of Baltimore v. Gill* (1869), 31 Md. 375, 394. The action may be maintained although plaintiff's interest is no different from that of other tax-payers: *Noble v. Davison*, 177 Ind. 19, 96 N. E. 325; *Brummitt v. Ogden Water Works Co.*, 33 Utah, 289, 93 Pac. 828.

<sup>21</sup> *Newmeyer v. Missouri & M. R. Co.*, 52 Mo. 81, 14 Am. Rep. 394.

<sup>22</sup> *Willard v. Comstock*, 58 Wis. 565, 46 Am. Rep. 657, 17 N. W. 401.

than that in which a tax-payer seeks to protect from lawless waste a public fund, which, when dissipated thus, the law will with strong hand compel him to replenish.”<sup>23</sup> Judge Dillon finds sufficient support for the doctrine in the analogy presented by the familiar rules of equity relating to suits by stockholders of private corporations to prevent or redress malfeasance or *ultra vires* acts on the part of their governing bodies.<sup>24</sup> This explanation has met with much favor from the courts,<sup>25</sup> but it is obvious that the analogy is not a perfect one.

<sup>23</sup> Harney v. Indianapolis etc. R. R. Co., 32 Ind. 244. “The foundation of the doctrine is the interference with the rights of the tax-payer in the increase of the burden of taxation, or the liability thereto, by misappropriating the property of the city, which may demand the levy of taxes to acquire other property in its place; or, the property having been acquired through taxation, its disposition would be in effect a misappropriation of taxes which may occasion levies to take the place of the misapplied tax”: Brockman v. City of Creston, 79 Iowa, 587, 44 N. W. 822.

<sup>24</sup> Dillon, Mun. Corp. (4th ed.), § 915. Professor Pomeroy (Equity Jurisprudence, §§ 259-270) classes these cases among those in which jurisdiction is assumed by equity for the purpose of avoiding a multiplicity of suits, where numerous persons are injured by the same unlawful act. He lays aside, as obviously not pertinent to a discussion of the doctrine relating to multiplicity of suits, the cases where it has been decided that the citizen indirectly sustaining an injury from an illegal official act has no cause of action whatever. It is the impression of the present writer that precisely this question, viz., the reasons for the existence or non-existence of any cause of action whatever in the tax-payer because of his ultimately having to bear an increased burden of taxation, is the crucial one in the theory of “tax-payers’ suits,” and that it has not received a thoroughly convincing answer. It is to be noticed that Judge Dillon advances his suggestion on the subject in a tentative manner, and does not attempt to support it by any earlier authority. The propriety of the remedy of injunction, on the other hand, is clear enough, if it be assumed or proved that the wrong to the tax-payer is not a “*damnum absque injuria*.” The question is, of course, chiefly of theoretical interest; the rule itself is established by an overwhelming weight of authority.

<sup>25</sup> See Russell v. Tate, 52 Ark. 541, 20 Am. St. Rep. 193, 7 L. R. A.

§ 1769. (§ 346.) **New York Rule.**—The rule in New York, although now settled by statute, has gone through various changes. In the early cases in the inferior courts the right of the tax-payer to obtain relief was clearly recognized. It was laid down that “when an act is clearly illegal, and when the necessary effect of such act will be to injure, or impose a burden upon the property of any corporation, there is enough, according to

180, 13 S. W. 130; *McIntyre v. Board of Commissioners of El Paso County*, 15 Colo. App. 78, 61 Pac. 237; *Hospers v. Wyatt*, 63 Iowa, 264; *Tukey v. City of Omaha*, 54 Neb. 370, 69 **Am. St. Rep.** 711, 74 N. W. 613; *Blood v. Manchester Elect. Lt. Co.*, 68 N. H. 340, 39 Atl. 335; *Linden Land Co. v. Milwaukee Elect. R’y & Lighting Co.*, 107 Wis. 493, 83 N. W. 851; *Roberts v. City of Louisville*, 92 Ky. 95, 36 **Am. St. Rep.** 449, 13 **L. R. A.** 844, 17 S. W. 216; *Scofield v. Eighth School District*, 27 Conn. 499; *New Orleans, M. & C. R. R. Co. v. Dunn*, 51 Ala. 128.

As an outgrowth of this analogy, it has been held that the tax-payer may not only sue to enjoin an illegal diversion of funds, but also “to compel the restitution of public funds which have been illegally diverted and lodged in the hands of persons not entitled to the same, who have taken them with notice of the wrongful diversion, and the governing body of the subordinate or local government will not act or take the necessary steps to have such funds restored”: *Johnson v. Black* (Va.), 49 S. E. 633, and cases cited. In strict accordance with this principle is the decision in a recent case (*Reed v. Cunningham* (Iowa), 101 N. W. 1055), where it was held that a tax-payer cannot sue to recover money illegally paid by a municipality, unless he shows a demand upon the officers to sue or that such demand would be unavailing. Upon the analogy of the stockholder’s suit, it has been held in North Carolina that the plaintiff must show that he has applied to the city for relief, except in cases of fraudulent or *ultra vires* acts: *Merrimon v. Southern Pav. etc. Co.*, 142 N. C. 539, 8 **L. R. A.** (N. S.) 574, 55 S. E. 366. But see *Jones v. Town of North Wilkesboro*, 150 N. C. 646, 64 S. E. 866, where it was held that plaintiff need not apply to governing body before suing to enjoin purchase of waterworks. In *Hoekman v. Iowa Civil Tp.*, 28 S. D. 206, 132 N. W. 1004, it was held that a property owner in a township need not request the officers of the township to commence an action against themselves before commencing suit.



every principle which has regulated the action of courts of equity, to warrant the interference of the court." This right of the tax-payers was supported on the ground that "the necessary effect of the act complained of will be to impose a burthen upon their real estate. Their interest, then, is as certain and direct as that of a stockholder in a moneyed or other corporation."<sup>26</sup> The illegal disposition of public money or property amounts to a breach of trust; therefore, an injunction was held proper.<sup>27</sup> Somewhat later a narrower rule was adopted, and it was held that a tax-payer in his character as such, whose position was not different from that of the whole body of tax-payers, had no such interest as entitled him to resort to a court of equity, to revise, restrain, or set aside the action of town or municipal authorities, upon an allegation that their acts were unauthorized and illegal, or that unless arrested they would subject the plaintiff to unjust or illegal taxation.<sup>28</sup> This, as we have seen, is an application of the rules relating to public nuisance. The reasoning upon which it was supported is similar to that applied to nuisance cases. "Every person may legally question the constitutional validity of an act of the legislature which affects his private rights; but if a citizen may maintain an action for such a purpose in respect to his rights as a voter and tax-payer, the courts may regularly be called upon to revise all laws which may be passed."<sup>29</sup>

<sup>26</sup> *Christopher v. Mayor*, 13 Barb. 567.

<sup>27</sup> *Christopher v. Mayor*, 13 Barb. 567; *Milbau v. Sharp*, 15 Barb. 193; *Stuyvesant v. Pearsall*, 15 Barb. 244. But to sustain an injunction it must appear that the appropriation was beyond the power of the corporate authorities by whom it was passed: *Roberts v. Mayor*, 5 Abb. Pr. 41.

<sup>28</sup> *Doolittle v. Supervisors*, 18 N. Y. 155; *Roosevelt v. Draper*, 23 N. Y. 318; *Kilbourne v. St. John*, 59 N. Y. 21, 17 Am. Rep. 291.

<sup>29</sup> *Doolittle v. Supervisors*, 18 N. Y. 155.

The rule was finally embodied in a series of statutes familiarly known as the Tax-payers' Acts.<sup>30</sup> These statutes authorize actions to be maintained by tax-payers against officers, agents, commissioners, or other persons acting in behalf of any county, town, village, or municipal corporation "to prevent any illegal official act on the part of any such officers, agents, commissioners or other persons, or to prevent waste or injury to any property, funds or estate of such county, town, village or municipal corporation." It will be observed that these provisions contemplate two classes of public acts, viz.: Acts in and of themselves illegal and acts illegal because involving a waste of public funds. This distinction must be kept in mind, for otherwise the decisions will seem in hopeless conflict.

In the first class of cases, the injunction is freely granted whenever it clearly appears that the action is illegal.<sup>31</sup> Thus, it has issued to restrain the appointment of officers under an unconstitutional law,<sup>32</sup> to restrain the employment or payment of persons who have not passed civil service examinations,<sup>33</sup> and to prevent the payment of a salary out of a trust fund without audit.<sup>34</sup> Likewise, it is proper when municipal funds are about to be expended under authority of an unconstitutional law,<sup>35</sup> or when a board of supervisors il-

<sup>30</sup> Laws of 1872, c. 161; Laws of 1881, c. 531; Laws of 1891, c. 276, § 8; Code Civ. Proc., § 1925.

<sup>31</sup> *Evans v. City of Hudson St. Comm'rs*, 84 Hun, 206, 32 N. Y. Supp. 547; *West v. City of Utica*, 71 Hun, 540, 24 N. Y. Supp. 1075; *Beebe v. Board of Supervisors*, 64 Hun, 377, 19 N. Y. Supp. 629; *Bush v. O'Brien*, 164 N. Y. 205, 58 N. E. 106; *Altschul v. Ludwig*, 216 N. Y. 459, 111 N. E. 216; *Southern Leasing Co. v. Ludwig*, 217 N. Y. 100, 111 N. E. 470.

<sup>32</sup> *Rathbone v. Wirth*, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15.

<sup>33</sup> *Peck v. Belknap*, 130 N. Y. 394, 29 N. E. 977; *Rogers v. Common Council*, 123 N. Y. 173, 9 L. R. A. 579, 25 N. E. 274.

<sup>34</sup> *Warrin v. Baldwin*, 105 N. Y. 534, 12 N. E. 49.

<sup>35</sup> *Mercer v. Floyd*, 24 Misc. Rep. 164, 53 N. Y. Supp. 433.

legally threatens to submit the question of removal of the county seat to the electors<sup>36</sup> or to allow the illegal assignment of a right to construct a railway in a highway,<sup>37</sup> or to restrain a village from contracting debts in excess of the charter limit.<sup>38</sup>

In the second class of cases, however, the right to relief is much narrower. "The terms 'waste' and 'injury' used in this statute comprehended only illegal, wrongful or dishonest official acts, and were not intended to subject the official action of boards, officers, or municipal bodies acting within the limits of their jurisdiction and discretion, but which some tax-payer might conceive to be unwise, improvident, or based on errors of judgment, to the supervision of the judicial tribunals."<sup>39</sup> Accordingly, it may be laid down as a general principle that an injunction will not issue to restrain waste or injury of public property by officers acting under their discretionary powers unless fraud, collusion, corruption or bad faith can be shown.<sup>40</sup> For instance, where a stat-

<sup>36</sup> *Williams v. Boynton*, 147 N. Y. 426, 42 N. E. 184.

<sup>37</sup> *Case v. Cayuga Co.*, 88 Hun, 59, 34 N. Y. Supp. 595.

<sup>38</sup> *Gerlach v. Brandreth*, 34 App. Div. 197, 54 N. Y. Supp. 479.

<sup>39</sup> *Talcott v. City of Buffalo*, 125 N. Y. 280, 26 N. E. 263.

<sup>40</sup> *Talcott v. City of Buffalo*, 125 N. Y. 280, 26 N. E. 263; *Ziegler v. Chapin*, 126 N. Y. 342, 27 N. E. 471; *Boon v. City of Utica*, 5 Misc. Rep. 391, 26 N. Y. Supp. 932; *Rogers v. O'Brien*, 1 App. Div. 397, 37 N. Y. Supp. 358; *Chittenden v. Wurster*, 152 N. Y. 345, 37 L. R. A. 809, 46 N. E. 857; *Abraham v. Meyers*, 29 Abb. N. C. 384, 23 N. Y. Supp. 226; *New York Central & H. R. R. Co. v. Maine*, 71 Hun, 417, 24 N. Y. Supp. 962; *Bell v. City of Rochester*, 61 N. Y. St. Rep. 721, 30 N. Y. Supp. 365; *Wilkins v. Mayor etc. of City of New York*, 9 Misc. Rep. 610, 30 N. Y. Supp. 424; *Adamson v. Nassau R. R. Co.*, 89 Hun, 261, 34 N. Y. Supp. 1073; *Sheehy v. McMillan*, 26 App. Div. 140, 49 N. Y. Supp. 1088; *Kittinger v. Buffalo Traction Co.*, 25 App. Div. 329, 49 N. Y. Supp. 329; *Holtz v. Diehl*, 26 Misc. Rep. 224, 56 N. Y. Supp. 841; *Rockefeller v. Taylor*, 28 Misc. Rep. 460, 59 N. Y. Supp. 1038; *Press Pub. Co. v. Holahan*, 29 Misc. Rep. 684, 62 N. Y. Supp. 872; *Keator v. Dalton*, 29 Misc. Rep. 692, 62 N. Y. Supp. 878; *Basselin v. Pate*, 30 Misc. Rep. 368, 63 N. Y. Supp.

ute provides that all contracts for public work shall be let to the lowest and best bidder, a strong case of abuse of discretion must be shown before a court will interfere with a contract to let to a higher bidder.<sup>41</sup> Thus, it has been held that where a telephone franchise has been granted to a corporation for nothing when a private individual has offered fifteen thousand dollars, no injunction should be granted in the absence of an additional showing, for it might be to the public interest to have the privilege awarded to the corporation, and it therefore might be the best bidder.<sup>42</sup> Where, however, a clear case of fraud or abuse of discretion is made out, and the result will be a waste of public funds, an injunction will be granted.

§ 1770. (§ 347.) **The Rule in Massachusetts.**—The general equity jurisdiction in Massachusetts is narrow and closely confined by statute. Consequently, it is held that in the absence of a statute, a court has not jurisdiction to entertain a suit by individual tax-payers to restrain a municipality from doing an illegal act.<sup>43</sup> It is provided by statute, however, that “when a town votes to raise by taxation or pledge of its credit, or to pay from its treasury, any money for a purpose other than those for which it has the legal right and power, the

653; *Norris v. Wurster*, 23 App. Div. 124, 48 N. Y. Supp. 656; *Gusthal v. Board of Aldermen*, 23 App. Div. 315, 48 N. Y. Supp. 652.

<sup>41</sup> *Berghoffen v. City of New York*, 31 Misc. Rep. 205, 64 N. Y. Supp. 1082; *Kingsley v. Bowman*, 33 App. Div. 1, 53 N. Y. Supp. 426; *Terrell v. Strong*, 14 Misc. Rep. 258, 35 N. Y. Supp. 1000. Where, however, it is clearly illegal to let the contract according to certain requirements, as where one bidder is discriminated against because he employs non-union labor, an injunction is proper: *Meyers v. City of N. Y.*, 58 App. Div. 534, 69 N. Y. Supp. 529; *Davenport v. Walker*, 57 App. Div. 221, 68 N. Y. Supp. 161.

<sup>42</sup> *Barhite v. Home Tel. Co.*, 50 App. Div. 25, 63 N. Y. Supp. 659.

<sup>43</sup> *Baldwin v. Inhab. of Wilbraham*, 140 Mass. 459, 4 N. E. 829; *Steele v. Municipal Signal Co.*, 160 Mass. 36, 35 N. E. 105; *Prince v. Crocker*, 166 Mass. 347, 32 L. R. A. 610, 44 N. E. 446.



supreme judicial court may, upon the suit or petition of not less than ten taxable inhabitants thereof, briefly setting forth the cause of complaint, hear and determine the same in equity."<sup>44</sup> This statute is confined in its application to cases coming within its terms; and although such a case is made out, relief will be refused if it appears that the tax-payers have been guilty of laches.<sup>45</sup>

§ 1771. (§ 348.) **The Rule in Ohio.**—In Ohio the taxpayer is authorized to sue only when it is made the duty of the solicitor of the corporation to commence an action and he, on demand, refuses to do so. The statute provides that the solicitor "shall apply in the name of the corporation to a court of competent jurisdiction for an order or injunction to restrain the misapplication of funds of the corporation or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinance governing the same, which was procured by fraud or corruption."<sup>46</sup> In construing this, the supreme court of the state has held that where proceedings of a municipal corporation are unauthorized and void, either from the want of power or from its unlawful exercise, and are designed to raise a fund by taxation to be applied to the object contemplated by such proceedings, an injunction will issue.<sup>47</sup>

§ 1772. (§ 349.) **Illustrations of the General Principle; Municipal Aid Bonds.**—Abundant illustration of the principles discussed in the preceding sections has been afforded by tax-payers' suits to restrain the unauthorized issue of bonds by municipalities in aid of the con-

<sup>44</sup> Pub. Stats. Mass., c. 27, § 129. See, also, Stats. 1847, c. 37, § 1.

<sup>45</sup> *Tash v. Adams*, 10 Cush. 252; *Fuller v. Inhab. of Melrose*, 1 Allen, 166; *Parsons v. City of Northampton*, 154 Mass. 410, 28 N. E. 350.

<sup>46</sup> Rev. Stats. Ohio, § 1777.

<sup>47</sup> *Elyria Gas & Water Co. v. City of Elyria*, 49 N. E. 335, 57 Ohio St. 374.

struction of railways or other *quasi*-public works.<sup>48</sup> A strong ground for equitable interference in such cases is found in the facts that such bonds are usually negotiable and valid in the hands of any *bona fide* purchaser, and the tax-payer is consequently remediless unless the issuance of the bonds can be arrested.<sup>49</sup> It is not within the

<sup>48</sup> *Wright v. Bishop*, 88 Ill. 302 (railway aid subscriptions prohibited by present constitution of Illinois); *Chestnutwood v. Hood*, 68 Ill. 132; *City of Madison v. Smith*, 83 Ind. 502; *City of Alma v. Loehr*, 42 Kan. 368, 22 Pac. 424 (no injunction when the bonds already negotiated); *Menard v. Hood*, 68 Ill. 121 (same); *Curtenius v. Hoyt*, 37 Mich. 583; *Wagner v. Meety*, 69 Mo. 150; *State v. Saline County Court*, 51 Mo. 350, 11 *Am. Rep.* 454; *Newmeyer v. Missouri & M. R. Co.*, 52 Mo. 81, 14 *Am. Rep.* 394; *North v. Platte County*, 29 Neb. 447, 26 *L. R. A.* 395, 45 N. W. 692 (relief defeated by laches); *List v. City of Wheeling*, 7 W. Va. 501; *Lynch v. Eastern, L. F. & M. R. Co.*, 57 Wis. 430, 15 N. W. 743, 825; *Whiting v. Sheboygan etc. R. Co.*, 25 Wis. 167, 3 *Am. Rep.* 30; *Water, Light & Gas Co. v. Hutchinson Interurban R'y Co.*, 74 Kan. 661, 87 Pac. 883; *Bates v. City of Hastings*, 145 Mich. 574, 108 N. W. 1005; and cases cited in the following notes.

<sup>49</sup> *Hodgman v. Chicago & St. P. R'y Co.*, 20 Minn. 48 (Gil. 36); *Harrington v. Town of Plainview*, 27 Minn. 224, 6 N. W. 777; *Hamilton v. Village of Detroit*, 85 Minn. 83, 88 N. W. 419. "It can remain no longer a question whether the restraining power of equity should be exercised to prevent abuses of, and deviations from, the special power conferred upon the municipal officers in the execution and delivery of such negotiable bonds. If the tax-payers and real parties in interest have not the remedy by injunction, then there exists none whatever for the wrong. It becomes an evil wholly without prevention or redress by any process known to the law. The court is therefore of the opinion that the writ of injunction will issue in such a case, not only to give effect to the safeguards and restraints imposed by the legislature or the constitution of the state, but also to enforce the terms and conditions prescribed by the voters of the town": *Lawson v. Schnellen*, 33 Wis. 288, 294. If the bonds are void in the hands of innocent holders, the question whether the existence of the defense in suits at law upon the bonds affords an adequate remedy so as to preclude equitable relief is one on which the authorities are at variance: See *post*, chapter on Cancellation of

scope of this work to discuss the grounds on which various attempted issues of railway aid bonds have been held invalid. Any failure to comply substantially with the terms of the constitution or statute authorizing their issuance and regulating the manner thereof will warrant the exercise of the restraining power of a court of equity.<sup>50</sup> Injunction is also properly granted if the terms and conditions prescribed by the voters of the town in making their grant of aid have not been complied with by the recipient.<sup>51</sup>

§ 1773. (§ 350.) **Injunctions Against Exceeding Constitutional or Statutory Limits of Indebtedness.**—In many of the states it is provided in the constitution,

Instruments. The better opinion seems to be, that this fact “is no sufficient reason why the tax-payers of the corporation should not have the right to call upon a court of equity to prevent them [the securities] from being issued, and thus avoid the threatened wrong, and provide a remedy which will at once reach the whole mischief, secure the rights of all, both for the present and the future, and thus avoid a *multiplicity of suits*.” *Lynchburg & R. St. R’y Co. v. Dameron*, 95 Va. 545, 28 S. E. 951. To the effect that tax-payers may be estopped by acquiescence to question such bonds, see *Schmitz v. Zeh*, 91 Minn. 290, 97 N. W. 1049.

<sup>50</sup> See *Hodgman v. Chicago & St. P. R. Co.*, 20 Minn. 48, 20 Gil. 36; *English v. Smock*, 34 Ind. 115, 7 *Am. Rep.* 215; *Town of Clarksdale v. Broadus*, 77 Miss. 667, 28 South. 954 (insufficient notice); *Wullenwaber v. Dunigan*, 30 Neb. 877, 13 *L. R. A.* 811, 47 N. W. 420; *Chestnutwood v. Hood*, 68 Ill. 132.

<sup>51</sup> *Lawson v. Schnellen*, 33 Wis. 288, 294; *Wagner v. Meety*, 69 Mo. 150; *Wullenwaber v. Dunigan*, 30 Neb. 877, 13 *L. R. A.* 811, 47 N. W. 420; *Township of Midland v. County Board of Gage County*, 37 Neb. 582, 56 N. W. 317 (the railroad to which aid was voted assigned to another company; the county board was enjoined from delivering the bonds to the vendee. “The electors of the township are entitled to stand on the very letter of their promise. If they promised a donation to A if he would build a certain improvement, it does not follow that B is entitled to the donation, though he builds the improvement”); *Nash v. Baker*, 37 Neb. 713, 56 N. W. 376 (same point).

statutes or city charters that no municipal corporation shall incur indebtedness in excess of certain limits. Tax-payers have often called upon the courts to prevent a violation of such provisions. As a general rule, when it can be shown that action is to be taken in disregard of such limits, injunction relief will be readily granted. Accordingly, under the provisions as they exist in many states, when it appears that contracts have been let which will entail an excessive expenditure, an injunction will issue.<sup>52</sup> A like principle often applies to the issuance of bonds, the courts holding that an injunction is proper when the amount of the issue exceeds the limit, and sometimes when the issue is for the purpose of taking up an excessive debt.<sup>53</sup> One form of statute prohibits the in-

<sup>52</sup> *Dorothy v. Pierce*, 27 Or. 373, 41 Pac. 668; *Wormington v. Pierce*, 22 Or. 606, 30 Pac. 450; *O'Malley v. Borough of Olyphant*, 198 Pa. St. 525, 48 Atl. 483; *Honaker v. Board of Education*, 42 W. Va. 170, 57 Am. St. Rep. 847, 32 L. R. A. 413, 24 S. E. 544; *City of Springfield v. Edwards*, 84 Ill. 626; *Scott v. City of Goshen*, 162 Ind. 204, 70 N. E. 79; *City of Logansport v. Jordan*, 171 Ind. 121, 17 Ann. Cas. 415, 37 L. R. A. (N. S.) 1036, 85 N. E. 959; *Blood v. Beal*, 100 Me. 30, 60 Atl. 427; *Tullos v. Church* (Tex. Civ. App.), 171 S. W. 803. But see *Swan v. City of Indianola*, 142 Iowa, 731, 121 N. W. 547. For an admirable discussion of the statutes, see *Dillon, Municipal Corporations*, § 130ff.

<sup>53</sup> *Rogers v. Leseur Co.*, 57 Minn. 434, 59 N. W. 488; *Rice v. City of Milwaukee*, 100 Wis. 516, 76 N. W. 341; *Town of Winamac v. Huddleston*, 132 Ind. 217, 31 N. E. 561; *Fowler v. City of Superior*, 85 Wis. 411, 54 N. W. 800; *Anderson v. Orient Fire Ins. Co.*, 88 Iowa, 579, 55 N. W. 348; *City of Council Bluffs v. Stewart*, 51 Iowa, 385, 1 N. W. 628; *Dunbar v. Board of Commissioners*, 5 Idaho, 407, 49 Pac. 409; *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. R. A. 1070; *City of Ottumwa v. City Water Supply Co.*, 119 Fed. 315, 56 C. C. A. 219; *Purell v. City of East Grand Forks*, 91 Minn. 486, 98 N. W. 351; *Marlow v. School District No. 4, Murray County*, 29 Okl. 304, 116 Pac. 797. In *Kyes v. St. Croix Co.*, 108 Wis. 136, 83 N. W. 637, an injunction was issued because the ordinance authorizing the bonds violated a statute in that no provision was made for providing funds for paying the interest. In *Goodson v. Dean*, 173 Ala. 301, 55 South.



currence of indebtedness for one year in anticipation of the revenues of future years.<sup>54</sup> Under such provision, however, it is not necessary to wait until the revenues for the current year are collected before incurring the debt.<sup>55</sup> In granting relief in all of these cases the courts will look to the real nature of the transaction, and if the statute is really violated, a shallow expedient for evasion will not bar an injunction.<sup>56</sup>

§ 1774. (§ 351.) **Awarding Contracts—"Lowest Bidder"**—**Discriminating in Favor of Union Labor.**—Another class of cases where the remedy is awarded freely is where a contract, although within the general powers

1010, it was held that a tax-payer cannot enjoin an issue of bonds on the ground that they will exceed the constitutional limit in the absence of allegations of any steps toward issuance. In *Troutman v. Hays*, 31 Ky. Law Rep. 204, 101 S. W. 976, it was held that equity will not enjoin the issuance of bonds on the ground that the payment of interest and the establishment of a sinking fund would require an assessment in excess of the constitutional limit.

<sup>54</sup> *Webster v. Douglas Co.*, 102 Wis. 181, 72 *Am. St. Rep.* 870, 77 N. W. 885, 78 N. W. 451; *Shinn v. Board of Education*, 39 W. Va. 497, 20 S. E. 604; *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *Bradford v. City and County of San Francisco*, 112 Cal. 537, 44 Pac. 912. And the rule holds, although the money be needed for necessary current expenses: *Sackett v. City of New Albany*, 88 Ind. 473, 45 *Am. Rep.* 467.

<sup>55</sup> *Hanley v. Randolph Co. Court*, 50 W. Va. 439, 40 S. E. 389; *City of Alpena v. Kelley*, 97 Mich. 550, 56 N. W. 941. Sometimes it is held proper for a city to contract for necessities for a period covering a number of years, provided the amount to be paid annually does not exceed the limit; *City of Valparaiso v. Gardner*, 97 Ind. 1, 49 *Am. Rep.* 416. But see *Putnam v. City of Grand Rapids*, 58 Mich. 416, 25 N. W. 330.

<sup>56</sup> *Hoffman v. Board of Commissioners*, 18 Mont. 224, 44 Pac. 973; *Reynolds v. City of Waterville*, 92 Me. 292, 42 Atl. 553. In *Ramsey v. City of Shelbyville*, 26 Ky. Law Rep. 1102, 83 S. W. 116, an injunction was issued restraining the enforcement of an ordinance accepting a library building and agreeing to pay \$1,000 per year for the support thereof.

of the municipality, is improperly let because of some abuse of discretion or non-compliance with law. Such questions often arise under constitutional or other provisions requiring contracts to be let to the lowest bidder. These provisions are of two kinds, and the distinction must be carefully observed. Where it is declared that contracts must be let to the "lowest bidder," no discretion is left to the governing body, and if it appears that a higher bidder has been allowed the preference, an injunction will issue at the instance of the tax-payer.<sup>57</sup> On the other hand, under a frequent form of the statute declaring that contracts shall be let to the "lowest responsible bidder" or to the "lowest and best bidder," a large discretion is given, and an injunction will be allowed only in a clear case of abuse.<sup>58</sup> A result of these provisions is that if certain described public work is about to be done without a call for bids, or if a proper advertisement is not made giving a description of the work and what will be required, or if the contract is let before the expiration of the time designated in the call for bids, an injunction will issue.<sup>59</sup> This is a necessary

<sup>57</sup> *Mueller v. Eau Claire County*, 108 Wis. 304, 84 N. W. 430; *Holden v. City of Alton*, 179 Ill. 318, 53 N. E. 556 (*dictum*).

<sup>58</sup> *Inge v. Board of Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20, 33 South. 678; *Diamond v. City of Mankato*, 89 Minn. 48, 93 N. W. 911; *Downing v. Ross*, 1 App. D. C. 251; *Keith v. Johnson*, 22 Ky. Law Rep. 947, 59 S. W. 487 (a case of awarding a franchise which was required to be given to the highest and best bidder; the principle is the same). In *Times Pub. Co. v. City of Everett*, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. 695, it was held that when the contract is let to other than the lowest bidder, the contracting agent should judicially find the facts which, in its judgment, render the apparently lowest bid not the lowest in fact.

<sup>59</sup> *Follmer v. Nuckolls Co.*, 6 Neb. 204; *Littler v. Jayne*, 124 Ill. 123, 16 N. E. 374; *Manly Bldg. Co. v. Newton*, 114 Ga. 245, 40 S. E. 274; *Schumm v. Seymour*, 24 N. J. Eq. 143; *Jones Bros. Hardware Co. v. Erb*, 54 Ark. 645, 13 L. R. A. 353, 17 S. W. 7; *Mazet v. City of Pittsburg*, 137 Pa. St. 548, 20 Atl. 693; *Mayor etc. v. Keyser*, 72

consequence, for otherwise the statutes could be easily evaded. The motive of the tax-payer in bringing the suit is immaterial, provided he can show a case of injury to himself as a tax-payer. Consequently, an unsuccessful bidder may be and often is the plaintiff.<sup>60</sup>

Cases involving the same or similar principles arise when a town or city, by ordinance or otherwise, attempts to discriminate in favor of union labor. Where there is a provision requiring contracts to be let absolutely to the lowest bidder, the principle stated above of course controls.<sup>61</sup> Where discretion is given, proof of the fact that discrimination has been made for that reason will be sufficient to show abuse of discretion and to warrant an injunction.<sup>62</sup> And even when there is no provision as to bidders, if a contract is let under an ordinance declaring that contracts shall be let only with union labor provisions, injunctive relief will be

Md. 106, 19 Atl. 706; *Woodruff v. Welton* (Neb.), 97 N. W. 1037. See, also, *Diamond v. City of Mankato*, 89 Minn. 48, 93 N. W. 911; *Le Tourney v. Hugo*, 90 Minn. 420, 97 N. W. 115; *City of Chicago v. Mohr* (Ill.), 74 N. E. 1056 (permitting changes to be made after bids were opened); *Bennett v. Baltimore*, 106 Md. 484, 14 Ann. Cas. 419, 68 Atl. 14 (contract illegal because advertisement insufficient); *State v. Board of Comm'rs of Newton County*, 165 Ind. 262, 6 Ann. Cas. 468, 74 N. E. 1091 (contract authorized by motion when it should have been authorized by ordinance); *Matthews v. Town of Livermore*, 156 Cal. 294, 104 Pac. 303 (tax-payer may enjoin city from building sewer system by day labor when law requires contract); *Anderson v. Fuller*, 51 Fla. 380, 120 Am. St. Rep. 170, 6 L. R. A. (N. S.) 1026, 41 South. 684.

<sup>60</sup> *Times Pub. Co. v. City of Everett*, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. 695; *Holden v. City of Alton*, 179 Ill. 318, 53 N. E. 556; *Chippewa Bridge Co. v. City of Durand* (Wis.), 99 N. W. 603.

<sup>61</sup> *Holden v. City of Alton*, 179 Ill. 318, 53 N. E. 556 (*dictum*).

<sup>62</sup> *Holden v. City of Alton*, 179 Ill. 318, 53 N. E. 556; *Adams v. Brennan*, 177 Ill. 194, 69 Am. St. Rep. 222, 42 L. R. A. 718, 52 N. E. 314. See, also, *Miller v. City of Des Moines*, 143 Iowa, 409, 21 Ann. Cas. 207, 23 L. R. A. (N. S.) 815, 122 N. W. 226.

awarded.<sup>63</sup> The theory is that the ordinance being void, any contract made under it must also of necessity be void. The reasons for holding the ordinance void, and which are additional to those which apply to tax-payers' suits in general, are that an unlawful discrimination results, and that a monopoly is fostered; both of these results are contrary to the policy of the law.

§ 1775. (§ 352.) **Injunctions Against Removal of County Seats.**—Tax-payers frequently have sought to invoke the aid of equity to prevent the removal of a county seat. In a sense, this is a political matter, but on the other hand, it may involve a waste of a large sum of money and thus be a great and direct injury to the tax-payers. The tendency of the modern authorities, therefore, is to allow an injunction when it appears that the illegal removal will result in a waste of public funds.<sup>64</sup> Applying this principle, injunctions are allowed when the election authorizing the removal is void because of failure to take the proper preliminary steps or because not authorized by statute.<sup>65</sup> For the same reason, when

<sup>63</sup> *City of Atlanta v. Stein*, 111 Ga. 789, 51 L. R. A. 335, 36 S. E. 932.

<sup>64</sup> In *Stuart v. Bair*, 8 Baxt. 141, this principle is laid down. In *Lanier v. Padgett*, 18 Fla. 842, the tax-payers were allowed relief because the "proceeding might involve them and the whole people of the county in great expense and confusion, and jeopardize the titles to property." See, also, *Rickey v. Williams*, 8 Wash. 479, 36 Pac. 480; *Way v. Fox*, 109 Iowa, 340, 80 N. W. 405; *Board of Supervisors v. Buckley* (Miss.), 38 South. 104; *Poe v. Sheridan County*, 52 Mont. 279, 157 Pac. 185; *Lindsay v. Allen* (Tenn.), 82 S. W. 178; *Mitchell v. Lasseter*, 114 Ga. 275, 40 S. E. 287.

<sup>65</sup> *Rickey v. Williams*, 8 Wash. 479, 36 Pac. 480; *Todd v. Rustad*, 43 Minn. 500, 46 N. W. 73. In some jurisdictions it is held, contrary to the general rule as to elections, that an injunction will issue to prevent the calling or holding of an unauthorized county seat election: *Solomon v. Fleming*, 34 Neb. 40, 51 N. W. 304; *Streissguth v. Geib*, 67 Minn. 360, 69 N. W. 1097. The better rule would seem to



the removal is legal, an injunction will issue to prevent

be that the equity court should not interfere with the election. When the court takes jurisdiction in such matters it is asserting a right to hear election contests, which are not a subject of equitable cognizance: *People v. Board of Supervisors*, 75 Cal. 179, 16 Pac. 776; *Caruthers v. Harnett*, 67 Tex. 127, 2 S. W. 523. See chapter on Public Officers, *ante*, § 331. In Washington it is held that an injunction will issue to prevent removal when there has been fraud in counting the votes: *Krieschel v. Board of Snohomish County Commissioners*, 12 Wash. 428, 41 Pac. 186; but mere errors in counting will not be sufficient to warrant the relief: *Parmeter v. Bourne*, 8 Wash. 45, 35 Pac. 586, 757.

**Temporary Injunction.**—In *Shaw v. Circuit Court of Hamlin County*, 27 S. D. 49, 129 N. W. 907, an election was held for the removal of a county seat, and was carried by less than two votes more than the necessary two-thirds. A contest was instituted. A temporary injunction was issued to enjoin the county officers from removing their offices pending the hearing of the contest.

**County Division.**—A tax-payer may enjoin the enforcement of a void statute for county division: *Wheeler v. Herbert*, 152 Cal. 224, 92 Pac. 353; and an *ultra vires* act changing county lines within the limits of a town: *Town of Maysville v. Smith*, 132 Ga. 316, 64 S. E. 131.

**Annexation of Territory.**—Where proceedings of a municipal corporation in annexing territory are in excess of corporate powers, they may be enjoined by property owners, both upon the ground of preventing illegal annexation and of preventing a change of the property of cities from the territorial limits of one municipality or political body to those of another: *City of Pueblo v. Stanton*, 45 Colo. 523, 102 Pac. 512. See, also, *School Dist. No. 61 v. McFarland*, 154 Mo. App. 411, 134 S. W. 673 (detaching part of village school district and annexing to another enjoined); *Wilton v. Pierce County*, 61 Wash. 386, 112 Pac. 386. But such relief will be denied when the statute provides an adequate remedy by appeal to the State Superintendent of Instruction: *Field v. School Dist. No. 110, Butler County*, 83 Kan. 186, 109 Pac. 775.

**Tax-payer's Suit Against Another City.**—A unique situation arose in *Sample v. City of Pittsburg*, 212 Pa. St. 533, 62 Atl. 201, where a citizen of Allegheny was permitted to maintain a suit to enjoin officials of the city of Pittsburg from taking proceedings under an un-

the erection of an expensive county building at the old site.<sup>66</sup>

§ 1776. (§ 353.) **Miscellaneous Illustrations.**—Whenever a city's money is about to be paid or used for a purpose not authorized by law or under a contract *ultra vires* for any reason, or is to be paid wrongfully, a tax-payer will be allowed an injunction.<sup>67</sup> As a

constitutional statute to annex Allegheny. But a contrary result was reached in *Thompson v. Haskell*, 24 Okl. 70, 102 Pac. 700, where it was held that a tax-payer's suit to prevent taking of land from one county and annexing it to another cannot be maintained either by a tax-payer of the district to be annexed or by a tax-payer of the county outside the district to be annexed. The court disposed of the contention that annexation would result in increased taxation by saying that the theory is that taxes are imposed for benefits.

<sup>66</sup> *Wells v. Ragsdale*, 102 Ga. 53, 29 S. E. 165.

<sup>67</sup> A tax-payer has been allowed an injunction in the following cases, the purposes for which the money was intended being held to be improper: Against paying an attorney under an illegal contract for the collection of taxes: *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23; *Grannis v. Board of Commissioners*, 81 Minn. 55, 83 N. W. 495; *Frederick v. Douglas Co.*, 96 Wis. 411, 71 N. W. 798; but not to annul the contract; *Board of Commissioners of Wayne Co. v. Dickinson*, 153 Ind. 682, 53 N. E. 929. Against spending money *ultra vires* for a dispensary for the sale of liquor: *Leesburg v. Putnam*, 103 Ga. 110, 68 Am. St. Rep. 80, 29 S. E. 602; *McCullough v. Brown*, 41 S. C. 220, 23 L. R. A. 410, 19 S. E. 458. Against paying a water company, under an illegal contract extending over a number of years: *Flynn v. Little Falls E. & W. Co.*, 74 Minn. 180, 77 N. W. 38, 78 N. W. 106. Against paying a reward, *ultra vires*, for the arrest of a defaulting official; *Patton v. Stephens*, 14 Bush, 324. Against illegally using highway fund for waterworks: *Savidge v. Village of Spring Lake*, 112 Mich. 91, 70 N. W. 425. Against paying a collusive judgment: *Beyer v. Town of Crandon*, 98 Wis. 306, 73 N. W. 771; *Nevill v. Clifford*, 55 Wis. 161, 12 N. W. 419. Against contract making an illegal exemption from taxation: *Altgelt v. City of San Antonio*, 81 Tex. 447, 13 L. R. A. 383, 17 S. W. 75. Against publishing delinquent tax list in paper not a newspaper: *Sinclair v. Commissioners of Winona Co.*, 23 Minn. 404, 23 Am. Rep. 694. See *Dillon on Municipal Corpora-*

common example, such relief will be granted when

tions, § 914ff. But see *Normand v. Otoe Co.*, 8 Neb. 18. In general, see *Daviess Co. v. Goodwin*, 25 Ky. Law Rep. 1081, 77 S. W. 185. For an instance of the remedy of cancellation granted at suit of a tax-payer, see *Bowman v. Frith* (Ark.), 84 S. W. 709. By statute in Wisconsin, a tax-payer has been allowed to maintain suit to recover money paid by a county without authority: *Estell v. Knight*, 117 Wis. 540, 94 N. W. 290. See, also, *ante*, end of note 25.

**Alabama.**—*Gillespie v. Gibbs*, 147 Ala. 449, 41 South. 868 (fact that, after suit is started, the city officers revoke the *ultra vires* order is not ground for refusing injunction); *Kumpoe v. Bynum*, 158 Ala. 311, 48 South. 55.

**Arkansas.**—*Smith v. Dandridge*, 98 Ark. 38, **Ann. Cas.** 1912D, 1130, 34 L. R. A. (N. S.) 129, 135 S. W. 800 (injunction will not issue to prevent payment of extra compensation under a contract merely voidable).

**California.**—*Matthews v. Town of Livermore*, 156 Cal. 294, 104 Pac. 303; *Clause v. City of San Diego*, 159 Cal. 434, 114 Pac. 573 (where a method of paying for public work in a manner not prescribed by law might be expensive and wasteful, and contractors might be precluded from participating in an effort to secure contracts to do the work, a tax-payer may have an injunction); *Osburn v. Stone*, 170 Cal. 480, 150 Pac. 367.

**Florida.**—*Anderson v. Fuller*, 51 Fla. 380, 120 Am. St. Rep. 170, 6 L. R. A. (N. S.) 1026, 41 South. 684.

**Georgia.**—*Hodges v. Talbert*, 135 Ga. 253, 69 S. E. 103 (tax-payer may enjoin a county board of education from unlawfully giving to a separate local school system money which does not properly belong to it, or from misapplying public funds arising from taxation); *Fluker v. City of Union Point*, 132 Ga. 568, 64 S. E. 648 (tax-payer may enjoin payment of salary to night watchman, when there is no authority for the creation of the office).

**Indiana.**—*Board of Election Comm'rs v. Knight* (Ind.), 117 N. E. 565; *City of Indianapolis v. Robison* (Ind.), 117 N. E. 861.

**Illinois.**—*Stevens v. Henry County*, 218 Ill. 468, 4 Ann. Cas. 136, 4 L. R. A. (N. S.) 339, 75 N. E. 1024 (tax ferret contract); *Lindblad v. Board of Education*, 221 Ill. 261, 77 N. E. 450 (school board enjoined from misappropriating funds in payment of unauthorized salaries); *Jones v. O'Connell*, 266 Ill. 443, 107 N. E. 731.

public funds are to be used *ultra vires* for purposes of

**Iowa.**—*Ries v. Heppner*, 127 Iowa, 408, 103 N. W. 346 (tax-payer may enjoin school board from making unauthorized payments for school books out of the contingent fund, although the board would have the right to spend the same amount of money for the purpose in another way).

**Indiana.**—*Board of Comm'rs of La Porte County v. Wolff*, 166 Ind. 325, 76 N. E. 247 (injunction will not issue to prevent final payment under a public contract when there is an adequate remedy by appeal from the action of the board in accepting the work); *Noble v. Davison*, 177 Ind. 19, 96 N. E. 325; *Advisory Board of Coal Creek Tp. v. Levandowski* (Ind. App.), 84 N. E. 346. In *City of Indianapolis v. Maag*, 57 Ind. App. 493, 107 N. E. 529, it is held that a tax-payer may enjoin the sale of a public street to an individual only where he shows special injury to himself.

**Kansas.**—*Pollock v. Kansas City*, 87 Kan. 205, 42 L. R. A. (N. S.) 465, 123 Pac. 985 (paving contract).

**Kentucky.**—*Dyer v. City of Newport*, 123 Ky. 203, 94 S. W. 25 (single tax-payer may enjoin execution of *ultra vires* contract); *Owensboro Waterworks Co. v. City of Owensboro*, 29 Ky. Law Rep. 1118, 96 S. W. 867.

**Maryland.**—*Konig v. Mayor of Baltimore*, 128 Md. 465, 97 Atl. 837.

**Nebraska.**—*Dunkin v. Blust*, 83 Neb. 80, 119 N. W. 8 (injunction against expenditure of money under void appropriation bill); *Roberts v. Thompson*, 82 Neb. 458, 118 N. W. 106.

**North Dakota.**—*McKinnon v. Robinson*, 24 N. D. 367, 139 N. W. 580 (erection of courthouse).

**Oklahoma.**—*Hannan v. Board of Education of City of Lawton*, 25 Okl. 372, 30 L. R. A. (N. S.) 214, 107 Pac. 646; *Walcott v. Dennes*, 29 Okl. 228, 116 Pac. 784 (where a contract for building has already been let, and the contractor is not a party to the suit, a tax-payer cannot enjoin the building of a schoolhouse in a manner other than that authorized by the voters); *Marlow v. School Dist. No. 4, Murray County*, 29 Okl. 304, 116 Pac. 797; *Town of Afton v. Gill* (Okl.), 156 Pac. 658; *Ashton v. Board of Comm'rs of Murray County*, 45 Okl. 731, 147 Pac. 305 (tax-payer granted injunction to restrain payment of collusive judgment). A suit is premature if brought before any liability has attached under the contract: *Pitser v. City of Pawnee*, 47 Okl. 559, 149 Pac. 201. Compare *Board of Comm'rs v. Dudding* (Okl.), 160 Pac. 109.



entertainment of visitors or to aid charitable associa-

**Oregon.**—*Terwilliger Land Co. v. City of Portland*, 62 Or. 101, 123 Pac. 57 (tax-payer allowed injunction against local improvement to be paid for by special assessment, proceedings being void and there being a possible liability on a *quantum meruit*).

**South Dakota.**—*Weatherer v. Herron*, 25 S. D. 208, 126 N. W. 244; *Hoekman v. Iowa Civil Tp.*, 28 S. D. 206, 132 N. W. 1004 (property owner in township may enjoin the adjusting of highways to section lines illegally made when the result thereof will be to create a burden on the tax-payers).

**Tennessee.**—*Pope v. Dykes*, 116 Tenn. 230, 93 S. W. 85 (where statute authorizes sale of bonds to improve certain roads, tax-payer may enjoin use of money to improve other roads).

**Utah.**—*Brummitt v. Ogden Waterworks Co.*, 33 Utah, 289, 93 Pac. 828 (tax-payer may have injunction against ordinance fixing unreasonable rates for city and individuals to pay).

**Washington.**—*Powell v. City of Walla Walla*, 64 Wash. 582, 117 Pac. 389 (city may be enjoined from letting contract when it has no power to make an appropriation for payment); *Farnsworth v. Town of Wilbur*, 49 Wash. 416, 19 L. R. A. (N. S.) 320, 95 Pac. 642 (town may be enjoined from satisfying judgment without consideration; it amounts to a gift of the town's property); *Gantenbein v. City of Pasco*, 71 Wash. 635, 129 Pac. 374 (fact that statute provides for objections and hearing before council does not oust equity of jurisdiction).

**Wisconsin.**—*McMillan v. City of Fond du Lac*, 139 Wis. 367, 120 N. W. 240 (execution of contract obtained by corruption enjoined); *McGowan v. Paul*, 141 Wis. 388, 123 N. W. 253 (expenditure of funds for building sidewalks enjoined); *Neacy v. City of Milwaukee*, 151 Wis. 504, 139 N. W. 409 (injunction against illegal construction and maintenance of municipal electric light and power plant); *Johnson v. City of Milwaukee*, 147 Wis. 476, 133 N. W. 627 (injunction against payment of salary to one appointed in violation of civil service law); *Carstens v. City of Fond du Lac*, 137 Wis. 465, 119 N. W. 117; *Cawker v. City of Milwaukee*, 133 Wis. 35, 113 N. W. 417; *Allen v. City of Milwaukee*, 128 Wis. 678, 116 Am. St. Rep. 54, 8 Ann. Cas. 392, 5 L. R. A. (N. S.) 680, 106 N. W. 1099; *Menasha Woodenware Co. v. Town of Winter*, 159 Wis. 437, 150 N. W. 526.

In order that plaintiff may maintain the action, he must be liable to injury in his capacity as a tax-payer. Thus, in *Kasik v. Janssen*,

tions.<sup>68</sup> Frequently, statutes declare that public officers shall not be interested in public contracts, and under such provisions, an injunction will be granted if a violation is shown.<sup>69</sup> Likewise, where the object is illegal, an injunction will issue to prevent the issuance or payment of warrants,<sup>70</sup> or the execution of a mortgage or bonds.<sup>71</sup>

158 Wis. 606, 149 N. W. 398, a chief of police required his officers to buy their uniforms of a certain dealer. It was held that a rival dealer could not maintain a tax-payer's suit to prevent the discrimination.

**Effect of Other Remedy.**—The existence of a remedy by appeal to the council, or some similar right, does not necessarily deprive equity of the right to grant an injunction: *Gantenbein v. City of Paseo*, 71 Wash. 635, 129 Pac. 374; *Harlow v. Board of Comm'rs for Payne County*, 33 Okl. 353, 125 Pac. 449. Compare *Royer v. State* (Ind. App.), 112 N. E. 122. But where a school board threatens illegally to change text-books, and there is an adequate remedy at law by *mandamus*, an injunction will be denied: *Harley v. Lindemann*, 129 Wis. 514, 8 L. R. A. (N. S.) 124, 109 N. W. 570. In general, see *Bailey v. Board of Comm'rs* (Diwer), 57 Ind. App. 285, 107 N. E. 38.

<sup>68</sup> *Black v. Common Council of City of Detroit*, 119 Mich. 571, 78 N. W. 660; *Austin v. Coggeshall*, 12 R. I. 329, 34 Am. Rep. 648; *State v. City of New Orleans*, 50 La. Ann. 880, 24 South. 666.

<sup>69</sup> *McElhinney v. City of Superior*, 32 Neb. 744, 49 N. W. 705; *Weitz v. Independent Dist. of Des Moines*, 87 Iowa, 81, 54 N. W. 70; *Alexander v. Johnson*, 144 Ind. 82, 41 N. E. 811; *Miller v. Sullivan*, 32 Wash. 115, 72 Pac. 1022; *Nuckols v. Lyle*, 8 Idaho, 589, 70 Pac. 401; *Lainhart v. Burr*, 49 Fla. 315, 38 South. 711; *Noble v. Davison*, 177 Ind. 19, 96 N. E. 325.

<sup>70</sup> *Ackerman v. Thummel*, 40 Neb. 95, 58 N. W. 738; *Russell v. Tate*, 52 Ark. 541, 20 Am. St. Rep. 193, 7 L. R. A. 180, 13 S. W. 130; *Sexton v. Smith*, 32 Okl. 441, 122 Pac. 686. The fact that the statute authorizes suit to recover back money so paid does not oust equity of jurisdiction: *Bowles v. Neely*, 28 Okl. 556, 115 Pac. 344.

<sup>71</sup> *Vaughn v. Board of Commissioners of Forsyth Co.*, 118 N. C. 636, 24 S. E. 425; *Bolton v. City of Antonio* (Tex. Civ. App.), 21 S. W. 64; *Mayor etc. v. Gill*, 31 Md. 375; *Powell v. Town of Providence*, 127 La. 66, 53 South. 429; *Rushe v. Town of Hyattsville*, 116 Md. 122, Ann. Cas. 1913D, 73, 81 Atl. 278. But a tax-payer cannot enjoin the issuance of bonds void on their face and which would be

Upon the same principle, a tax-payer may enjoin the improper use of public property.<sup>72</sup> Such use involves

void in the hands of a *bona fide* purchaser: *Streator v. Linseott*, 153 Cal. 285, 95 Pac. 42. And the court will not, in such a suit, in effect decide an election contest: *Link v. Karb*, 89 Ohio St. 326, 104 N. E. 632.

<sup>72</sup> Thus, it has been held that a tax-payer may enjoin the use of a school building for religious or other private purposes: *Scofield v. Eighth School Dist.*, 27 Conn. 499; *Lewis v. Bateman*, 26 Utah, 434, 73 Pac. 509; *Spencer v. School Dist.*, 15 Kan. 259, 22 Am. Rep. 268. In the first case the court said: "It is quite obvious that more or less injury must arise, not merely from the use of the building and its furniture, but from deranging the furniture, books and stationery belonging to the school, and by materially increasing the risk of destroying the house by fire." "But the value of the right . . . cannot be measured by the mere pecuniary injury. . . . It is more correct to estimate it by the value of the building, if it was to be rented for the purposes for which it is used gratuitously." "And we know of no principle that will justify the misappropriation of trust property for any purpose whatever." See, also, *Nerlien v. Village of Brooten* (Minn.), 102 N. W. 867 (use of town hall for commercial purposes enjoined). A tax-payer may annul a lease of school property for use in drilling for oil and gas, and may enjoin the use of the lot for such purpose: *Herald v. Board of Education*, 65 W. Va. 765, 31 L. R. A. (N. S.) 588, 65 S. E. 102. Likewise, an injunction will issue to prevent the unlawful removal of a schoolhouse: *McLain v. Maricle*, 60 Neb. 353, 83 N. W. 85; *Williams v. School District No. 5*, 167 Mo. App. 476, 151 S. W. 506; *Tucker v. McKay*, 131 Mo. App. 728, 111 S. W. 867. But see *Parody v. School Dist.*, 15 Neb. 514, 19 N. W. 633. A tax-payer may enjoin a county from building a courthouse on a city lot dedicated to park purposes, although the city consents: *McIntyre v. Board of Commissioners of El Paso Co.*, 15 Colo. App. 78, 61 Pac. 237. In *Perry Public Library Ass'n v. Lobsitz*, 35 Okl. 576, 45 L. R. A. (N. S.) 368, 130 Pac. 919, Mr. Carnegie had given money for a library building on condition that the city would furnish the site and maintain the library. After erection of the building, the city started to use it also as a city hall, as a headquarters for a commercial club, and as a meeting place for public conventions. It was held that a tax-payer may maintain a suit to compel the city to use the building according to the terms of the trust. He may also enjoin the illegal sale of public property: *Willard v. Comstock*, 58 Wis. 565,

both a breach of trust and a direct pecuniary injury. Often it results in more—in a direct inconvenience to the tax-payer.

In some jurisdictions the courts have refused to enjoin an act manifestly illegal when it has seemed more inequitable to grant than to refuse an injunction.<sup>73</sup>

46 *Am. Rep.* 657, 17 N. W. 401. See *Davenport v. Buffington*, 97 Fed. 234, 38 C. C. A. 453. In *Sherburne v. City of Portsmouth* (N. H.), 58 Atl. 38, a tax-payer was allowed an injunction to restrain a common council from granting the use of a public common to individuals for a baseball park. See, however, *Davidson v. Mayor etc. of Baltimore*, 96 Md. 509, 53 Atl. 1121, where it was held that a tax-payer cannot enjoin officers from changing use of a school building from an English-German school to a colored high school, without showing special damage. See, also, *Amusement Syndicate Co. v. City of Topeka*, 68 Kan. 801, 74 Pac. 606; *Bryant v. Logan* (W. Va.), 49 S. E. 21 (tax-payer cannot enjoin unless specially injured); *Village of Riverside v. MacLean*, 210 Ill. 308, 102 *Am. St. Rep.* 164, 71 N. E. 408 (owners of lots adjoining a tract dedicated for a public park may enjoin the municipality from constructing a highway through the park, without showing special damage), citing many cases. But see *Baneroft v. Baneroft* (Del. Ch.), 61 Atl. 689. In *Bayard v. Baneroft* (Del. Ch.), 62 Atl. 6, a tax-payer was denied the right to enjoin action permitting a railroad to be run through a public park, thereby interfering with its beauty. "The court of chancery has never used the tremendous power of the injunction process to protect artistic sensibilities."

<sup>73</sup> *Ebert v. Langlade Co.*, 107 Wis. 569, 83 N. W. 942; *Brasher v. Miller*, 114 Ala. 485, 21 South. 467; *Farmer v. City of St. Paul*, 65 Minn. 176, 33 L. R. A. 199, 67 N. W. 990. In this case the court said: "While it is true that, upon grounds of sound public policy, the doctrine of *ultra vires* is applied with greater strictness to municipal than to private corporations, and that in this state a tax-payer may enjoin an unauthorized appropriation of public money, yet in cases where the proposed appropriation is only technically illegal, and it would be more inequitable to grant the injunction than to refuse it, it may be refused." In *Appleton Water Works Co. v. City of Appleton*, 116 Wis. 363, 93 N. W. 262, it was said that this principle should be considered only in cases of extreme doubt. See, also, *Noble v. Davison*, 177 Ind. 19, 96 N. E. 325, where it is held



Such cases are of rare occurrence, and must depend upon their own facts. Occasionally the doctrine of laches is applied to these suits;<sup>74</sup> but it would seem that generally the doctrine is inapplicable, especially if the taxpayer acts promptly upon receiving information.<sup>75</sup>

An injunction, it has been held, will not be granted to a tax-payer to restrain the enforcement of a void municipal ordinance, when the case is not brought within the principles laid down above.<sup>76</sup>

that the doctrine has no application to an action based on the theory that the act sought to be enjoined is void.

<sup>74</sup> *Tash v. Adams*, 10 Cush. 252; *Mahon v. City of New Orleans*, 52 La. Ann. 1226, 27 South. 650; *Dorner v. School District No. 5*, 137 Wis. 147, 19 L. R. A. (N. S.) 171, 118 N. W. 353 (right lost by delay of twenty years); *Meistrell v. Board of Comm'rs of Ellis County*, 76 Kan. 319, 91 Pac. 65 (relief denied when plaintiff waited until defendant had spent a large sum in good faith); *Royer v. State* (Ind. App.), 112 N. E. 122; *Chew v. City of Philadelphia*, 257 Pa. St. 589, L. R. A. 1918A, 986, 101 Atl. 915.

<sup>75</sup> *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23; *Black v. Common Council of City of Detroit*, 119 Mich. 571, 78 N. W. 660; *Austin v. Coggeshall*, 12 R. I. 329, 34 Am. Rep. 648.

<sup>76</sup> *Field v. Village of Western Springs*, 181 Ill. 186, 54 N. E. 929. The text is quoted in *Maxwell v. Smith*, 87 Wash. 629, 152 Pac. 530. In general, see the following cases where relief has been denied: *Goodson v. Dean*, 173 Ala. 301, 55 South. 1010; *Bayard v. Bancroft* (Del. Ch.), 62 Atl. 6; *Field v. School Dist. No. 110, Butler County*, 83 Kan. 186, 109 Pac. 775; *White v. City of Chatfield*, 116 Minn. 371, 133 N. W. 962 (illegal use by city of money received from bonds issued for a legal purpose is not ground to enjoin payment of bonds; nor is an unauthorized use of the building, constructed as a city hall, ground for enjoining completion of such building); *Morse v. Jacky*, 34 Mont. 165, 85 Pac. 882 (tax-payer cannot enjoin school trustees acting under void election from incurring liabilities, for there would be no legal liability, and all bills must be passed by the county commissioners); *Vogel v. Rawley*, 85 Neb. 600, 123 N. W. 1037 (plaintiff alleged that a village board was about to grant saloon licenses illegally; that witnesses would be afraid to attend meetings and protest because they were held in a place where the protestants were likely to be attacked; that plaintiff had already been attacked;

§ 1777. (§ 354.) **Relief Against Ordinances Injuring the Individual in a Capacity Other Than That of Taxpayer.**—The principle is generally, but not universally, accepted, that the enforcement of a void municipal ordinance may be enjoined, where an injunction is necessary for the purpose of avoiding a multiplicity of suits,<sup>77</sup> or

but the court denied an injunction on the ground that there was an adequate remedy by appeal from the action of the board); *Smith v. Board of Comm'rs of Rogers County*, 26 Okl. 819, 110 Pac. 669 (taxpayer may not enjoin the construction of a bridge on the ground that it would work an injustice, where there is an adequate remedy by appeal to the District Court).

<sup>77</sup> *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726; *City of Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575, 15 L. R. A. 321, 28 N. E. 853; *Brown v. Catlettsburg*, 11 Bush (Ky.), 435; *Shinkle v. City of Covington*, 83 Ky. 420; *City of Newport v. Newport & C. Bridge Co.*, 90 Ky. 193, 8 L. R. A. 484, 13 S. W. 720; *South Covington etc. R'y Co. v. Berry*, 93 Ky. 43, 40 Am. St. Rep. 161, 15 L. R. A. 604, 18 S. W. 1026; *Sylvester Coal Co. v. City of St. Louis*, 130 Mo. 323, 51 Am. St. Rep. 566, 32 S. W. 649; *Jewel Tea Co. v. City of Carthage*, 257 Mo. 383, 165 S. W. 743; *Third Ave. R. R. Co. v. Mayor*, 54 N. Y. 159; *United Traction Co. v. City of Watervliet*, 35 Misc. Rep. 392, 71 N. Y. Supp. 977.

In these cases the multiplicity of suits sought to be avoided consisted in numerous prosecutions of the single complainant or his servants for numerous violations of the invalid ordinance. It was once held in New York (*West v. Mayor*, 10 Paige, 539) that equity would not assume jurisdiction in this class of cases until the complainant had established his right by a successful defense in at least one of the actions at law. See 1 Pom. Eq. Jur., § 254, note, where it is shown that this case is irreconcilable with the later case of *Third Ave. R. R. Co. v. Mayor*, 54 N. Y. 159. See *Brunstein v. City of Fort Collins*, 53 Colo. 254, 125 Pac. 119. It is held elsewhere that the rule in *West v. Mayor* cannot apply under the blending of law and equity in the code system: *Sylvester Coal Co. v. City of St. Louis*, 130 Mo. 323, 51 Am. St. Rep. 566, 32 S. W. 649. It is followed, however, in Illinois: *Chicago, B. & Q. R. Co. v. City of Ottawa*, 148 Ill. 397, 36 N. E. 80; *Poyer v. Village of Des Plaines*, 123 Ill. 111, 5 Am. St. Rep. 494, 13 N. E. 819.

It seems that when the question is not of the validity of the ordinance, but of its application to the complainant, injunction will not

of preventing irreparable injury to private rights.<sup>78</sup> Multiplicity of suits may be a ground for the injunction either when a large group of persons are threatened with

be granted unless, perhaps, to avoid a multiplicity of prosecutions: *Ludlow & C. Coal Co. v. City of Ludlow*, 102 Ky. 354, 43 S. W. 435.

<sup>78</sup> *Des Moines City R. Co. v. City of Des Moines*, 90 Iowa, 770, 26 L. R. A. 767, 58 N. W. 906; *McFarlain v. Town of Jennings*, 106 La. 541, 31 South. 62; *Coast Co. v. Borough of Spring Lake (N. J.)*, 36 Atl. 21; *United Traction Co. v. City of Watervliet*, 35 Misc. Rep. 392, 71 N. Y. Supp. 977; *City of Austin v. Austin City Cemetery Ass'n*, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528; *Bristol Door & Lumber Co. v. Bristol*, 97 Va. 304, 75 Am. St. Rep. 783, 33 S. E. 588; *City of Atlanta v. Gate City Gaslight Co.*, 71 Ga. 106; *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 68 Am. St. Rep. 155, 42 L. R. A. 696, 51 N. E. 758; *City of Roanoke v. Bolling*, 101 Va. 182, 43 S. E. 343; *Old Colony Trust Co. v. City of Wichita*, 123 Fed. 762; *Glucose Refining Co. v. City of Chicago (Ill.)*, 138 Fed. 209; *Portland R'y, L. & P. Co. v. City of Portland (Or.)*, 201 Fed. 119; *Seaboard Air Line R'y Co. v. City of Raleigh*, 219 Fed. 573; *Dreyfus v. Boone*, 88 Ark. 353, 114 S. W. 718; *Bear v. City of Cedar Rapids*, 147 Iowa, 341, 27 L. R. A. (N. S.) 1150, 126 N. W. 324; *Le Blanc v. City of New Orleans*, 138 La. 243, 70 South. 212; *Churchill v. City of Albany*, 65 Or. 442, Ann. Cas. 1915A, 1094, 133 Pac. 632; *Robinson v. City of Galveston*, 51 Tex. Civ. App. 292, 111 S. W. 1076; *Goar v. City of Rosenberg*, 53 Tex. Civ. App. 218, 115 S. W. 653; *Parker v. City of Fairmont*, 72 W. Va. 688, 47 L. R. A. (N. S.) 1138, 79 S. E. 660. In Maryland, any party whose interests are injuriously affected by a void ordinance may enjoin its enforcement: *City of Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239 (ordinance within general grant of power, but clearly unreasonable and oppressive); *Deems v. City of Baltimore*, 80 Md. 164, 45 Am. St. Rep. 339, 26 L. R. A. 54, 30 Atl. 648 (milk inspection ordinance). An injunction will not issue when the enforcement will amount to a mere trespass for which there is an adequate remedy at law: *Town of Orange City v. Thayer (Fla.)*, 34 South. 573.

Where an invalid ordinance attempts to prohibit the establishment of a baseball field in a certain location, the owners may enjoin its enforcement: *New Orleans Baseball & A. Co. v. City of New Orleans*, 118 La. 228, 118 Am. St. Rep. 366, and note, 10 Ann. Cas. 757, 7 L. R. A. (N. S.) 1014, 42 South. 784. Likewise, a party injured may enjoin the enforcement of an invalid ordinance which pro-

prosecution for violation of the invalid ordinance,<sup>79</sup> or numerous prosecutions are begun or threatened against a single person.<sup>80</sup> Some cases, however, deny the right to equitable interference, on the ground that the complainant's defense to the prosecution affords him an adequate remedy at law.<sup>81</sup>

hibits more than one crematory in a township, and declare that none shall be established until a supervisor approves the site: *Abbey Land & Imp. Co. v. San Mateo County*, 167 Cal. 434, *Ann. Cas.* 1915C, 804, 52 *L. R. A. (N. S.)* 408, 139 Pac. 1068. A telephone company may enjoy the enforcement of an invalid ordinance compelling it to remove poles: *Southern Bell Telephone & Telegraph Co. v. City of Mobile*, 162 Fed. 523. Enforcement of a void ordinance attempting to regulate jitney buses may be enjoined: *Huston v. City of Des Moines*, 176 Iowa, 455, 156 N. W. 883; *Auto Transit Co. v. City of Ft. Worth (Tex. Civ.)*, 182 S. W. 685. But an injunction will not issue to restrain the enforcement of an ordinance on the ground that it is unconstitutional where there is no showing of irreparable injury: *Washingtonian Home of Chicago v. City of Chicago*, 281 Ill. 110, 117 N. E. 737.

<sup>79</sup> *City of Chicago v. Collins*, 175 Ill. 445, 67 *Am. St. Rep.* 224, 49 *L. R. A.* 408, 51 N. E. 907; *Wilkie v. City of Chicago*, 188 Ill. 444, 80 *Am. St. Rep.* 182, 58 N. E. 1004; *Glucose Refining Co. v. City of Chicago*, 138 Fed. 209; *Spiegler v. City of Chicago (Ill.)*, 74 N. E. 718. See *Pom. Eq. Jur.*, § 254 *et seq.*, where the subject is examined at large.

<sup>80</sup> See cases *supra*, note 77.

<sup>81</sup> The text is quoted in *City of Galveston v. Mistrot*, 47 Tex. Civ. App. 63, 104 S. W. 417. See *Devron v. First Municipality*, 4 La. Ann. 11; *Levy v. City of Shreveport*, 27 La. Ann. 620; *Cohen v. Commissioners of Goldsboro*, 77 N. C. 2; *Wardens v. Washington*, 109 N. C. 21, 13 S. E. 700; *Scott v. Smith*, 121 N. C. 94, 28 S. E. 64. See, also, the Illinois cases *supra*, in note 77.

Reasons for this view are stated with some fullness in the opinion from which the following extract is taken: "If the ordinance is invalid, we cannot assume that the court in which appellee may be tried for its violation will not so hold, if this question is presented; nor can we presume that, if he is acquitted on this ground, the officer of the city will continue to harass him with further arrests; so that, if his own contention is true, he is in no danger of suffering the irreparable injury of which he complains; nor would he, under



Relief has been more frequently denied against the enforcement of penal ordinances on the ground that the proceedings for their enforcement were of a criminal or *quasi*-criminal nature, and that equity declines to in-

such circumstances, be subjected to a multiplicity of suits. It would doubtless be convenient for appellee to have the judgment of the court upon the validity of the ordinance before submitting himself to liability for accumulated penalties; but, if arrested and convicted, and he chooses to take the chances of ultimately defeating the ordinance upon the ground of its invalidity, that is no ground for equitable interference": *City of Denver v. Beede*, 25 Colo. 172, 54 Pac. 624. To the present writer, the logic of the last sentence seems as faulty as its grammar. At all events, deliverance from this too common form of persecution is often much more than a matter of "convenience" to its victim, as the facts of reported cases abundantly show.

**Adequate Remedy at Law.**—In general, see *Moss & Co. v. McCarthy*, 191 Fed. 202; *McCormack Bros. Co. v. City of Tacoma*, 201 Fed. 374; *Seaboard Air Line R'y Co. v. City of Raleigh*, 219 Fed. 573; *Princess Amusement Co. v. Metzger*, 169 Ind. 376, 82 N. E. 758; *Majestic Theater Co. v. City of Cedar Rapids*, 153 Iowa, 219, **Ann. Cas.** 1913E, 93, 133 N. W. 117; *Thompson v. Tucker*, 15 Okl. 486, 6 **Ann. Cas.** 1012, 83 Pac. 413; *City of Galveston v. Mistrot*, 47 Tex. Civ. App. 63, 104 S. W. 417; *Hoffman v. Tooele City*, 42 Utah, 353, 45 **L. R. A. (N. S.)** 992, 130 Pac. 61; *Holmes v. Salt Lake City*, 43 Utah, 253, 134 Pac. 571.

An injunction will not issue to prevent the enforcement of an alleged illegal ordinance declaring stray animals a nuisance, where the poundkeeper has taken only one of plaintiff's animals, and there is no threatened continuance: *Tinsley v. City of Caruthersville*, 121 Mo. App. 142, 98 S. W. 800. Where an ordinance does not forbid the erection of a building but merely prohibits its maintenance as a skating-rink, an allegation that the inspector of buildings will not give a permit for the erection of the building is not sufficient to warrant an injunction: *Princess Amusement Co. v. Metzger*, 169 Ind. 376, 82 N. E. 758. Where a town bridge over a railroad crossing has become defective, and it is the duty of the town to strengthen it, the proper method of compelling this is by *mandamus* and not by a suit in equity: *West Jersey & S. R. Co. v. City of Woodbury*, 80 N. J. Eq. 412, 84 Atl. 1047. In *Pacific States Supply Co. v. City and County of San Francisco*, 171 Fed. 727, the plaintiff sought

terfere with the administration of the criminal laws.<sup>82</sup> It is believed, however, that in applying this rule the courts have sometimes lost sight of its qualification, which is as well settled as the rule itself, that a court of equity may in a proper case interfere by injunction to restrain any act or proceeding, whether connected with crime or not, which tends to the destruction or impairment of property or property rights.<sup>83</sup>

an injunction against the enforcement of an ordinance requiring a permit for excavating. The ordinance was valid. If the city authorities should arbitrarily administer it, there is an adequate remedy at law to compel the issuance of a permit. Hence an injunction was refused.

<sup>82</sup> *Mass & Co. v. McCarthy*, 191 Fed. 202; *City of Bessemer v. Bessemer City Waterworks*, 152 Ala. 391, 44 South. 663; *City Council of Montgomery v. West*, 146 Ala. 680, 40 South. 215; *City of Bisbee v. Arizona Insurance Agency*, 14 Ariz. 313, 127 Pac. 722; *Rider v. Leatherman (Ark.)*, 107 S. W. 996; *Mayor, etc., of Shellman v. Saxon*, 134 Ga. 29, 27 L. R. A. (N. S.) 452, 67 S. E. 438; *Georgia R'y & Electric Co. v. Town of Oakland City*, 129 Ga. 576, 59 S. E. 296 (no injunction against enforcement of ordinance requiring street-cars to stop at certain points); *Salter v. City of Columbus*, 125 Ga. 96, 54 S. E. 74; *Poult v. City of Sycamore*, 104 Ga. 24, 41 L. R. A. 772, 30 S. E. 417 (ordinance penalizing sale of intoxicating liquors); *Phillips v. Mayor*, 61 Ga. 386 (same); *Garrison v. City of Atlanta*, 68 Ga. 64; *Mayor etc. of City of Moultrie v. Patterson*, 109 Ga. 370, 34 S. E. 600; *Smiser v. City of Cynthiana*, 29 Ky. Law Rep. 1244, 97 S. W. 35; *Pleasants v. Smith*, 90 Miss. 440, 122 Am. St. Rep. 317, 9 L. R. A. (N. S.) 773, 43 South. 475; *Coykendall v. Hood*, 36 App. Div. 558, 55 N. Y. Supp. 718; *Wade v. Nunnally*, 19 Tex. Civ. App. 256, 46 S. W. 668; *Kissinger v. Hay*, 52 Tex. Civ. App. 295, 113 S. W. 1005. See, however, *Sylvester Coal Co. v. City of St. Louis*, 130 Mo. 323, 51 Am. St. Rep. 566, 32 S. W. 649, holding that "the doctrine that criminal statutes cannot be tested or their enforcement restrained in the civil courts has no application to the case. Municipal ordinances, though penal, are not criminal statutes. They are *quasi* criminal in form, but not so regarded in procedure." See, also, *post*, chapter XXI.

<sup>83</sup> *Glucose Refining Co. v. City of Chicago (Ill.)*, 138 Fed. 209 (smoke ordinance); *United Traction Co. v. City of Watervliet*, 35

Misc. Rep. 392, 71 N. Y. Supp. 977 (against enforcement of ordinance limiting speed of street-cars to six miles an hour); *Dobbins v. City of Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18; *City of Atlanta v. Gate City Gaslight Co.*, 71 Ga. 106 (against enforcement of ordinance tending to the destruction of a franchise for the use of streets by a gas company); *Board of Comm'rs of City of Mobile v. Orr*, 181 Ala. 308, 45 L. R. A. (N. S.) 575, 61 South. 920; *Yale Theater Co. v. City of Lawton*, 35 Okl. 444, 130 Pac. 135; *Mahoning & S. R'y & Light Co. v. City of New Castle*, 233 Pa. St. 413, *Ann. Cas.* 1913B, 658, 82 Atl. 501 (street railway may enjoin city from taking its employees off its cars in enforcing an invalid ordinance requiring a certain kind of brake on cars); *City Cab, Carriage & Transfer Co. v. Hayden*, 73 Wash. 24, *Ann. Cas.* 1914D, 731, L. R. A. 1915F, 726, 131 Pac. 472 (injunction against ordinance regulating hackmen at railroad station); *Fellows v. City of Charleston*, 62 W. Va. 665, 125 Am. St. Rep. 990, 13 *Ann. Cas.* 1185, 13 L. R. A. (N. S.) 737, 59 S. E. 623; *City of Austin v. Austin City Cemetery Ass'n*, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528. In the last case an injunction was sought by a cemetery association against the enforcement of an ordinance making it a "misdemeanor" for anyone to bury human bodies in certain territory comprising the plaintiff's burial ground. The court says in part in its able opinion: "It is clear to us . . . that the effect of the ordinance is such that, if its enforcement be not restrained, it may result in a total destruction of the value of appellee's property for the purpose for which it was acquired. . . . No one, we apprehend, without some considerable inducement, will do an act which may cause him to be arrested and prosecuted, however clear he might be in his own mind that the act constituted no violation of the criminal law. . . . As long as the ordinance remains undisturbed, its acts *in terrorem*, and practically accomplishes a prohibition against the burial of the dead within the limits of the city of Austin, save in the excepted localities," etc.

In *City of Tyler v. Story*, 44 Tex. Civ. App. 250, 97 S. W. 856, the court lays down three exceptions to the general rule that equity will not grant relief, viz.: (1) Where relief is necessary to protect the franchise of a public service corporation; (2) where necessary to prevent multiplicity of suits, allowing one to be tried; (3) where the plaintiff is occupying property under claim of right and fine will be too small to allow an appeal.

The general principle stated at the beginning of this section has found a frequent application, of late years, in the cases where an injunction has been sought against the enforcement or passage of ordinances fixing the rates of gas companies, water companies, or other "public utilities," or other municipal legislation impairing the obligation of the contract contained or implied in the complainant's franchise, or conflicting with other constitutional guaranties. These cases chiefly have to do with questions of constitutional law; but the appropriateness of the remedy by injunction seems to have been conceded in most of them,<sup>84</sup>

<sup>84</sup> See *Capital City Gaslight Co. v. City of Des Moines*, 72 Fed. 829; *Cleveland City R'y Co. v. City of Cleveland*, 94 Fed. 385; *Los Angeles City Water Co. v. City of Los Angeles*, 103 Fed. 711, 738, etc.; *Buffalo Gas Co. v. City of Buffalo*, 156 Fed. 370; *San Francisco Gas & Electric Co. v. City and County of San Francisco*, 164 Fed. 884; *Contra Costa Water Co. v. City of Oakland*, 165 Fed. 518; *Cumberland Telephone & Tel. Co. v. City of Louisville*, 187 Fed. 637; *City of Kankakee v. American Water Supply Co.*, 199 Fed. 757, 118 C. C. A. 195; *Penn Mutual Life Ins. Co. v. City of Austin*, 168 U. S. 685, 18 Sup. Ct. 223 (right to injunction lost by five years laches); *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116, 6 L. R. A. 756, 22 Pac. 910, 1046; and cases cited in *Los Angeles City Water Co. v. City of Los Angeles*, 103 Fed. 711, 716. See, also, *Little Falls Elect. & Water Co. v. City of Little Falls*, 102 Fed. 663; *Spring Valley Water Works v. City and County of San Francisco*, 124 Fed. 575; *Palatka Water Works v. City of Palatka*, 127 Fed. 161; *City of Chicago v. Rogers Park Water Co.*, 214 Ill. 212, 73 N. E. 375. And the same result has been reached where the municipal body has no power to fix rates: *Mills v. City of Chicago*, 127 Fed. 731. The positions of the parties were, in effect, just the opposite in *Brummitt v. Ogden Waterworks Co.*, 33 Utah, 289, 93 Pac. 828, where a tax-payer was allowed an injunction against the enforcement of an ordinance fixing unreasonably high rates for the city and individuals to pay. It has been held that the suit may be maintained when the ordinance is passed, although the ministerial act of publication remains to be done before the ordinance is effective: *Minneapolis Street R'y Co. v. City of Minneapolis (Minn.)*, 155 Fed. 989.



and has been expressly decided in many.<sup>85</sup>

In *City of Dallas v. Dallas Consol. Electric St. R'y Co.* (Tex. Civ. App.), 159 S. W. 76, an invalid initiative ordinance had been passed fixing rates for street railways, etc. The council had taken no steps to make a criminal liability. It was held that the company was entitled to an injunction to restrain the enforcement of the ordinance, although no attempt to enforce had been made. The court said that the ordinance stood as a law and was therefore a menace to the street railway's property. It subjected the company to complaints and suits by its patrons and by the public.

<sup>85</sup> In *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341, 19 Sup. Ct. 77, 82, injunction was sought against the erection of competing waterworks by the city, in violation of complainant's contract and franchise. The court, speaking of the remedy at law for the threatened breach of the contract, says: "In the meantime great—perhaps irreparable—damage would have been done to the plaintiff. What the measure of such damages would be exceedingly difficult of ascertainment, and would depend largely upon the question of whether the value of plaintiff's plant was destroyed or merely impaired. It would be impossible to say what would be the damage incurred at any particular moment, since such damage might be more or less dependent upon whether the competition of the city should ultimately destroy, or only interfere with, the business of the complainant." The case of *Southwest Missouri Light Co. v. City of Joplin*, 101 Fed. 23, 33, was similar. In *Los Angeles City Water Co. v. City of Los Angeles*, 88 Fed. 720, 748, the court says in regard to an ordinance fixing water rates, when the state laws and constitution impose severe penalties for charging more than the legal rates: "The ordinance, by reason of the severe pains and penalties which apparently fortify it, is daily, hourly, and momentarily enforcing itself. The defendants must either submit to the terms of the ordinance or incur unusually onerous expenditures. It is reasonably certain that if, with the ordinance standing, they were to undertake the collection of rates in excess of those prescribed in the ordinance, they would be resisted at every point by the consumers of water, and thus be driven to innumerable actions at law. Besides, should they, in any instance, succeed in collecting without an action a higher rate than the ordinance prescribes, it is equally certain that they would thereby bring upon themselves protracted and heavy litigation, having for its object forfeiture of their entire system of works. Surely these injuries are irreparable, and actions at law, so far from being adequate to the exigencies of the

§ 1778. (§ 355.) **Injunctions Against Wrongful Acts in General.**—Where municipal corporations, or their officers, threaten to do some wrongful act which will directly injure an individual, such a party may, if the case comes within some recognized head of equity jurisdiction, restrain such action. Thus, where municipal authorities wrongfully threaten to remove certain shade trees from a street, the abutting owner may obtain an injunction, his injury being irreparable.<sup>86</sup> Likewise, abutting owners have been allowed to enjoin the change of a park into a highway, where the park had been dedicated in conformity with a general building plan.<sup>87</sup> A few miscellaneous illustrations are appended in the note.<sup>88</sup>

situation, are, as complainants, in their brief, forcibly put it, mere mockeries of a remedy.' See, also, *Los Angeles City Water Co. v. City of Los Angeles*, 103 Fed. 711, 738 (city threatens to enforce constitutional provision for forfeiture of complainant's works if ordinance is disobeyed); *New Memphis Gas & Light Co. v. City of Memphis*, 72 Fed. 952 (where injunction *pendente lite* granted against ordinance fixing rates); *Riverside & A. R'y Co. v. City of Riverside*, 118 Fed. 736; *Gainesville Gas & Electric Power Co. v. City of Gainesville*, 63 Fla. 425, 58 South. 785 (injunction issued to prevent multiplicity of suits); *Bluefield Waterworks & Imp. Co. v. City of Bluefield*, 69 W. Va. 1, 33 L. R. A. (N. S.) 759, 70 S. E. 772 (citing this section of the text).

<sup>86</sup> *Mayor etc. of City of Frostburg v. Wineland*, 98 Md. 239, 103 Am. St. Rep. 399, 56 Atl. 811. See, also, *Burget v. Incorporated Town of Greenfield*, 102 Iowa, 432, 94 N. W. 933.

<sup>87</sup> *Village of Riverside v. Maclean*, 210 Ill. 308, 102 Am. St. Rep. 164, 71 N. E. 408. In *McIlhinny v. Village of Trenton*, 148 Mich. 380, 118 Am. St. Rep. 583, 12 Ann. Cas. 23, 10 L. R. A. (N. S.) 623, 111 N. W. 1083, an abutting owner was allowed an injunction to restrain the city from erecting an electric light plant in its streets. But it has been held that an abutting owner can enjoin such diversion only when he will suffer special injury. There is no special injury by reason of a railroad running through the park and interfering with its beauty: *Bayard v. Bancroft* (Del. Ch.), 62 Atl. 6.

<sup>88</sup> See *Lerch v. City of Duluth*, 88 Minn. 295, 92 N. W. 1116; *Nebraska Telephone Co. v. City of Fremont* (Neb.), 99 N. W. 811

(interference with telephone poles and wires enjoined); *West Jersey & S. R. Co. v. Waterford Tp.*, 64 N. J. Eq. 157, 55 Atl. 157; *Rochester & L. O. Water Co. v. City of Rochester*, 176 N. Y. 36, 68 N. E. 117; *Schooling v. City of Harrisburg*, 42 Or. 494, 71 Pac. 605; *Belington & N. R. Co. v. Town of Alston*, 54 W. Va. 597, 46 S. E. 612 (injunction against tearing up railroad tracks).

**Cases in Which Injunctions were Granted.**—*Olmsted v. City of Superior*, 155 Fed. 172 (bondholder granted an injunction to restrain diversion of funds from payment of bonds); *Town of Cuba v. Mississippi Cotton Oil Co.*, 150 Ala. 259, 10 L. R. A. (N. S.) 310, 43 South. 706 (enforcement of ordinance declaring cottonseed houses to be a nuisance enjoined); *Wilson v. Alhambra*, 158 Cal. 430, *Ann. Cas.* 1912A, 614, 111 Pac. 254; *McGourin v. Town of De Funiak Springs*, 51 Fla. 502, 41 South. 541 (municipal officials enjoined from opening street over private land without condemnation); *Peginis v. City of Atlanta*, 132 Ga. 302, 35 L. R. A. (N. S.) 716, 63 S. E. 857; *Cutsinger v. City of Atlanta*, 142 Ga. 555, *Ann. Cas.* 1916C, 280, L. R. A. 1915B, 1097, 83 S. E. 263; *Ironside v. City of Vinita*, 6 Ind. Ter. 485, 98 S. W. 167 (ordinance prohibited repairs to certain buildings within fire limits when damage amounted to twenty-five per cent; owner allowed injunction to prevent interference with repairs when damage amounted to less than twenty-five per cent); *Hume v. Independent School District (Iowa)*, 164 N. W. 188 (injunction against expulsion of pupil by school board); *Murphy v. Fairmount Township*, 89 Kan. 760, 133 Pac. 169 (abutting owner granted injunction to prevent maintenance of culvert which caused overflow of his land); *Smafield v. Smith*, 153 Mich. 270, 116 N. W. 990 (owner granted injunction to restrain drain commissioners from overflowing his land); *Building Commission of City of Detroit v. Kunin*, 181 Mich. 604, *Ann. Cas.* 1916C, 959, 148 N. W. 207; *Hobbs v. Germany*, 94 Miss. 469, 22 L. R. A. (N. S.) 983, 49 South. 515 (board of education enjoined from enforcing rule requiring all pupils to remain in their homes and study between hours of 7 and 9 every evening); *Omaha & C. B. St. R. Co. v. City of Omaha*, 90 Neb. 6, 132 N. W. 731 (electric company granted injunction to prevent city authorities from causing its poles and wires to be removed, etc.); *Rosenberg v. Sheen*, 77 N. J. Eq. 476, 77 Atl. 1019 (owner granted injunction to prevent tearing down of building under void order of the building department condemning it as unsafe); *Southern Leasing Co. v. Ludwig*, 217 N. Y. 100, 111 N. E. 470; *Crawford v. Town of Marion*, 154 N. C. 73, 35 L. R. A. (N. S.) 193, 69 S. E. 763; *Palmer v. Central Board of Education*, 220 Pa. St. 568, 70 Atl. 433 (school board

arranged competition for plans, and nine architects submitted proposed plans; the board then determined to select an architect by another method; the architects who submitted plans were granted an injunction to prevent the appointment of an architect in any other manner until the plans submitted were passed upon); *Bowers v. Machir* (Tex. Civ. App.), 191 S. W. 758 (injunction against closing an alley); *Town of Appalachia v. Mainous* (Va.), 93 S. E. 566; *Donohoe v. Fredlock*, 72 W. Va. 712, 79 S. E. 736.

In *Kirk v. Board of Health* (Wyman), 83 S. C. 372, 23 L. R. A. (N. S.) 1188, 65 S. E. 387, plaintiff was allowed an injunction to prevent a city board of health from confining her in a pesthouse, such confinement not being essential to public health. As to adequacy of the legal remedy, the court said: "Personal liability depends on proof of bad faith. True, bad faith may be shown by evidence that the official action was so arbitrary and unreasonable that it could not have been taken in good faith; but there is no such showing in this case. Even if there were such showing, the remedy by action for damages would not be adequate where the health or life of the citizen is by force unnecessarily imperiled. Protection from the loss of health or life is the only adequate relief in such case." In *Baker v. City of Grand Rapids*, 142 Mich. 687, 106 N. W. 208, 209, it was said that a coal dealer injured by competition of the city might enjoin such competition where it was unauthorized and illegal.

**Cases in Which Injunctions were Refused.**—*McCaskill v. Bower*, 126 Ga. 341, 54 S. E. 942 (injunction is not proper to prevent school board from putting into force a rule requiring children to wear uniforms; there is an adequate legal remedy by *mandamus* if the rule is improper); *Smith v. Miller*, 44 Ind. App. 168, 88 N. E. 859; *Atchison, T. & S. F. R'y Co. v. O'Leary*, 79 Kan. 664, 100 Pac. 628; *Fralinger v. Cooke*, 108 Md. 682, 71 Atl. 529 (property owner not specially damaged cannot maintain bill to enjoin encroachment on street); *McWilliams v. Burnes*, 115 Mo. App. 6, 90 S. W. 735; *Harrison Land Co. v. Crucible Steel Co.*, 82 N. J. Eq. 414, 89 Atl. 41 (owner not specially damaged cannot enjoin vacation of street); *C. Beek Co. v. City of Milwaukee*, 139 Wis. 340, 131 Am. St. Rep. 1061, 120 N. W. 293.

**Injunctions Against Police Raids.**—In the following cases, the court refused to enjoin the police from entering premises to determine whether certain ordinances had been violated: *Moss & Co. v. McCarthy*, 191 Fed. 202; *Adams v. Chesapeake Oyster & Fish Co.*,



34 Colo. 219, 82 Pac. 528; Kearney v. Laird, 164 Mo. App. 406, 144 S. W. 904. See, also, Canon City v. Manning, 43 Colo. 144, 17 L. R. A. (N. S.) 272, 95 Pac. 537.

**Injunctions at Suit of One Public Corporation Against Another.**—  
City of Bayonne v. Borough of North Arlington, 77 N. J. Eq. 166, 140 Am. St. Rep. 547, 75 Atl. 558; School Dist. No. 3 v. Young, 152 Mo. App. 304, 133 S. W. 143.

## CHAPTER XIX.

INJUNCTIONS AGAINST TAXATION; AND AGAINST  
SPECIAL OR LOCAL ASSESSMENTS.

## ANALYSIS.

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- § 381. Same—Injunction to enforce action of board of equalization.
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§ 453. Same—Effect of statutes prohibiting or limiting resort to equity.

§ 454. Same—Estoppel—Laches.

§ 455. Same—Tender.

§ 1779. (§ 356.) **In General—Two Classes of States.** The rules governing the issuance of injunctions to restrain the collection of invalid taxes are far from uniform. In general, the states may be divided into two classes, although in but few of the states will all the rules be found to agree. In states of the first type the jurisdiction depends upon the existence of some recognized ground for general equitable relief, such as the prevention of a multitude of suits, the removal of a cloud upon title, and the like. In states of the second type the jurisdiction rests upon the illegality or invalidity of the tax, and is independent of the existence of any generally recognized ground for equitable relief.

§ 1780. (§ 357.) **First Type.**—In states of the first type the mere illegality of the tax is not ground for equitable relief. “It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury; or if the property is real estate, throw a cloud upon the title of the complainant, or there must be some allegation of fraud, before the aid of a court of equity can be invoked. There must in every case be some special circumstance attending a threatened injury of this kind, which distinguishes it from a common trespass, and brings the case under some recognized head of equity jurisdiction before the extraordinary and preventive remedy of injunction can be invoked.”<sup>1</sup>

<sup>1</sup> Wells, Fargo & Co. v. Dayton, 11 Nev. 161. The leading case of this type is Dows v. City of Chicago, 11 Wall. 108, 20 L. Ed. 65, where the court gave the following reasons for the rule: “It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost import-

ance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public."

In general, see—

**Federal Courts.**—*Dows v. City of Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Arkansas B. & L. Ass'n v. Madden*, 175 U. S. 269, 44 L. Ed. 159, 20 Sup. Ct. 119; *Pittsburgh, C., C. & St. L. R'y Co. v. Board of Pub. Works of W. Va.*, 172 U. S. 32, 43 L. Ed. 354, 19 Sup. Ct. 90; *Pacific Express Co. v. Scibert*, 142 U. S. 339, 30 L. Ed. 1035, 12 Sup. Ct. 250; *Shelton v. Platt*, 139 U. S. 596, 35 L. Ed. 276, 11 Sup. Ct. 646; *Union Pac. R'y Co. v. Cheyenne*, 113 U. S. 516, 28 L. Ed. 1098, 5 Sup. Ct. 601; *State Railroad Tax Cases*, 92 U. S. 616, 23 L. Ed. 663; *Hannewinkle v. City of Georgetown*, 15 Wall. 547, 21 L. Ed. 231; *Maish v. Arizona*, 164 U. S. 599, 41 L. Ed. 567, 17 Sup. Ct. 193; *Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 37 L. Ed. 91, 13 Sup. Ct. 194; *Woodman v. Ely*, 2 Fed. 839; *Bank of Kentucky v. Stone*, 88 Fed. 383; *Taylor v. Louisville & N. R. Co.*, 88 Fed. 350, 31 C. C. A. 537; *Robinson v. City of Wilmington*, 25 U. S. App. 144, 65 Fed. 856, 13 C. C. A. 177; *Tilton v. Oregon C. M. R. Co.*, 3 Sawy. 22, Fed. Cas. No. 14,055; *Union & Planters' Bank v. City of Memphis*, 111 Fed. 561, 49 C. C. A. 455; *Stonebraker v. Hunter*, 215 Fed. 67, 131 C. C. A. 375.

**Alabama.**—*Boyd v. City of Selma*, 96 Ala. 144, 16 L. R. A. 729, 11 South. 393; *Patterson v. Pitts*, 180 Ala. 100, 60 South. 390; *Adams v. Southern R'y Co.*, 176 Ala. 320, 58 South. 397; *City of Ensley v. McWilliams*, 145 Ala. 159, 117 Am. St. Rep. 26, 41 South. 296.

**California.**—*Savings & Loan Soc. v. Austin*, 46 Cal. 415, 417.

**Colorado.**—*Wason v. Major*, 10 Colo. App. 181, 50 Pac. 741; *City of Highlands v. Johnson*, 24 Colo. 371, 51 Pac. 1004; *Dumars v. City of Denver*, 16 Colo. App. 375, 65 Pac. 580; *Hallett v. Board of Commissioners of Arapahoe County*, 40 Colo. 308, 90 Pac. 678.

**Delaware.**—*Philadelphia, W. & B. R. Co. v. Neary*, 5 Del. Ch. 600, 8 Atl. 363; *Equitable Guarantee & Trust Co. v. Donahoe*, 8 Del. Ch. 422, 45 Atl. 583; *Catts v. Town of Smyrna*, 10 Del. Ch. 263, 91 Atl. 297.

**Michigan.**—*Albany & Boston Min. Co. v. Auditor-General*, 37 Mich. 391.

**Minnesota.**—*Clarke v. Ganz*, 21 Minn. 387; *Scribner v. Allen*, 12 Minn. 148 (Gil. 85).

§ 1781. (§ 358.) **Second Type.**—In states of this type, the mere illegality of a tax is (subject to some limitations) a ground of jurisdiction for its injunction, apart from any question of irreparable injury, of multiplicity of suits, or of cloud on title. No distinction, in principle, is made between taxes on real and on personal property. As might be expected, the tax litigation in many of these states is very extensive. As a result of this litigation, several of the states have worked out a large body of special rules on the subject of equitable relief against taxation, wholly unaided by reference to the development of the subject in sister states; thus rendering any generalizations drawn from a comparison of these rules somewhat difficult, if not unprofitable. In a few of these states, moreover, injunction of illegal taxa-

**Nevada.**—Wells, Fargo & Co. v. Dayton, 11 Neb. 161.

**New York.**—Mercantile Nat. Bank v. City of New York, 27 Misc. Rep. 32, 57 N. Y. Supp. 254; Susquehanna Bank v. Supervisors of Broome Co., 25 N. Y. 312; Western R. R. Co. v. Nolan, 48 N. Y. 514; Mutual Ben. Life Ins. Co. v. Supervisors, 2 Abb. Pr., N. S., 233; Mayor etc. v. Meserole, 26 Wend. 132; Heywood v. City of Buffalo, 14 N. Y. 534.

**North Dakota.**—Farrington v. New England Inv. Co., 1 N. D. 102, 45 N. W. 191; Douglas v. City of Fargo, 13 N. D. 467, 101 N. W. 919.

**Oregon.**—Welch v. Clatsop County, 24 Or. 452, 33 Pac. 934; Southern Or. Co. v. Coos County, 39 Or. 185, 64 Pac. 646; Goodnough v. Powell, 23 Or. 525, 32 Pac. 396; Portland Hibernian Ben. Soc. v. Kelly, 28 Or. 173, 52 Am. St. Rep. 769, 42 Pac. 3; Alliance Trust Co. v. Multnomah County, 38 Or. 433, 30 L. R. A. 167, 63 Pac. 498. See, also, Yamhill County v. Foster, 53 Or. 124, 99 Pac. 286; Kime v. Thompson, 60 Or. 183, 118 Pac. 174; Southern Oregon Co. v. Quine, 70 Or. 63, 139 Pac. 332.

**West Virginia.**—Douglass v. Town of Harrisville, 9 W. Va. 162, 27 Am. Rep. 548; Winifrede Coal Co. v. Board of Education, 47 W. Va. 132, 34 S. E. 776; Christie v. Melden, 23 W. Va. 667; Riddle v. Town of Charlestown, 43 W. Va. 796, 28 S. E. 831; Williams v. County Court, 26 W. Va. 488, 53 Am. Rep. 94; Blue Jacket Consol. Copper Co. v. Scherr, 50 W. Va. 533, 40 S. E. 514.

tion is expressly authorized and, to some extent, regulated by statute. Injunction is usually a matter of right when property exempt by law from taxation is sought to be taxed; on the other hand, where the question is one of an oppressive overvaluation, the complainant must, as a general rule, first pursue the statutory remedy of appeal to the board of review or equalization. As to what constitutes a substantial illegality in the assessment or levy of a tax, as distinguished from a mere irregularity that is not a matter for injunctive relief, the decisions are numerous and varying. Where the tax as a whole is illegal, any number of tax-payers may join in the suit, or one may sue on behalf of all others similarly affected.<sup>2</sup> The states clearly belonging in this group are: Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri (by recent decisions), Montana, Nebraska, North Carolina, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Washington, and Wyoming.<sup>3</sup>

<sup>2</sup> The numerous and able decisions of the Illinois courts, *infra*, may be consulted with profit as representative of this type of states.

<sup>3</sup> **Arkansas.**—Harrison v. Norton, 104 Ark. 16, 148 S. W. 497.

**Iowa.**—In Iowa, an injunction will issue to restrain the collection of a tax levied by virtue of a mistaken certificate as to the result of an election: Cattell v. Lowry, 45 Iowa, 478; and when the tax was voted by the electors as the result of misrepresentation: Sinnett v. Moles, 38 Iowa, 25. It is the proper remedy to prevent the collection of an invalid tax on shares of stock in a national bank: Iowa Nat. Bank v. Murrow (Iowa), 133 N. W. 769; Citizens' Nat. Bank v. Murrow (Iowa), 133 N. W. 769. In general, see Montis v. McQuiston, 107 Iowa, 651, 78 N. W. 704; Chicago, M. & St. P. R'y Co. v. Phillips, 111 Iowa, 377, 82 N. W. 787; F. M. Hubbell, Son & Co. v. Bennett Bros., 130 Iowa, 66, 106 N. W. 375; Security Savings Bank v. Carroll, 131 Iowa, 605, 109 N. W. 212; Bennett v. City of Emmetsburg, 138 Iowa, 67, 115 N. W. 582.

**Louisiana.**—In Louisiana, "it is well settled that where an officer is proceeding to collect a state tax illegally, either on account of a void assessment or irregularity in the mode of collecting, or for other



cause, though the state is interested in such proceeding and the officer is acting under the direct authority from the state, that the proceedings may be arrested by injunction in a suit against the officer alone": *Budd et al. v. Houston*, 36 La. Ann. 959. Where, however, the tax is apparently valid on its face, and the tax-roll has been placed in the hands of the tax collector, the legality cannot be tested by an injunction suit against the collector alone: *Gaither v. Green*, 40 La. Ann. 362, 4 South. 210; *Kansas City S. & G. R'y Co. v. Davis*, 50 La. Ann. 1054, 23 South. 946. An injunction may also be granted to restrain a sale for taxes which have been paid: *Koek v. Triche*, 52 La. Ann. 825, 27 South. 354.

**Maryland.**—In Maryland, "the collection of taxes will not be interfered with or restrained by a court of equity for mere irregularities in their proceedings, or for any hardship that may result from their collection. It is only when the tax itself is clearly illegal, or the tribunal imposing it has clearly exceeded its powers, or the rights of the tax-payers have been violated, that the interposition of the special remedy by injunction can be successfully invoked, and only then when no appellate tribunal has been created with power to remedy the wrong": *County Commissioners of Allegany Co. v. Union M. Co.*, 61 Md. 545. In general, see *Mayor etc. of Baltimore v. Porter*, 18 Md. 284, 79 Am. Dec. 686. See, also, *Mayor etc. of Baltimore v. Gail*, 106 Md. 684, 68 Atl. 282. An injunction has been granted to restrain the collection of a tax on property improperly returned by the registrar of wills as being in the hands of an administrator, when it has really been distributed: *Nicodemus v. Hull*, 93 Md. 364, 48 Atl. 1049. Under a code provision that courts of equity have no jurisdiction of suits where the original debt or damage does not amount to twenty dollars, it has been held that an injunction will not issue to restrain the collection of a tax of seven dollars and thirty-two cents: *Code of Pub. Gen. Laws*, art. XVI, § 91; *Kuenzel v. City of Baltimore*, 93 Md. 750, 49 Atl. 649.

**Missouri.**—In Missouri, the supreme court has stated that it would be difficult to reconcile the authorities, either in that state or elsewhere; but that of late years the court has been disposed to regard with favor proceedings which are preventive in their character, rather than compel the injured party to seek redress after the damage is accomplished: *Overall v. Ruenzi*, 67 Mo. 203; *McPike v. Pen*, 51 Mo. 63; *St. Louis & S. F. R'y Co. v. Apperson*, 97 Mo. 301, 10 S. W. 478; *Noll v. Morgan*, 82 Mo. App. 112. See, however, *McPike v. Pew*, 48 Mo. 525, holding that an officer seizing property under a void tax

levy would be a mere trespasser, and that the injured party would have an ample remedy at law; to the same effect with the last case, *Barrow v. Davis*, 46 Mo. 394, and *Sayre v. Tompkins*, 23 Mo. 443, distinguishing between void taxes on real and on personal property.

**New Mexico.**—In New Mexico, the courts will “arrest any attempt to enforce the collection of a tax when it is apparent that the power to do so was not originally and clearly vested in the taxing power”: *Poe v. Howell* (N. M.), 67 Pac. 62.

**North Carolina.**—It is provided by statute in North Carolina that injunctions shall not be issued to restrain the collection of any tax or the sale of any property for the non-payment of any tax, except such tax as has been levied or assessed for an illegal or unauthorized purpose, or except the tax be illegal or invalid, or the assessment be illegal and invalid: Acts of 1895, c. 119, § 76. Thus, an injunction will not be granted merely because the defendant was not the lawful tax collector for the year: *McDonald v. Teague*, 119 N. C. 604, 26 S. E. 158. On the other hand, when the tax is illegally levied, the injunction will issue: *Graves v. Moore Co. Commissioners*, 135 N. C. 49, 47 S. E. 134; *Purnell v. Page*, 133 N. C. 125, 45 S. E. 534; *Moore v. Sugg*, 112 N. C. 233, 17 S. E. 72. In such a case, any tax-payer may bring the suit in his own behalf only, or on behalf of all others similarly situated: *Moore v. Sugg*, 112 N. C. 233, 17 S. E. 72. In general, see *Caldwell Land & Lumber Co. v. Smith*, 146 N. C. 199, 59 S. E. 653; *Southern R’y Co. v. Board of Commissioners of Mecklenburg County*, 148 N. C. 220, 61 S. E. 690.

**Pennsylvania.**—In Pennsylvania, where the matters complained of are mere irregularities in the valuation or assessment and the tax is lawfully assessed, an injunction will not issue, but the complainant will be remanded to his remedy at law. Where, however, there is either a want of power to tax or a disregard of the constitution in the mode of assessment, an injunction will issue: *St. Mary’s Gas Co. v. Elk County*, 191 Pa. St. 458, 43 Atl. 321; *Banger’s Appeal*, 109 Pa. St. 79, 16 Wkly. Not. Cas. 289; *Arthur v. School Dist.*, 164 Pa. St. 410, 30 Atl. 299, 35 Wkly. Not. Cas. 289; *Moore v. Taylor*, 147 Pa. St. 481, 23 Atl. 768. Thus, such relief may be obtained to restrain the collection of a tax on exempt property: *St. Mary’s Gas Co. v. Elk County*, 191 Pa. St. 458, 43 Atl. 321; *Lehigh Coal & Nav. Co. v. Miller*, 155 Pa. St. 542, 26 Atl. 660. Likewise, an injunction will issue when an illegal excess is imposed and when the tax is levied without authority: *Appeal of Conners*, 103 Pa. St. 356. In general, see *Shenango Furnace Co. v. Fairfield Tp.*, 229 Pa. 357, 78 Atl. 937; *Byers v. Hempfield Tp.*, 226 Pa. 278, 75 Atl. 415.

§ 1782. (§ 359.) **Principles of General Application—Irregularities.**—It is a principle of general application that mere irregularities in the assessment are not sufficient to warrant the interference of equity.<sup>4</sup> The collec-

**South Dakota.**—In South Dakota injunctions are readily granted to restrain the collection of illegal taxes. The injunction will be granted to restrain the collection of an illegal excess, provided the amount legally due is tendered: *Dakota Loan & Trust Co. v. County of Coddington*, 9 S. D. 159, 68 N. W. 314. In general, see *Chicago & N. W. R. Co. v. Rolfson*, 23 S. D. 405, 122 N. W. 343.

**Tennessee.**—In Tennessee tax-books are process equivalent to an execution in the hands of an officer. An injunction will issue to restrain the collection of a tax, even on personal property, under void process, although there is a concurrent remedy by *certiorari*: *Alexander v. Henderson*, 105 Tenn. 431, 58 S. W. 648; *National Bank of Chattanooga v. Mayor & Aldermen of Chattanooga*, 8 Heisk. 816. An injunction, however, will not issue to restrain the collection of a void tax when the complainant waits until the greater part has been paid: *Kennedy v. Montgomery*, 98 Tenn. 165, 38 S. W. 1075. In general, see *Briscoe v. McMillan*, 117 Tenn. 115, 100 S. W. 111; *Southern Express Co. v. Patterson*, 122 Tenn. 279, 123 S. W. 353.

**Wyoming.**—The statutes in this state provide for the remedy of injunction to restrain the illegal levy or collection of taxes: *Rev. Stats. 1899, § 4172*. This relief “will not be allowed on account of the mere failure of the taxing officers to fulfill the requirements of the statute in the levy and assessment, but it must appear that the tax itself is inequitable for the reason that the property was not taxable, or that it was not the property of the complainant, or the like”: *Horton v. Driskell*, 13 Wyo. 66, 3 *Ann. Cas.* 561, 77 *Pac.* 354.

<sup>4</sup> **Federal Courts.**—*State Railroad Tax Cases*, 92 U. S. 616, 23 *L. Ed.* 663; *Douglas County v. Stone*, 110 Fed. 812; *Robinson v. City of Wilmington*, 25 U. S. App. 144, 65 Fed. 856, 13 C. C. A. 177; *Woodman v. Ely*, 2 Fed. 839; *King County v. Northern Pacific R’y Co.*, 196 Fed. 323, 116 C. C. A. 143; *Singer Sewing Machine Co. v. Benedict*, 179 Fed. 628, 103 C. C. A. 186; *Jackson Lumber Co. v. McCrimmon*, 164 Fed. 759.

**Arizona.**—*County of Cochise v. Copper Queen Consol. Min. Co.*, 8 *Ariz.* 221, 71 *Pac.* 946.

**Arkansas.**—*Wells, Fargo & Co. Express v. Crawford County*, 63 *Ark.* 576, 37 *L. R. A.* 371, 40 S. W. 710.

tion of public revenue will not be prevented unless there is some substantial defect which renders the tax invalid as to the complainant. Public policy demands that no needless restriction be placed upon the securing of the necessary means for conducting the government.

The rule has been well stated as follows; "Whatever may be the rule of decision in actions at law, where title

California.—Merrill v. Gorham, 6 Cal. 41.

Florida.—Bloxham v. Consumers' etc. R. R. Co., 36 Fla. 519, 51 Am. St. Rep. 44, 29 L. R. A. 507, 18 South. 444.

Illinois.—Chicago, B. & Q. R. Co. v. Frary, 22 Ill. 34; see the forcible statement of the reasons for the rule in the opinion of Caton, C. J.; Huck v. Chicago & A. R. Co., 86 Ill. 360; Union Trust Co. v. Weber, 96 Ill. 346, 351, 357; Shriver v. McGregor, 224 Ill. 397, 79 N. E. 706; Correll v. Smith, 221 Ill. 149, 77 N. E. 440; Howard v. Burke, 248 Ill. 224, 140 Am. St. Rep. 159, 93 N. E. 775 (acts of *de facto* officers not enjoined for mere reason that they are not *de jure*); Holt v. Hendee, 248 Ill. 288, 21 Ann. Cas. 202, 93 N. E. 749 (that the property was not fully identified and described as required by law will not warrant an injunction); Gray v. Board of School Inspectors of Peoria, 231 Ill. 63, 83 N. E. 95.

Indiana.—Ricketts v. Spraker, 77 Ind. 371; Yocum v. First Nat. Bank (Ind.), 38 N. E. 599; Hendricks v. Gilchrist, 76 Ind. 369; City of Delphi v. Bowen, 61 Ind. 33; Center & W. Gravel Road Co. v. Black, 32 Ind. 468; Cleveland, C. C. & St. L. R'y Co. v. Town of Waynetown, 153 Ind. 550, 55 N. E. 451; Crowder v. Riggs, 153 Ind. 158, 53 N. E. 1019; Morton C. Hunter Stone Co. v. Woodard, 152 Ind. 474, 53 N. E. 947; McCrory v. O'Keefe, 162 Ind. 534, 70 N. E. 812; Citizens' Nat. Bank v. Klauss, 47 Ind. App. 50, 93 N. E. 681.

Iowa.—Saar v. Carson, 145 Iowa, 525, 124 N. W. 204; Empire State Surety Co. v. City of Des Moines, 152 Iowa, 531, 131 N. W. 870, 132 N. W. 837.

Kansas.—Kansas Mut. Life Ass'n v. Hill, 51 Kan. 636, 33 Pac. 300; Missouri River F. S. & G. R. Co. v. Morris, 7 Kan. 210; Challiss v. Comm'rs of Atchison County, 15 Kan. 49; Chicago, B. & Q. R. Co. v. Clerk of Norton County, 55 Kan. 386, 40 Pac. 654; Parker v. Challiss, 9 Kan. 155; Dutton v. Citizens' Nat. Bank, 53 Kan. 440, 36 Pac. 719; Ryan v. Board of Commissioners, 30 Kan. 185, 2 Pac. 156; City of Lawrence v. Killam, 11 Kan. 499.



is sought to be supported, based upon tax proceedings, and where there has not been a compliance with the statute in such proceedings, either as to manner or time, we think an entirely different rule prevails where the action is a proceeding in equity to restrain the collection of the tax. Where a party invokes the powers of a court of equity to relieve him from the payment of a tax, he must not only show that there has been a departure in manner

**Kentucky.**—*Levi v. City of Louisville*, 97 Ky. 394, 28 L. R. A. 480, 30 S. W. 973; *Ryan v. City of Louisville*, 133 Ky. 714, 118 S. W. 992.

**Maryland.**—*County Commissioners of Allegany Co. v. Union M. Co.*, 61 Md. 545; *Mayor etc. of Baltimore v. Porter*, 18 Md. 284; 79 Am. Dec. 686; *Moffat v. Calvert County Commissioners*, 97 Md. 266, 54 Atl. 960.

**Missouri.**—*St. Louis & S. F. R'y Co. v. Gracy*, 126 Mo. 472, 29 S. W. 579 (equity deals with the substance of transactions, and treats their form as of secondary importance, unless the law, which it is bound to follow, otherwise ordains).

**Nebraska.**—*Spargur v. Romine*, 38 Neb. 736, 57 N. W. 523; *Chicago, B. & W. R. Co. v. City of Nebraska City*, 53 Neb. 453, 73 N. W. 952; *Wilson v. City of Auburn*, 27 Neb. 435, 43 N. W. 257; *Bellevue Imp. Co. v. Village of Bellevue*, 39 Neb. 876, 58 N. W. 446.

**Oklahoma.**—*Sweet v. Boyd*, 6 Okl. 699, 52 Pac. 939; *Boyd v. Wiggins*, 7 Okl. 85, 54 Pac. 411; *Sharpe v. Engle*, 2 Okl. 624, 39 Pac. 384.

**Oregon.**—*Hibernian Ben. Society v. Kelly*, 28 Or. 173, 52 Am. St. Rep. 769, 30 L. R. A. 167, 42 Pac. 3; *Oregon Real Estate Co. v. Multnomah County*, 35 Or. 285, 58 Pac. 106; *Goodnough v. Powell*, 23 Or. 525, 32 Pac. 396; *Yamhill County v. Foster*, 53 Or. 124, 99 Pac. 286.

**Pennsylvania.**—*St. Mary's Gas Co. v. Elk County*, 191 Pa. St. 458, 43 Atl. 321; *Banger's Appeal*, 109 Pa. St. 79, 16 Wkly. Not. Cas. 289; *Arthur v. Polk Borough School District*, 164 Pa. St. 410, 30 Atl. 299, 35 Wkly. Not. Cas. 289; *Moore v. Taylor*, 147 Pa. St. 481, 23 Atl. 768.

**Tennessee.**—*Briscoe v. McMillan*, 117 Tenn. 115, 100 S. W. 111.

**Texas.**—*George v. Dean*, 47 Tex. 73.

**Washington.**—*Wingate v. Ketner*, 8 Wash. 94, 35 Pac. 591.

**West Virginia.**—*Tygart's Val. Bank v. Town of Philippi*, 38 W. Va. 219, 18 S. E. 489; *Christie v. Malden*, 23 W. Va. 667; *Hager v. Melton*, 66 W. Va. 62, 66 S. E. 13.

**Wisconsin.**—*Foster v. Rowe*, 132 Wis. 268, 111 N. W. 688.

or time from the proceedings provided for the assessment, levy or collection of the tax, or an omission in the procedure, but he must show that such departure or omission affects the groundwork and substance of the procedure, and affects the justice or merit of the claim on the part of the public, and affects injuriously his substantial rights. This action being a proceeding in equity, where equitable relief only is asked, will be governed by rules and principles prevalent in those courts where relief of that character is prayed.”<sup>5</sup>

§ 1783. (§ 360.) **Same—Application of This Principle.** In accordance with this principle, it is held that mere errors in the assessment will not warrant the court in granting relief.<sup>6</sup> In Illinois, if a tax is levied for a lawful purpose and without fraud, a mere erroneous determination as to the place of the complainant’s residence does not constitute such illegality as will be relieved against in equity.<sup>7</sup> In Kansas, an injunction will not issue because a tax legally voted is illegally reduced;<sup>8</sup> nor because assessments are based upon only twenty-five per cent of the actual cash value although a statute requires that they be levied at the actual value;<sup>9</sup> nor because the assessment is set out in detail on the books when a statute provides that it be grouped under one head.<sup>10</sup> Likewise, it has been held that the assessment of some at the full cash value while others are assessed at much less,<sup>11</sup> or the failure of township assessors to

<sup>5</sup> *Sweet v. Boyd*, 6 Okl. 699, 52 Pac. 939.

<sup>6</sup> *County of Cochise v. Copper Queen Consol. Min. Co.*, 8 Ariz. 221, 71 Pac. 946.

<sup>7</sup> *Williams v. Dutton*, 184 Ill. 608, 56 N. E. 868.

<sup>8</sup> *Seward v. Rheiner*, 2 Kan. App. 95, 43 Pac. 423.

<sup>9</sup> *Challiss v. Rigg*, 49 Kan. 119, 30 Pac. 190.

<sup>10</sup> *Kansas City, Ft. S. & G. R. R. Co. v. Scammon*, 45 Kan. 481, 25 Pac. 858.

<sup>11</sup> *Adams v. Beman*, 10 Kan. 37.

meet and agree upon an equal basis of valuation,<sup>12</sup> or the levying of a slight excess,<sup>13</sup> are all mere irregularities which do not warrant the issuance of an injunction. For the same reason, an injunction will not issue when an assessment is excessive merely as an error of judgment, unless the excess is so great as to raise a presumption of fraud.<sup>14</sup> And it is well settled that it will not issue when an error in assessment is induced by the action of the tax-payer himself.<sup>15</sup> In Kentucky, an injunction will not be granted merely because the city has failed to tax certain personalty not exempt from taxation;<sup>16</sup> nor because property belonging to a mother and her son has been assessed in the name of the father, it having been so listed by the son.<sup>17</sup> And it is no ground for an injunction that the taxing officer, who is an officer *de facto*, may not be the legal official because of certain irregularities in the election.<sup>18</sup> The court will not, at the suit of an individual tax-payer, inquire into the necessity for the levy.<sup>19</sup> In Nebraska, it is held that where the irregularity is the result of the plaintiff's own act, as where an officer of a corporation made a return of its property in his own name and was assessed for it in consequence, there is no ground for equitable interference.<sup>20</sup> An error of a tax collector in marking an

<sup>12</sup> Smith v. Commissioners of Leavenworth County, 9 Kan. 296.

<sup>13</sup> Id.

<sup>14</sup> Board of Commissioners of Lincoln County v. Bryant, 7 Kan. App. 252, 53 Pac. 775. This proposition is more fully discussed in a later section.

<sup>15</sup> Bank of Santa Fe v. Buster, 50 Kan. 356, 31 Pac. 1094; Winfield Bank v. Nipp, 47 Kan. 744, 28 Pac. 1015.

<sup>16</sup> Levi v. City of Louisville, 97 Ky. 394, 28 L. R. A. 480, 30 S. W. 973.

<sup>17</sup> Ryan v. City of Central City, 21 Ky. Law Rep. 1070, 54 S. W. 2.

<sup>18</sup> Chambers v. Adair, 23 Ky. Law Rep. 373, 62 S. W. 1128.

<sup>19</sup> McInerney v. Huelefeld, 116 Ky. 28, 25 Ky. Law Rep. 272, 75 S. W. 237.

<sup>20</sup> McGillin v. Chase County, 39 Neb. 422, 58 N. W. 138.

assessment paid does not entitle one who purchases in reliance upon the record to equitable relief.<sup>21</sup> In Oklahoma, an injunction will not be granted merely because a tax is levied a few days too late.<sup>22</sup> In Oregon, it is no ground for an injunction that the property is assessed in the wrong name.<sup>23</sup> And the mere illegality of an order of a county court in directing penalties to be added to unpaid taxes is no ground for such relief when the sheriff has no authority to enforce collection and has made no attempt to do so.<sup>24</sup> For the same reason that it is denied in this case, it will be denied when it is sought to restrain an extension of a tax on the tax-books, unless it is wholly unauthorized and void in all its parts.<sup>25</sup> In none of these actions, however, will the motives of the plaintiff be inquired into.<sup>26</sup> In Texas, where there is a misdescription of the property by the assessor, or an irregularity in his entering it upon the assessment list or roll, no ground for an injunction is presented.<sup>27</sup>

§ 1784. (§ 361.) **Necessity for Tender—In General.**

It is a rule of general application that where a tax is valid in part and invalid in part, no relief will be awarded unless a payment or tender is made of the portion admitted to be valid.<sup>28</sup> This is an application of

<sup>21</sup> *Philadelphia Mtg. & Tr. Co. v. City of Omaha*, 63 Neb. 280, 93 Am. St. Rep. 442, 57 L. R. A. 150, 88 N. W. 523.

<sup>22</sup> *Sharpe v. Engle*, 2 Okl. 624, 39 Pac. 384.

<sup>23</sup> *Portland Hibernian Ben. Soc. v. Kelly*, 28 Or. 173, 52 Am. St. Rep. 769, 42 Pac. 3.

<sup>24</sup> *Oregon Real Estate Co. v. Multnomah County*, 35 Or. 285, 58 Pac. 106.

<sup>25</sup> *Goodnough v. Powell*, 23 Or. 525, 32 Pac. 396.

<sup>26</sup> *Vaughn v. School District*, 27 Or. 57, 39 Pac. 393.

<sup>27</sup> *George v. Dean*, 47 Tex. 73.

<sup>28</sup> **Federal Courts.**—*Northern Pac. R. Co. v. Clark*, 153 U. S. 252, 38 L. Ed. 706, 14 Sup. Ct. 809; *Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 37 L. Ed. 91, 13 Sup. Ct. 194; *Dundee Mortgage Trust Inv.*



the maxim that "he who seeks equity must do equity." Public policy requires that public revenues be collected; and courts of equity will not interfere to relieve a tax-

Co. v. Parrish, 24 Fed. 197; German National Bank v. Kimball, 103 U. S. 732, 26 L. Ed. 469; State Railroad Tax Cases, 92 U. S. 575, 616, 23 L. Ed. 663, 674; Parmley v. St. Louis etc. R. Co., 3 Dill. C. C. 25, Fed. Cas. No. 10,768; Morenci Copper Co. v. Freer, 127 Fed. 199; People's Nat. Bank v. Marye, 191 U. S. 272, 48 L. Ed. 180, 24 Sup. Ct. 68; Tacoma R'y & Power Co. v. Pierce County, 193 Fed. 90; Raymond v. Chicago Union Traction Co., 207 U. S. 20, 12 Ann. Cas. 757, 52 L. Ed. 78, 28 Sup. Ct. 7.

Alabama.—Nashville, C. & St. L. R'y Co. v. City of Attalla, 118 Ala. 362, 24 South. 450; Tallassee Mfg. Co. v. Spigener, 49 Ala. 262.

Arizona.—Allen (Murray) v. Evans, 7 Ariz. 359, 64 Pac. 412.

Arkansas.—Wells, Fargo & Co. Express v. Crawford County, 63 Ark. 576, 37 L. R. A. 371, 40 S. W. 710.

California.—County of Los Angeles v. Ballerino, 99 Cal. 593, 597, 32 Pac. 581, 34 Pac. 329 (*dictum*).

Colorado.—Insurance Co. of North America v. Bonner, 24 Colo. 220, 49 Pac. 366; American Refrigerator Transit Co. v. Adams (Thomas), 28 Colo. 119, 63 Pac. 410; Wason v. Major, 10 Colo. App. 181, 50 Pac. 741; People v. Henderson, 12 Colo. 369, 21 Pac. 144; Bottom v. Young, 52 Colo. 533, 125 Pac. 500 (no injunction against tax sale, although statute providing for such sales is void, unless plaintiff pays or tenders amount justly due, with legal penalties for delay); City and County of Denver v. Hallett, 45 Colo. 132, 100 Pac. 408.

Florida.—Pickett v. Russell, 42 Fla. 116, 634, 28 South. 764.

Idaho.—Northern Pac. R'y Co. v. Kootenai County, 19 Idaho, 75, 112 Pac. 320.

Indiana.—Buck v. Miller, 147 Ind. 586, 62 Am. St. Rep. 436, 37 L. R. A. 384, 45 N. E. 647, 47 N. E. 8; Shepardson v. Gillette, 133 Ind. 125, 31 N. E. 788; Bundy v. Summerland, 142 Ind. 92, 41 N. E. 322; Smith v. Union County Nat. Bank, 131 Ind. 201, 30 N. E. 948; Smith v. Rude Bros. Mfg. Co., 131 Ind. 150, 30 N. E. 947; Hyland v. Central I. & S. Co., 129 Ind. 68, 13 L. R. A. 515, 28 N. E. 308; City of Logansport v. McConnell, 121 Ind. 419, 23 N. E. 264; Montgomery v. Wassem, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184 (drainage assessment); Board of Commissioners v. Dailey, 115 Ind. 360, 17 N. E. 619;

payer of his rightful share of public burdens. Where taxes are legal, or, whether strictly legal or not, are just and equitable, the illegal excess, if it can be separated, is

*Morrison v. Jacoby*, 114 Ind. 84, 14 N. E. 546, 15 N. E. 806 (a leading case); *Ricketts v. Spraker*, 77 Ind. 371; *Mesker v. Koch*, 76 Ind. 68; *City of Delphi v. Bowen*, 61 Ind. 33; *City of Jeffersonville v. Louisville & J. Bridge Co.*, 169 Ind. 645, 83 N. E. 337; *Citizens' Nat. Bank v. Klauss*, 47 Ind. App. 50, 93 N. E. 681. In *Buck v. Miller*, *supra*, the court said: "While injunction is the proper remedy against the collection of taxes where the assessment is wholly void, yet the burden is upon the plaintiff to allege and prove facts necessary to show that the whole of the property was not subject to assessment for taxation."

**Iowa.**—*Reed v. City of Cedar Rapids*, 138 Iowa, 366, 116 N. W. 140; *Corey v. City of Fort Dodge*, 133 Iowa, 666, 111 N. W. 6.

**Kansas.**—*City of Lawrence v. Killam*, 11 Kan. 499; *Bank of Garnett v. Ferris*, 55 Kan. 120, 39 Pac. 1042; *City of Ottawa v. Barney*, 10 Kan. 270; *Gibbins v. Adamson*, 44 Kan. 203, 24 Pac. 51; *Wilson v. Longendyke*, 32 Kan. 267, 4 Pac. 361; *Parsons Natural Gas Co. v. Rockhold*, 79 Kan. 661, 100 Pac. 639; *McIntyre v. Williamson*, 8 Kan. App. 711, 54 Pac. 928.

**Kentucky.**—*Thompson v. City of Lexington*, 104 Ky. 165, 46 S. W. 481; *City of Covington v. Pullman Co.*, 121 Ky. 218, 89 S. W. 116.

**Michigan.**—*Albany & Boston Min. Co. v. Auditor-General*, 37 Mich. 391; *Merrill v. Humphrey*, 24 Mich. 170.

**Mississippi.**—*Lewis v. Village of Boguechitto*, 76 Miss. 356, 24 South. 875; *Mobile & O. R. R. Co. v. Moseley*, 52 Miss. 127.

**Montana.**—*Ward v. Board of Commissioners*, 12 Mont. 23, 29 Pac. 658; *Montana Ore Purchasing Co. v. Maher*, 32 Mont. 480, 81 Pac. 13.

**Nebraska.**—*Burlington & M. R. R. Co. v. Board of Commissioners of York County*, 7 Neb. 487.

**New Mexico.**—*Crane v. Cox*, 18 N. M. 377, 137 Pac. 589.

**North Carolina.**—*London v. City of Wilmington*, 78 N. C. 109.

**North Dakota.**—*Farrington v. New England Inv. Co.*, 1 N. D. 102, 45 N. W. 191; *Douglas v. City of Fargo*, 13 N. D. 467, 101 N. W. 919; *State Finance Co. v. Trimble*, 16 N. D. 199, 112 N. W. 984.

**Oklahoma.**—*Thurston v. Caldwell*, 40 Okl. 206, 137 Pac. 683.

**Oregon.**—*Dayton v. Multnomah County*, 34 Or. 239, 55 Pac. 23; *Alliance Trust Co. v. Multnomah County*, 38 Or. 433, 63 Pac. 498;

only conditionally voidable in equity, the condition being payment of the balance of the taxes.<sup>29</sup> It follows that equity will not grant relief to restrain a tax sale, cancel a tax certificate, or restrain the issuance of a tax deed, except upon terms that the taxes be first paid to which there are no objections, or which, in justice and equity, the property owner ought to pay.<sup>30</sup> Where a tax is attacked as being excessive,<sup>31</sup> or as discriminating against the plaintiff,<sup>32</sup> a tender is always a condition of relief. While the principle is plain, the application is not always easy.

§ 1785. (§ 362.) **Same—Application of the Rule.**—  
“The application of this rule is not confined to cases

*Goodnough v. Powell*, 23 Or. 525, 32 Pac. 396; *Welch v. Clatsop County*, 24 Or. 452, 33 Pac. 934.

*Washington.*—*Landes Estate Co. v. Clallam County*, 19 Wash. 569, 53 Pac. 670.

*West Virginia.*—*Siers v. Wiseman*, 58 W. Va. 340, 52 S. E. 460 (in suit to cancel tax deed, plaintiff must reimburse purchaser at tax sale to extent of all taxes and all costs and expenses properly incurred).

*Wisconsin.*—*Wells v. Western Pav. etc. Co.*, 96 Wis. 116, 70 N. W. 1071, and cases cited. The doctrine was supposed for a time to have been discredited: *Marsh v. Board of Supervisors of Clark County*, 42 Wis. 502. But the doctrine is now firmly established by the later cases.

<sup>29</sup> *Wells v. Western Paving etc. Co.*, 96 Wis. 116, 70 N. W. 1071; *Mills v. Johnson*, 17 Wis. 598, 603; *Bond v. City of Kenosha*, 17 Wis. 284, 286; *Hersey v. Board of Supervisors of Milwaukee County*, 16 Wis. 185, 186, 82 Am. Dec. 713.

<sup>30</sup> *Wells v. Western Paving etc. Co.*, 96 Wis. 116, 70 N. W. 1071; *Tifield v. Marinette County*, 62 Wis. 532, 537, 22 N. W. 705; *Worthen v. Badgett*, 32 Ark. 496 (injunction will not be granted against the issuance of a tax deed after a sale for excessive taxes, unless the amount really due is tendered or paid).

<sup>31</sup> *City of Ottawa v. Barney*, 10 Kan. 270; *Welch v. Clatsop County*, 24 Or. 452, 33 Pac. 934.

<sup>32</sup> *Bank of Garnett v. Ferris*, 55 Kan. 120, 39 Pac. 1042.

where the relief demanded is the enjoining of the *collection* of a tax, as distinguished from suits to obtain an injunction against the issuance of a deed, or a decree removing a cloud, or some other relief in regard to the proceedings taken to enforce collection. . . . The particular kind of equitable relief applied for is immaterial. Nor can the rule be limited to cases where it appears that only a part of the original tax is just. If the entire tax or charge should justly be paid, the complainant would have no standing at all in equity, and he is allowed relief in any case solely because he offers to pay all that is just.”<sup>33</sup> Thus, where the assessment is invalid because the property is improperly described, but is otherwise just, the plaintiff may have relief from penalties imposed only upon paying the full amount of the original tax.<sup>34</sup> “The moral obligation to pay the amount justly chargeable as taxes is as great where the defect arises from an imperfect description of property as where it is caused by a valuation fraudulently made excessive,<sup>35</sup> or by a higher levy than the board had power to make,<sup>36</sup> or by a levy improperly made, or a street assessment on an illegally enhanced value,<sup>37</sup> in each of which cases the rule here invoked was applied.”

§ 1786. (§ 363.) **Same—Tender—How Made.**—“The tender must be made to the officer authorized to collect the taxes. It must be actual and unconditional, and made in money or in evidence of indebtedness of the county which by law of the state is made a legal tender

<sup>33</sup> *Couts v. Cornell*, 147 Cal. 560, 109 Am. St. Rep. 168, 82 Pac. 194.

<sup>34</sup> *Couts v. Cornell*, 147 Cal. 560, 109 Am. St. Rep. 168, 82 Pac. 194; *Grant v. Cornell*, 147 Cal. 565, 109 Am. St. Rep. 173, 82 Pac. 193.

<sup>35</sup> *Pacific Postal Tel. Cable Co. v. Dalton*, 119 Cal. 604, 606, 51 Pac. 1072; *County of Los Angeles v. Ballerino*, 99 Cal. 593, 597, 32 Pac. 581, 34 Pac. 329.

<sup>36</sup> *Quint v. Hoffman*, 103 Cal. 506, 508, 37 Pac. 514.

<sup>37</sup> *Esterbrook v. O'Brien*, 98 Cal. 671, 674, 33 Pac. 765.



in the payment of the taxes.”<sup>38</sup> In some states it is held that if the tender is refused, it must be kept good by payment into court. The complaint should show both a tender and a deposit in court.<sup>39</sup> And it has been held that a plaintiff may, upon motion, after his tender has been refused, be granted leave to pay the amount into court.<sup>40</sup>

§ 1787. (§ 364.) **Same—Amount of Tender.**—Where the legal amount is uncertain, the plaintiff is not held to absolute exactness in making the payment or tender. Where a tender is made in good faith, under the belief that it is sufficient, the court will not dismiss the bill, but will compel the plaintiff to pay the additional amount before being entitled to an injunction.<sup>41</sup> In Washington, it is held that it is sufficient if the plaintiff makes a tender of the amount he avers is justly due, keeps it good, and offers to pay such further sum as should be found due.<sup>42</sup> A finding of a larger amount due, where plaintiff acts in good faith, affects only the matter of costs. Where a court without usurpation of the functions of the fiscal department can determine the amount

<sup>38</sup> Chicago, B. & Q. R. Co. v. Board of Comm’rs of Norton County, 67 Fed. 413, 14 C. C. A. 458.

<sup>39</sup> Bundy v. Summerland, 142 Ind. 92, 41 N. E. 322; Hewett v. Fenstamaker, 128 Ind. 315, 27 N. E. 621; City of Logansport v. Case, 124 Ind. 254, 24 N. E. 88 (enjoining execution of tax deed); Morrison v. Jacoby, 114 Ind. 84, 14 N. E. 546, 15 N. E. 806; Welch v. Astoria, 26 Or. 89, 37 Pac. 66.

<sup>40</sup> Richmond & D. R. Co. v. Blake, 49 Fed. 904.

<sup>41</sup> Chicago, B. & Q. R. Co. v. Board of Commissioners of Norton County, 67 Fed. 413, 14 C. C. A. 458. The plaintiff should, however, ask the court to determine the amount due and offer to pay that amount: George C. Bagley Elevator Co. v. Butler, 24 S. D. 429, 123 N. W. 866.

<sup>42</sup> Landes Estate Co. v. Clallam County, 19 Wash. 569, 53 Pac. 670.

due from a plaintiff in equity, it will fix that amount and decree its payment.<sup>43</sup>

§ 1788. (§ 365.) **Same—Time of Tender—Averment of Readiness and Willingness Insufficient.**—It is not sufficient that the bill merely aver a readiness and willingness to pay the part of the tax legally due.<sup>44</sup> The amount must be actually tendered or paid. The reasons

<sup>43</sup> *San Diego Realty Co. v. Cornell*, 150 Cal. 637, 89 Pac. 603. In this case the court held the assessment void because the property was not properly described, but decreed that plaintiff, as a condition of relief, should pay the amount of the original assessment without the penalties. It was objected that this was a judicial usurpation of a function of government; that it was an attempt by the court to impose taxes and to regulate their collection. The court said: "This difficulty is purely imaginary. Of course, if it had become necessary for the court, in determining the amount due from plaintiff, to value the property, to make an assessment, or to fix a rate, no court for a moment would undertake to perform these purely legislative duties. But in every case where a court without usurpation of the functions of the fiscal department can determine the amount due from a plaintiff in equity, it will fix that amount and decree its payment. Here there was no question of the court being called upon to exercise the machinery of the taxing power in levying taxes. All that had been done by proper authority. The amount of taxes, the value of the property, the tax rate, and the amount due had all been fixed. In effect, all that the court was required to decide was whether the penalties and impositions for delinquency were justly chargeable against the property where the assessment was void. It held, and properly held, that they were not, but decreed that the sum which the state had fixed as due for taxes should be paid before it would grant relief. Thus the court was not called upon to reassess or to make a new rate, but merely to adopt those already made, those which the taxing officers themselves would have had to readopt if a new assessment had been ordered under the law."

<sup>44</sup> *State Railroad Tax Cases*, 92 U. S. 575, 616, 23 L. Ed. 663, 674; *Chicago, B. & Q. R. Co. v. Board of Commissioners of Norton County*, 67 Fed. 413, 14 C. C. A. 458; *Huntington v. Palmer*, 7 Sawy. 355, 8 Fed. 449; *Welch v. Astoria*, 26 Or. 89, 37 Pac. 66. But see *Payne v. Anderson*, 80 Neb. 216, 114 N. W. 148.

are well stated by Mr. Justice Miller, of the supreme court of the United States, in a leading case.<sup>45</sup> "It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill, that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed." But in Florida, under a constitutional provision that "no person or corporation shall be relieved from the payment of any tax that may be illegal, or illegally or irregularly assessed, until he or it shall have paid such portion of his or its taxes as may be legal, and legally and regularly assessed," it is held that payment is not a prerequisite to beginning proceedings, "but that such payment must be made before the applicant is relieved from the illegal tax."<sup>46</sup>

§ 1789. (§ 366.) **Same—Tender Unnecessary When Tax Wholly Void.**—Where a tax or assessment is wholly void or illegal, no payment or tender is necessary.<sup>47</sup>

<sup>45</sup> State Railroad Tax Cases, 92 U. S. 575, 616, 23 L. Ed. 663, 674.

<sup>46</sup> Const. 1885, art. IX, § 8; Pickett v. Russell, 42 Fla. 116, 634, 28 South. 764.

<sup>47</sup> Fargo v. Hart, 193 U. S. 490, 48 L. Ed. 761, 24 Sup. Ct. 498; First Nat. Bank v. City of Covington, 103 Fed. 523; Albany City

This follows as a matter of course; for if the tax is wholly void, the plaintiff would have no means of ascertaining how much he should tender. Thus, in an action to restrain the issuance of a tax deed where an assessment was fraudulent and it was impossible for the plaintiff to determine, by computation or otherwise, what amount of taxes was justly chargeable against his lands, it was held

Nat. Bank v. Maher, 19 Blatchf. 175, 6 Fed. 417; 20 Blatchf. 341, 9 Fed. 884; Ritterbusch v. Atchison, T. & S. F. R'y Co., 198 Fed. 46, 117 C. C. A. 154; Barnes v. Bee, 138 Fed. 476; Dumars v. City of Denver, 16 Colo. App. 375, 65 Pac. 580; Clay v. Wrought Iron Range Co., 42 Ind. App. 145, 85 N. E. 119; First Nat. Bank v. Fisher, 45 Kan. 726, 26 Pac. 482; Sioux City Bridge Co. v. Dakota County, 61 Neb. 75, 84 N. W. 607; Hassan v. City of Rochester, 67 N. Y. 528; State Finance Co. v. Trimble, 16 N. D. 199, 112 N. W. 984; Lewiston Water & Power Co. v. Asotin Co., 24 Wash. 371, 64 Pac. 544.

The rule is well stated by Mr. Justice Harlan in *Village of Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. 187: "The present case is not one in which, as in most of the cases brought to enjoin the collection of taxes or the enforcement of special assessments, it can be plainly or clearly seen from the showing made by the pleadings that a particular amount, if no more, is due from the plaintiff, and which amount should be paid or tendered before equity would interfere. It is, rather, a case in which the entire assessment is illegal. In such a case it was not necessary to tender, as a condition of relief being granted to the plaintiff, any sum, as representing what she supposed, or might guess, or was willing to concede was the excess of cost over any benefits accruing to the property. She was entitled, without making such a tender, to ask a court of equity to enjoin the enforcement of a rule of assessment that infringed upon her constitutional rights."

In *Ritterbusch v. Atchison, T. & S. F. R. Co.*, 198 Fed. 46, 117 C. C. A. 154, it is held that no tender is necessary where the entire tax is void, or a substantial amount is inequitable and it is impossible to determine how much is valid.

Where a federal court has enjoined the collection of a tax on the ground that it violates a contract, and the state attempts to levy a similar tax the next year, an injunction may issue without tender: *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 50 L. Ed. 477, 26 Sup. Ct. 252.



that an allegation of payment or tender was unnecessary; and further, that there was no good reason for requiring an averment of willingness to pay, as that would be an allegation of mere mental condition, of no benefit to the defendant, and incapable of disproof.<sup>48</sup> And it has been held that no tender is necessary where two lots are assessed together as the property of a person who did not own and never had owned one of them;<sup>49</sup> nor where county officers have declared in advance that they will not accept less than the full amount.<sup>50</sup> In the federal courts it has been held that the rule holds although a state statute requires that the amount of the tax must be deposited before suit.<sup>51</sup> A tender is probably unnecessary after a sale, when the purchaser is a party who was in duty bound to pay the tax.<sup>52</sup> Where the complaint is not to enjoin the collection of taxes, part of which are legal and part illegal, but to set aside a particular order alleged to be void, whereby a specific sum was illegally added to the assessed value of the plaintiff's property, the averment of payment or tender of payment of the legal taxes need not be made;<sup>53</sup> so, where plaintiff seeks to prevent the levy of an assessment upon property not subject to taxation.<sup>54</sup>

§ 1790. (§ 367.) **Injunction Granted Only at Suit of Tax-payer.**—An injunction against the collection of a tax will be granted only at the suit of a tax-payer. The same degree of interest is requisite as in all other cases where the extraordinary aid of equity is invoked. Thus, the collection of a school tax cannot be enjoined at the

<sup>48</sup> *Anderson v. Douglas County*, 98 Wis. 393, 74 N. W. 109.

<sup>49</sup> *Crane v. City of Janesville*, 20 Wis. 305.

<sup>50</sup> *First National Bank v. Hungate*, 62 Fed. 548.

<sup>51</sup> *Northern Pac. R. R. Co. v. Kurtzman*, 82 Fed. 241.

<sup>52</sup> *Allen (Murray) v. Evans*, 7 Ariz. 359, 64 Pac. 412.

<sup>53</sup> *Yocum v. First Nat. Bank*, 144 Ind. 272, 43 N. E. 231.

<sup>54</sup> *Hyland v. Brazil Block Coal Co.*, 128 Ind. 335, 26 N. E. 672.

suit of a board of education, because the board, as such, is not a tax-payer.<sup>55</sup> Nor at the suit of a municipal corporation suing in the interests of its tax-payers;<sup>56</sup> nor at the suit of the state.<sup>57</sup> Relief has been refused to creditors of the tax-payer.<sup>58</sup> This principle does not prevent the maintenance of a tax-payer's suit in a proper case to prevent an act of the assessing officer which will result in an increased tax to the tax-payers of the county.<sup>59</sup>

§ 1791. (§ 368.) **Plaintiff must Show Injury.**—Equity will not interfere to enjoin the collection of a tax unless the plaintiff shows a threatened injury to himself. Thus, in order to obtain an injunction to restrain a sale for taxes, the plaintiff must show that he is the owner of the land about to be sold. When there is grave doubt as to the ownership, the injunction will be refused.<sup>60</sup> But it is not necessary that it be shown that he was the owner when the tax was levied. It is sufficient if he is the owner at the time the suit is filed.<sup>61</sup> Equity will not give relief where plaintiff is not prejudiced in a substantial

<sup>55</sup> *Board of Education v. Guy*, 64 Ohio St. 434, 60 N. E. 573.

<sup>56</sup> *Town of Donaldsonville v. Police Jury*, 113 La. 16, 36 South. 873. Although a city and a tax commissioner have been permitted to restrain an assessor from making an illegal cut in an assessment: *City and County of Denver v. Pitcher*, 54 Colo. 203, 129 Pac. 1015.

<sup>57</sup> *State v. Shufford*, 77 Kan. 263, 94 Pac. 137.

<sup>58</sup> *Carpenter v. Jones County*, 130 Iowa, 494, 107 N. W. 435. In this case the tax-payer made a false return, greatly overvaluing his property, for the purpose of concealing his true financial condition. Creditors sought to limit the tax by injunction proceedings, but relief was denied.

<sup>59</sup> *Schley v. Lee*, 106 Md. 390, 67 Atl. 252; *Schley v. Montgomery County Comm'rs*, 106 Md. 407, 67 Atl. 250.

<sup>60</sup> *Broderick v. Allamakee County*, 104 Iowa, 750, 73 N. W. 884. Thus, a mortgagor, after foreclosure, has been denied the right to enjoin an illegal tax: *Sholes v. City of Omaha*, 78 Neb. 576, 111 N. W. 364.

<sup>61</sup> *Clearwater Timber Co. v. Shoshone County*, 155 Fed. 612.

right.<sup>62</sup> Thus, a complaint which alleges that a board of equalization has raised assessments after it has lost jurisdiction does not state a cause of action unless it shows that plaintiff's assessment has been raised, or that other assessments have been lowered, so as to increase plaintiff's proportionate liability.<sup>63</sup> The act sought to be enjoined must actually and proximately threaten injury. Thus, an injunction will not issue to prevent the holding of an election to vote a tax.<sup>64</sup>

§ 1792. (§ 369.) **Plaintiff must Come into Equity With Clean Hands.**—The plaintiff seeking the aid of a court of equity must come with clean hands; therefore an injunction will be refused to one who, for the purpose of evading taxation upon certain securities at the place of his residence, has made a pretended transfer thereof by an instrument in writing, but retains the full and actual control of the property.<sup>65</sup> An injunction will not issue to prevent the levy of a tax in violation of a contractual exemption where the plaintiff has not kept his part of the contract by giving an indemnity bond.<sup>66</sup> The mere fact that a party, complaining of an assessment of personal property at a rate greater than that at which realty has been assessed, is also the owner of realty which has obtained the lower assessment does not, however, deprive

<sup>62</sup> *Miller v. Vollmer*, 153 Ind. 26, 53 N. E. 949.

<sup>63</sup> *Lahman v. Hatch*, 124 Cal. 1, 56 Pac. 621. Section 71 of the act providing for irrigation districts (Stats. 1897, p. 534) provides: "The court hearing any of the contests herein provided for, in inquiring into the regularity, legality or correctness of such proceedings, must disregard any error, irregularity or omission which does not affect the substantial rights of the parties to such action or proceeding."

<sup>64</sup> *Roudanez v. Mayor etc. of New Orleans*, 29 La. Ann. 271.

<sup>65</sup> *Sisler v. Foster* (Ohio), 74 N. E. 639.

<sup>66</sup> *Havre de Grace Real Estate & P. Co. v. City of Havre de Grace*, 102 Md. 33, 61 Atl. 662.

him of his right to relief.<sup>67</sup> In Oklahoma, a plaintiff, to be entitled to relief, must allege that he has returned the property to the assessor at its full cash value.<sup>68</sup>

§ 1793. (§ 370.) **Laches.**—It is held in some jurisdictions that the right to enjoin a tax may be lost by laches.<sup>69</sup> In Nebraska, a suit to restrain the collection of a tax need not be brought within any fixed time. Therefore the question as to whether the right to relief is barred by laches depends upon the facts in each particular case.<sup>70</sup> Mere delay does not amount to laches, especially where the record fails to show that the plaintiff had notice of the levy.<sup>71</sup>

§ 1794. (§ 371.) **Burden of Proof.**—In actions to restrain the collection of taxes, the burden is upon the plaintiff to allege and prove the invalidity.<sup>72</sup>

§ 1795. (§ 372.) **Adequacy of the Legal Remedy—Taxes on Personal Property.**—The inadequacy of the legal remedy is a fundamental ground of jurisdiction. In tax cases this test is frequently applied to assessments upon personal property. Ordinarily, in states of the first class, it is held that there is an adequate remedy at law for injuries to personalty. If the officers of the law seize it for non-payment of an invalid tax, they are liable in trover or trespass, and damages are presumed

<sup>67</sup> *Citizens' Nat. Bank v. Board of Comm'rs of Lyon County*, 83 Kan. 376, 111 Pac. 496.

<sup>68</sup> *Williams v. Garfield Exchange Bank of Enid*, 38 Okl. 539, 134 Pac. 863.

<sup>69</sup> *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124; *Vickery v. Board of Comm'rs (Blair)*, 134 Ind. 554, 32 N. E. 880; *Montgomery v. Wasem*, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184.

<sup>70</sup> *Richards v. Hatfield*, 40 Neb. 879, 59 N. W. 777.

<sup>71</sup> *Casey v. Burt County*, 59 Neb. 624, 81 N. W. 851.

<sup>72</sup> *Webster v. City of Lincoln*, 50 Neb. 1, 69 N. W. 394; *Parrotte v. City of Omaha*, 61 Neb. 96, 84 N. W. 602.



to fully compensate for any loss. Consequently it is stated that in general an injunction will not issue to prevent the collection of an invalid tax on personal property.<sup>73</sup> In some jurisdictions it is held that the plaintiff

<sup>73</sup> **Federal Courts.**—*Linehan R'y Transfer Co. v. Pendergrass*, 70 Fed. 1, 16 C. C. A. 585; *Nye, Jenks & Co. v. Town of Washburn*, 125 Fed. 817; *Shelton v. Platt*, 139 U. S. 591, 596, 35 L. Ed. 273, 276, 11 Sup. Ct. 646; *Union Pac. R. Co. v. Lincoln Co.*, 2 Dill. 279, Fed. Cas. No. 14,379; *City of Milwaukee v. Koeffler*, 116 U. S. 219, 29 L. Ed. 612, 6 Sup. Ct. 372.

**California.**—*Ritter v. Patch*, 12 Cal. 298.

**Colorado.**—*Insurance Co. of North America v. Bonner*, 24 Colo. 220, 49 Pac. 366; *Id.*, 7 Colo. App. 97, 42 Pac. 681.

**Florida.**—*Odlin v. Woodruff*, 31 Fla. 160, 22 L. R. A. 699, 12 South. 227; *City of Jacksonville v. Massey Business College*, 47 Fla. 339, 36 South. 432; *Florida Packing & Ice Co. v. Carney*, 49 Fla. 293, 111 Am. St. Rep. 95, 38 South. 602; *Metcalf Co. v. Martin*, 54 Fla. 531, 127 Am. St. Rep. 149, 45 South. 463 (allegation that sale of bar fixtures will necessitate replacement at great cost, will cause delay, and will ruin business, not sufficient to warrant injunction, as all may be compensated in damages).

**Michigan.**—*Henry v. Gregory*, 29 Mich. 68; *Youngblood v. Sexton*, 32 Mich. 406, 408, 20 Am. Rep. 654.

**Minnesota.**—*Clarke v. Ganz*, 21 Minn. 387; *Laird, Norton Co. v. Pine County*, 72 Minn. 409, 75 N. W. 723; *Bradish v. Lucken*, 38 Minn. 186, 36 N. W. 454.

**Nevada.**—*Conley v. Chedie*, 6 Nev. 222, 223.

**North Carolina.**—*Hall v. City of Fayetteville*, 115 N. C. 281, 20 S. E. 373.

**North Dakota.**—*Schaffner v. Young*, 10 N. D. 245, 86 N. W. 733; *Minneapolis, St. P. & S. S. M. R. Co. v. Diekey County*, 11 N. D. 107, 90 N. W. 260.

**West Virginia.**—*White v. Stender*, 24 W. Va. 615, 49 Am. Rep. 283.

**Wisconsin.**—*Van Cott v. Board of Supervisors of Milwaukee County*, 18 Wis. 247, 259; *A. H. Stange Co. v. City of Merrill*, 134 Wis. 514, 115 N. W. 115; *Duluth Log Co. v. Town of Hawthorne*, 139 Wis. 170, 120 N. W. 864; *Lewis v. Town of Eagle*, 135 Wis. 141, 115 N. W. 361.

should pay the tax and then sue to recover it back.<sup>74</sup> The mere fact that the property may be used in interstate commerce does not give jurisdiction to a federal court to enjoin such a tax;<sup>75</sup> nor does the fact that the property is in a warehouse in transit from one state to another;<sup>76</sup> nor the fact that the complainant is a non-resident and the tax is therefore absolutely illegal.<sup>77</sup>

§ 1796. (§ 373.) **Same — Exceptions Where Injunctions Have Been Allowed.**—Where, however, the collection of an illegal tax on personal property involves a threat of irreparable injury and inconvenience to the public, an injunction may issue. Thus, where the business and traffic of a railroad company will be stopped by a seizure of its cars, an injunction is proper.<sup>78</sup> Where the business of the owner will be seriously interfered with or ruined by enforcement of the tax, equity may enjoin its collection; and such relief is authorized where the destruction of a corporate franchise is imminent.<sup>79</sup> It is frequently said that relief will only be granted when the personal property is of such peculiar value to the

<sup>74</sup> *Linehan R'y Transfer Co. v. Pendergrass*, 70 Fed. 1, 16 C. C. A. 585; *Nye, Jenks & Co. v. Town of Washburn*, 125 Fed. 817; *Shelton v. Platt*, 139 U. S. 591, 596, 35 L. Ed. 273, 276, 11 Sup. Ct. 646 (under Tennessee statute).

<sup>75</sup> *Linehan R'y Transfer Co. v. Pendergrass*, 70 Fed. 1, 16 C. C. A. 585; *Shelton v. Platt*, 139 U. S. 591, 596, 35 L. Ed. 273, 276, 11 Sup. Ct. 646.

<sup>76</sup> *Nye, Jenks & Co. v. Town of Washburn*, 125 Fed. 817.

<sup>77</sup> *City of Milwaukee v. Koeffler*, 116 U. S. 219, 29 L. Ed. 612, 6 Sup. Ct. 372.

<sup>78</sup> *Southern R'y Co. v. City of Asheville*, 69 Fed. 359; *Detroit v. Wayne Circuit Judge*, 127 Mich. 604, 8 Detroit Leg. N. 465, 86 N. W. 1032.

<sup>79</sup> *Stone v. Bank of Kentucky*, 174 U. S. 799, 43 L. Ed. 1187, 19 Sup. Ct. 881; *First Nat. Bank v. City of Covington*, 103 Fed. 523. But see *Metcalf Co. v. Martin*, 54 Fla. 531, 127 Am. St. Rep. 149, 45 South. 463.

owner that the loss cannot be compensated adequately in damages.<sup>80</sup> It is intimated in some cases that an injunction may issue where the remedy at law will be practically valueless, as where the collector is insolvent, or where a multiplicity of suits will be necessary.<sup>81</sup> In Minnesota, however, the mere fact that there are numerous tax-payers in the same position as the plaintiff does not give jurisdiction on the ground of multiplicity of suits, at least in the absence of any claim that the suit was brought in pursuance of a common understanding, and by the authority of such tax-payers.<sup>82</sup> In some jurisdictions no recovery of invalid taxes paid is allowed unless payment is made under duress. Where such a statute, in connection with another imposing a heavy penalty for non-payment, threatens injury to one upon whom an invalid tax has been assessed, injunctive relief has been allowed.<sup>83</sup> In West Virginia a broader rule is laid down when purely municipal taxation is in question. Thus, it has been held that if municipal authorities tax persons or property not legally taxable, or if they exceed the limit prescribed by the statute conferring their power to tax, their action is *ultra vires* and void, and equity has power to grant relief.<sup>84</sup>

<sup>80</sup> *Osborn v. Bank of the United States*, 9 Wheat. 738, 6 L. Ed. 204.

<sup>81</sup> *Detroit v. Wayne Circuit Judge*, 127 Mich. 604, 8 Detroit Leg. N. 465, 86 N. W. 1032; *Clarke v. Ganz*, 21 Minn. 387. Compare *Ritter v. Patch*, 12 Cal. 298. See, also, *Florida Packing & Ice Co. v. Carney*, 49 Fla. 293, 111 Am. St. Rep. 95, 38 South. 602 (*dictum*).

<sup>82</sup> *Bradish v. Lucken*, 38 Minn. 186, 36 N. W. 454.

<sup>83</sup> *Bank of Kentucky v. Stone*, 88 Fed. 383; affirmed *Stone v. Bank of Kentucky*, 174 U. S. 799, 43 L. Ed. 1187, 19 Sup. Ct. 881; *First Nat. Bank v. City of Covington*, 103 Fed. 523. Compare *Lykins v. Chesapeake & O. R'y Co.*, 209 Fed. 573, 126 C. C. A. 395.

<sup>84</sup> *Christie v. Melden*, 23 W. Va. 667. In this case the court said: "In the case before us the tax complained of is made collectible by monthly installments; and while the plaintiff might have a remedy at law for each illegal collection, his remedy would be much more

§ 1797. (§ 374.) **Same—In States of the Second Class.**—In states of the second class, where illegality of various degrees is ground for relief, an injunction is frequently granted to restrain the collection of taxes on personal property, notwithstanding the legal remedy. In Illinois, the injunction may be granted notwithstanding the existence of the legal remedy to recover back the amount of the tax paid, and notwithstanding that the proceedings for collection of the tax may constitute only a case of ordinary trespass.<sup>85</sup> Thus, an injunction may be granted where the assessor assesses personal property against one who was not the owner of the same, and had no possession or control over the same, and no interest therein, and the boards of review refuse to give relief.<sup>86</sup> In Kentucky, the injunction will issue where the tax is illegal and void.<sup>87</sup> The argument is that the “officer, acting in good faith and under the color of right, is justified by his process, and is not liable as a trespasser; and, as suit would not lie against the state directly, the only complete remedy is by injunction.”<sup>88</sup> In Nebraska, the remedy is not confined to cases of void taxation of real property, but will be granted equally to restrain the collection of a void tax on personal property.<sup>89</sup> The reason for this rule is that taxes on any effectual and perfect in equity; and as the acts of the town would be in their nature continuing and to be renewed each successive month, to restrict the plaintiff to his legal remedies would be to consign him to interminable litigation and involve a multiplicity of actions.”

<sup>85</sup> *Searing v. Heavysides*, 106 Ill. 85. But if a court of concurrent jurisdiction is first appealed to, equity will not interfere: *St. Louis Merchants' Bridge Co. v. Eisele*, 263 Ill. 50, 104 N. E. 1013.

<sup>86</sup> *Searing v. Heavysides*, 106 Ill. 85.

<sup>87</sup> *Gates v. Barrett*, 79 Ky. 295; *City of Lancaster v. Pope*, 156 Ky. 1, *Ann. Cas.* 1915C, 752, 160 S. W. 509.

<sup>88</sup> *Gates v. Barrett*, 79 Ky. 295; *Negley v. Henderson Bridge Co.*, 107 Ky. 414, 54 S. W. 171.

<sup>89</sup> *Rothwell v. Knox County*, 62 Neb. 50, 86 N. W. 903; *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369, 70 N. W. 955.



specific personal property are a lien on all of the owner's personalty. Hence, the court argues, there is just as much reason for an injunction in this case as in the case of realty. "It would be a vain thing for the law to require a tax to be paid, the payment of which would immediately give rise to an action for its recovery."<sup>90</sup>

§ 1798. (§ 375.) **Same—Same—Continued.**—In South Dakota, an injunction will be granted to enjoin the collection of an illegal tax on personal property, regular on its face, which is made a lien on land, especially when there is a possibility of a multiplicity of actions.<sup>91</sup> Thus, a public sale to numerous purchasers of shares in a corporation for illegal personal taxes, constituting a lien on real property, suggests a multitude of suits and irreparable injury, to avoid which the aid of a court of equity may be invoked.<sup>92</sup> But the courts, in at least one instance, have gone further, and have held that an injunction will issue to restrain the sale of personal property for an illegal tax, irrespective of whether it constitutes a lien on land or not. Thus, an injunction will issue to prevent the seizure and sale of personal property in satisfaction of a tax wrongfully and unlawfully levied thereon, in a county in which the plaintiff is not a resident, and in which the property is presumed not to have been when the assessment was made.<sup>93</sup> In Washington, where the tax is illegal, it is immaterial whether the subject-matter is real or personal property. Thus, an injunction will issue to restrain the sale of personal property under a tax beyond the jurisdiction of the assessor to assess;<sup>94</sup> and to restrain the sale of corporate

<sup>90</sup> Rothwell v. Knox County, 62 Neb. 50, 86 N. W. 903.

<sup>91</sup> Macomb v. Lake County, 9 S. D. 466, 70 N. W. 652.

<sup>92</sup> Id.

<sup>93</sup> Knapp v. Charles Mix County, 7 S. D. 399, 64 N. W. 187.

<sup>94</sup> Northwestern Lumber Co. v. Chehalis County, 24 Wash. 626, 64 Pac. 787.

stock to satisfy an illegal assessment.<sup>95</sup> And in case of personal property, at least, it will issue to restrain an illegal sale, even though the original tax was valid. Thus, where personal property is purchased in good faith by a person who has no notice of any lien upon it for taxes, such person may enjoin a sale to satisfy such lien.<sup>96</sup> In Montana, the relief is freely granted.<sup>97</sup> But in Mississippi, apart from a limited statutory authorization, an injunction will not ordinarily issue to restrain the collection of a tax on personal property, because in such a case there is a complete and adequate remedy at law.<sup>98</sup> And the mere fact that there are a great many tax-payers similarly situated, will not give the court jurisdiction.<sup>99</sup> But the insolvency of the tax collector renders the legal remedy inadequate, within the meaning of the rule.<sup>100</sup>

§ 1799. (§ 376.) **Same—Rule in New York.**—In New York, where an assessment is excessive or illegal, there is ordinarily an adequate remedy at law, and hence injunctive relief will be refused. Thus, a national bank cannot enjoin the collection of a tax on the ground that its property is assessed at a higher rate than other property within the state, in violation of the federal statute, for an ample remedy is provided by the state statute.<sup>101</sup> And a remainder-man, for the same reason, cannot enjoin a sale for taxes left unpaid by the life tenant.<sup>102</sup>

<sup>95</sup> *Lewiston Water & Power Co. v. Asotin County*, 24 Wash. 371, 64 Pac. 544.

<sup>96</sup> *Phelan v. Smith*, 22 Wash. 397, 61 Pac. 31.

<sup>97</sup> *Walsh v. Croft*, 27 Mont. 407, 71 Pac. 409.

<sup>98</sup> *Coulson v. Harris*, 43 Miss. 728.

<sup>99</sup> *Id.*

<sup>100</sup> *Richardson v. Scott*, 47 Miss. 236.

<sup>101</sup> *Mercantile Nat. Bank v. City of New York*, 27 Misc. Rep. 32, 57 N. Y. Supp. 254.

<sup>102</sup> *Sage v. City of Gloversville*, 43 App. Div. 245, 60 N. Y. Supp. 791.

§ 1800. (§ 377.) **Remedy by Appeal to Board of Equalization.**—In many of the states, boards of equalization exist, with jurisdiction to correct excessive assessments and various other defects. It is quite generally held that an appeal to such a board is an adequate remedy for defects which such a board can correct.<sup>103</sup>

<sup>103</sup> **California.**—Merrill v. Gorham, 6 Cal. 41.

**Colorado.**—American Refrigerator Transit Co. v. Adams, 28 Colo. 119, 63 Pac. 410.

**Illinois.**—Earl v. Raymond, 188 Ill. 15, 59 N. E. 19; American Express Co. v. Raymond, 189 Ill. 232, 59 N. E. 528; Sterling Gas Co. v. Higby, 134 Ill. 557, 25 N. E. 660; Cummins v. Webber, 218 Ill. 521, 75 N. E. 1041.

**Indiana.**—Cleveland, C. C. & St. L. R. R. Co. v. Baekus, 133 Ind. 513, 18 L. R. A. 729, 33 N. E. 421.

**Iowa.**—Collins v. City of Keokuk, 118 Iowa, 30, 91 N. W. 791. See, also, Bogaard v. Independent District, 93 Iowa, 269, 61 N. W. 859; Reed v. City of Cedar Rapids, 138 Iowa, 366, 116 N. W. 140; Corey v. City of Fort Dodge, 133 Iowa, 666, 111 N. W. 6.

**Kentucky.**—Ryan v. City of Louisville, 133 Ky. 714, 118 S. W. 992.

**Louisiana.**—Gaither v. Green, 40 La. Ann. 362, 4 South. 210; Kansas City, S. & G. R. Co. v. Davis, 50 La. Ann. 1054, 23 South. 946.

**Maryland.**—Baldwin v. Commissioners of Washington Co., 85 Md. 145, 36 Atl. 764; O'Neal v. Virginia & Md. Bridge Co., 18 Md. 1, 79 Am. Dec. 669; Methodist Protestant Church v. City of Baltimore, 6 Gill (Md.), 391, 48 Am. Dec. 540.

**Michigan.**—McDonald v. City of Escanaba, 62 Mich. 555, 29 N. W. 93.

**Missouri.**—National Bank of Unionville v. Staats, 155 Mo. 55, 55 S. W. 626; Meyer v. Rosenblatt, 78 Mo. 495; Dedue v. Todd, 22 Mo. 90.

**Montana.**—Cobban v. Hinds, 23 Mont. 338, 59 Pac. 1; Deloughrey v. Hinds, 23 Mont. 260, 58 Pac. 709; First Nat. Bank v. Bailey, 15 Mont. 301, 39 Pac. 83; Northern Pac. R. R. Co. v. Patterson, 10 Mont. 90, 93, 24 Pac. 704; Ward v. Board of Commissioners, 12 Mont. 23, 29 Pac. 658.

**Oklahoma.**—Williams v. Garfield Exchange Bank of Enid, 38 Okl. 539, 134 Pac. 863.

Perhaps the most frequent form of relief given by such boards is from excessive assessments.<sup>104</sup> As to the remedy when the board of equalization fails to grant proper relief, the authorities are not uniform.

In Illinois it is said that the complainant should first seek a hearing from the board of review. If that board refuses a hearing, or fails to consider the objections, *mandamus* to compel it to perform its duty in that respect will lie, is an adequate remedy, and should be resorted to.<sup>105</sup> "The valuation is not [like an assessment of exempt property] an act without jurisdiction or

**Oregon.**—West Portland Park Ass'n v. Kelly, 29 Or. 412, 45 Pac. 901.

**South Dakota.**—George C. Bagley Elevator Co. v. Butler, 24 S. D. 429, 123 N. W. 866.

**Texas.**—Duck v. Peeler, 74 Tex. 268, 272, 11 S. W. 1111.

**Vermont.**—Phillips v. Bancroft, 75 Vt. 357, 56 Atl. 9.

**Washington.**—Andrews v. King County, 1 Wash. 46, 22 Am. St. Rep. 136, 23 Pac. 409.

**West Virginia.**—West Virginia National Bank v. Spencer, 71 W. Va. 678, 77 S. E. 269; Island Creek Fuel Co. v. Harshbarger, 73 W. Va. 397, 80 S. E. 504.

**Wyoming.**—Ricketts v. Crewdson, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1.

<sup>104</sup> In Wyoming, such errors as assessment of land in the wrong district, or mistakes in description or levy *en masse* on separate parcels, are not ground for injunction, when the owner makes no effort to have them corrected by the board of equalization: Ricketts v. Crewdson, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1.

<sup>105</sup> Standard Oil Co. v. Magee, 191 Ill. 84, 60 N. E. 802, and cases cited; Coxe Bros. v. Salomon, 188 Ill. 571, 59 N. E. 422 (postponement of hearing by board until too late for *mandamus*, not a ground for injunction afterwards); White v. Raymond, 188 Ill. 298, 58 N. E. 976, and cases cited; Kinley Mfg. Co. v. Kochersperger, 174 Ill. 379, 51 N. E. 648; New Haven Clock Co. v. Kochersperger, 175 Ill. 383, 51 N. E. 629 (an important case); Kochersperger v. Larned, 172 Ill. 86, 49 N. E. 988; Beidler v. Kochersperger, 171 Ill. 563, 49 N. E. 716; Camp v. Simpson, 118 Ill. 224, 8 N. E. 308; Felsenthal v. Johnson, 104 Ill. 21.



authority, and, if it is excessive, the law intends that application shall be made to the board. . . . Fraud is a familiar ground of equity jurisdiction, and, if an assessment is fraudulent, equity should relieve against it, where the tax-payer has been diligent in seeking the remedy which the statute affords. In matters of revenue it is important that all questions should be speedily settled, and the tax-payer should first seek the remedy given by the statute, which it is presumed will be sufficient. If he fails to do so, it is his own neglect or folly."<sup>106</sup>

When the board of review have jurisdiction of the person and of the subject-matter, the court has no power to restrain the collection of the tax, in the absence of fraud either in the procedure of the board or in the conclusion reached by them.<sup>107</sup> Fraudulent conduct on the part of the assessor is purged by the hearing, review, and action of the board of review, if the latter is not charged with having itself been guilty of fraud.<sup>108</sup>

In New Hampshire, an application for abatement is the proper remedy, not only when the assessment is made upon an overvaluation, but also when the whole assessment is illegal. There being this adequate remedy at law, an injunction will not ordinarily be granted to restrain the collection of a tax.<sup>109</sup>

§ 1801. (§ 378.) **Same—Applies Only to Defects Remediable by Such Board.**—The requirement of appeal to the board of equalization applies ordinarily only to defects which can be remedied by that board. In cases

<sup>106</sup> *New Haven Clock Co. v. Kochersperger*, 175 Ill. 383, 51 N. E. 629.

<sup>107</sup> *Earl v. Raymond*, 188 Ill. 15, 59 N. E. 19; *American Express Co. v. Raymond*, 189 Ill. 232, 59 N. E. 528; *Sterling Gas Co. v. Higby*, 134 Ill. 557, 25 N. E. 660.

<sup>108</sup> *Burton Stock-car Co. v. Traeger*, 187 Ill. 9, 58 N. E. 418, and cases cited.

<sup>109</sup> *Rockingham Ten Cent Savings Bank v. Portsmouth*, 52 N. H. 17; *Brown v. Concord*, 56 N. H. 375.

where the whole tax is illegal, it is not necessary to apply to the board of equalization.<sup>110</sup> The function of that board is to correct errors in the valuation of property which has been assessed in legal form. It has no power, in general, to add to the rolls property not previously assessed, nor to take from them property which they embrace. Hence such an appeal would be useless.

§ 1802. (§ 379.) **Same—When Equity may Enjoin.—**

It is frequently stated that the complainant must show that he has applied to the board of equalization for relief.<sup>111</sup> If he has allowed his time to elapse, or for any reason has failed to make his appeal, equity will not relieve. It is also frequently stated that equity will relieve when the board of equalization acts fraudulently.<sup>112</sup> Thus, where the assessor and the board of equalization fraudulently combine to put an excessive valuation on the plaintiff's property, he may obtain relief in equity.<sup>113</sup>

<sup>110</sup> *Court v. O'Connor*, 65 Tex. 334, 339; *Davis v. Burnett*, 77 Tex. 3, 13 S. W. 613; *City of Baltimore v. Robert Poole & Son Co.*, 97 Md. 67, 54 Atl. 681; *Mt. Sterling Oil & Gas Co. v. Ratliff*, 127 Ky. 1, 104 S. W. 993.

<sup>111</sup> *American Refrigerator Transit Co. v. Adams*, 28 Colo. 119, 63 Pac. 410; *Liquidating Commissioners of N. O. Warehouse Co. v. Marrero*, 106 La. 130, 30 South. 305; *Baldwin v. Commissioners of Washington Co.*, 85 Md. 145, 36 Atl. 764; *O'Neal v. Virginia & Md. Bridge Co.*, 18 Md. 1, 79 Am. Dec. 669; *Methodist Protestant Church v. City of Baltimore*, 6 Gill (Md.), 391, 48 Am. Dec. 540; *West Portland Park Ass'n v. Kelly*, 29 Or. 412, 45 Pac. 901. No trifling excuse, such as illness of a corporation's agent, will excuse such appeal: *Clawson Lumber Co. v. Jones*, 20 Tex. Civ. App. 208, 49 S. W. 909.

<sup>112</sup> *United Globe Mines v. Gila County*, 12 Ariz. 217, 100 Pac. 774; *Cleveland, C. C. & St. L. R. R. Co. v. Backus*, 133 Ind. 513, 18 L. R. A. 729, 33 N. E. 421; *Johnson v. Holland*, 17 Tex. Civ. 210, 43 S. W. 71; *Ricketts v. Crewdson*, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1.

<sup>113</sup> *Oregon & C. R. Co. v. Jackson County*, 38 Or. 589, 64 Pac. 307, 65 Pac. 369.

In Washington, while the court will not interfere "to correct mere mistakes or inadvertences, or to contravene or set aside the judgments of assessors or boards of equalization in relation to values, it will interfere when the officers fraudulently, capriciously, or tyrannically refuse to exercise their judgment by adopting a rule or system of valuation designed to operate unequally and to violate a fundamental principle of the constitution."<sup>114</sup> Thus, where the assessment of real property is arbitrary and made without regard to the true value, as where a mortgage is assessed at thirty thousand dollars while the land itself is assessed at only two thousand, an injunction will issue, although the board of equalization refuses relief.<sup>115</sup> And the injunction will issue notwithstanding that a statutory remedy is provided by allowing objections to the rendition of a judgment, for the plaintiff is entitled to such relief in order to remove the cloud from his title.<sup>116</sup> In cases of personal property the rule is said to be not quite so broad. Thus, in such cases, it has been held that no injunction will issue when the sole question is whether or not the board of equalization acted under an honest belief in placing a value on the property.<sup>117</sup> An injunction may be granted where the taxpayer, relying upon a statement by the assessor that the assessment will be the same as in the previous year, fails to go before the board of equalization to protest against an increase.<sup>118</sup>

§ 1803. (§ 380.) **Same—Relief Where Assessments are Raised.**—Boards of equalization are frequently au-

<sup>114</sup> *Andrews v. King County*, 1 Wash. 46, 22 Am. St. Rep. 136, 23 Pac. 409.

<sup>115</sup> *Knapp v. King County*, 17 Wash. 567, 50 Pac. 480.

<sup>116</sup> *Benn v. Chehalis County*, 11 Wash. 134, 39 Pac. 365.

<sup>117</sup> *Olympia Water Works v. Gelbach*, 16 Wash. 482, 48 Pac. 251.

<sup>118</sup> *Landes Estate Co. v. Clallam County*, 19 Wash. 569, 53 Pac. 670.

thorized not only to lower assessments but to increase them. Thus, an injunction may issue to restrain the collection of an increase made by a county board without authority.<sup>119</sup> In Nebraska, where a board of equalization fraudulently and without notice raises an assessment, equitable relief is proper, especially where it is necessary to prevent a cloud on title.<sup>120</sup> In Texas, where the board errs in honest judgment, there is no appeal from its decision, and no injunction will issue; but when, in raising or fixing the value of property, it acts from corrupt or fraudulent motives, and in violation of the laws of the state, whether constitutional or statutory, its acts are voidable at the suit of the party aggrieved, and an injunction will issue to restrain the collection of the excess.<sup>121</sup>

§ 1804. (§ 381.) **Injunction to Enforce Action of Board of Equalization.**—Occasionally an injunction may issue to enforce the action of a board of equalization. Thus, where a state board of equalization orders an increase in assessments upon all except railroad property, and the local officers fail to make the increase, the railroad company is injured and may obtain an injunction.<sup>122</sup> And when a municipal assessment has been corrected and yet the municipal authorities proceed to levy the tax upon the original assessment, an injunction against the collection of such a tax may issue.<sup>123</sup>

119 *Brandirff v. Harrison Co.*, 50 Iowa, 164; *Montis v. McQuiston*, 107 Iowa, 651, 78 N. W. 704; *Montana Ore Purchasing Co. v. Maher*, 32 Mont. 480, 81 Pac. 13; *Sullivan v. Bitter*, 51 Tex. Civ. App. 604, 113 S. W. 193.

120 *South Platte Land Co. v. Board of Commissioners of Buffalo Co.*, 7 Neb. 253; *Brown v. Douglas County*, 98 Neb. 299, 152 N. W. 545.

121 *Johnson v. Holland*, 17 Tex. Civ. 210, 43 S. W. 71.

122 *Missouri, K. & T. R'y Co. v. Board of Commissioners*, 9 Kan. App. 350, 58 Pac. 121.

123 *City of Richmond v. Crenshaw*, 76 Va. 936.



§ 1805. (§ 382.) **Remedy by Suit to Recover Back.**—In some jurisdictions, the tax-payer is confined to paying an illegal tax under protest and then suing to recover it back. Such, we shall see, is the rule in the federal courts in regard to federal taxes.<sup>124</sup> In Massachusetts, the collection of illegal taxes, whether on real or on personal property, is not subject to injunction. A tax-payer who has been illegally assessed has an adequate and complete remedy at law by paying the tax and suing to recover it back.<sup>125</sup> “The legislature has evidently regarded this remedy as adequate and complete, having regard to a prompt and unembarrassed assessment and collection of taxes for the maintenance of the government.”<sup>126</sup> In North Carolina the statute provides that if any person claiming that any tax is illegal or excessive pays the same, and, within thirty days after payment, makes a written demand for a repayment thereof, and the same is not refunded within ninety days

<sup>124</sup> *Snyder v. Marks*, 109 U. S. 189, 27 L. Ed. 901, 3 Sup. Ct. 157; *Burgdorf v. District of Columbia*, 7 App. D. C. 405. As to the application of the rule by federal courts in other matters, see *Arkansas B. & L. Ass’n v. Madden*, 175 U. S. 269, 44 L. Ed. 159, 20 Sup. Ct. 119; *Robinson v. City of Wilmington*, 65 Fed. 856, 25 U. S. App. 144, 13 C. C. A. 177; *Shelton v. Platt*, 139 U. S. 596, 35 L. Ed. 276, 11 Sup. Ct. 646; *State Railroad Tax Cases*, 92 U. S. 616, 23 L. Ed. 663; *Dows v. City of Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481, 57 L. Ed. 1288, 33 Sup. Ct. 942.

<sup>125</sup> *Brewer v. City of Springfield*, 97 Mass. 152; *Loud v. City of Charlestown*, 99 Mass. 208; *Macy v. Nantucket*, 121 Mass. 351 (interpleader not maintainable to determine in which town plaintiff is liable to be taxed; but the objection may be waived; *Forest River Lead Co. v. Salem*, 165 Mass. 193, 202, 42 N. E. 802); *Kelley v. Barton*, 174 Mass. 396, 54 N. E. 860.

<sup>126</sup> *Loud v. City of Charlestown*, 99 Mass. 208. As to the rule in Colorado, see *Union Pac. R’y Co. v. Board of Commissioners of Weld County*, 217 Fed. 540, 133 C. C. A. 392. As to the rule in Alabama, see *Adams v. Southern R’y Co.*, 176 Ala. 320, 58 South. 397.

thereafter, he may sue to recover it.<sup>127</sup> This provides an adequate remedy at law for an illegal or excessive personal tax, at least, and hence in such a case an injunction will be refused.<sup>128</sup> In Illinois, however, the existence of such a remedy does not preclude a court of equity from granting relief.<sup>129</sup> In West Virginia, a statute giving a remedy at law for an illegal tax which does not by its terms take away the equitable jurisdiction will be construed as creating an additional remedy, and will not oust the court of equity of its jurisdiction.<sup>130</sup> And in the federal courts it is held that where the tax imposed is so large that to pay it would render the company insolvent, and it would have to be paid to several officers in various proportions, the legal remedy of suit to recover the amounts paid is inadequate.<sup>131</sup> And where the tax is very large, and the suit may have to be brought against a state officer who may not have the money, the legal remedy is inadequate.<sup>132</sup>

§ 1806. (§ 383.) **Other Remedies.**—Occasionally other remedies provided by state statutes are held adequate to the protection of the tax-payers. Thus, *quo warranto* is an adequate remedy in Pennsylvania where the illegality consists in the alleged illegal constitution of the board of assessors.<sup>133</sup> And *certiorari* is sometimes said to be

<sup>127</sup> Laws 1887, c. 137, § 84.

<sup>128</sup> Hall v. City of Fayetteville, 115 N. C. 281, 20 S. E. 373. The same has been held as to a tax fraudulently assessed on realty: Wilson v. Green, 135 N. C. 343, 47 S. E. 469. As to the rule in certain cases in South Carolina, see Fleming v. Power, 77 S. C. 528, 58 S. E. 430.

<sup>129</sup> Searing v. Heavysides, 106 Ill. 85.

<sup>130</sup> Winifrede Coal Co. v. Board of Education, 47 W. Va. 132, 34 S. E. 776.

<sup>131</sup> Raymond v. Chicago Union Traction Co., 207 U. S. 20, 12 Ann. Cas. 757, 52 L. Ed. 78, 28 Sup. Ct. 7.

<sup>132</sup> Michigan Telephone Tax Cases, 185 Fed. 634.

<sup>133</sup> Chostkov v. City of Pittsburgh, 177 Fed. 936.

adequate.<sup>134</sup> Where the statute provides for objections at certain stages of the proceedings, one who does not avail himself of the opportunities cannot go into equity.<sup>135</sup>

§ 1807. (§ 384.) **Fraud as Ground for Relief.**—In some of the states of the first class fraud is a ground for relief. Accordingly, if an assessment is fraudulently made excessive, or if it is arbitrarily or capriciously made, and is so out of proportion to the actual value as to give reasonable assurance that the officers could not have been honest in fixing the valuation, courts of equity are justified in enjoining the enforcement of the tax.<sup>136</sup> In some jurisdictions, when officers, by a systematic, intentional and illegal undervaluation of other property make an unjust discrimination against the complainant,

<sup>134</sup> *Union Pac. R. Co. v. Flynn*, 180 Fed. 565; *Goodwin v. City of Millville*, 75 N. J. Eq. 270, 71 Atl. 674; *Roe v. Jersey City*, 79 N. J. Eq. 645, 82 Atl. 873; *Long Dock Co. v. State Board of Assessors*, 86 N. J. L. 592, 92 Atl. 439.

<sup>135</sup> *First National Bank of Raton v. McBride*, 20 N. M. 381, 149 Pac. 353; *Price Shoe & Clothing Co. v. McBride*, 20 N. M. 409, 149 Pac. 362. Compare *Johnson v. Trustees of Hampton Normal & Agr. Institute*, 105 Va. 319, 54 S. E. 31.

<sup>136</sup> *Royal Salt Co. v. Board of Comm'rs of Ellsworth County*, 82 Kan. 203, 107 Pac. 640. See, also, *Louisville Trust Co. v. Stone*, 107 Fed. 305, 46 C. C. A. 299; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 168; *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 12 Ann. Cas. 757, 52 L. Ed. 78, 28 Sup. Ct. 7; *Atchison, T. & S. F. R. Co. v. Sullivan*, 173 Fed. 456, 97 C. C. A. 1; *County of Los Angeles v. Ballerino*, 99 Cal. 593, 597, 32 Pac. 581, 34 Pac. 329; *Pacific Postal Tel. Cable Co. v. Dalton*, 119 Cal. 604, 51 Pac. 1072; *National Tube Co. v. Shearer (Del. Ch.)*, 62 Atl. 1093; *Northern Pac. R'y Co. v. Clearwater County*, 26 Idaho, 455, 144 Pac. 1; *Symms v. Graves*, 65 Kan. 628, 70 Pac. 591; *Pioneer Iron Co. v. City of Negaunee*, 116 Mich. 430, 74 N. W. 700; *Merrill v. Humphrey*, 24 Mich. 170; *First Nat. Bank of Raton v. McBride*, 20 N. M. 381, 149 Pac. 353; *Oregon & C. R. Co. v. Jackson County*, 38 Or. 589, 64 Pac. 307, 65 Pac. 369; *Spokane & Eastern Trust Co. v. Spokane County*, 70 Wash. 48, Ann. Cas. 1914B, 641, 126 Pac. 54.

an injunction may issue.<sup>137</sup> And where officers, by a fraudulent exemption from taxation of property subject thereto, increase the burden on complainant, injunctive relief has been allowed.<sup>138</sup> It must appear that the party complaining has been, or will be, injured by such

<sup>137</sup> *Atchison, Topeka & S. F. R'y Co. v. Sullivan*, 173 Fed. 456, 97 C. C. A. 1. When the court finds that the board of taxation has systematically, repeatedly and continuously violated the law to the plaintiff's injury, it is like a continuing trespass, and an injunction is warranted: *Wells, Fargo & Co. v. Johnson*, 214 Fed. 180, L. R. A. 1916C, 522, 130 C. C. A. 528.

<sup>138</sup> In *Walsh v. King*, 74 Mich. 350, 41 N. W. 1080, the court said: "The bill shows that \$400,000 of taxable property was practically exempted from taxation in violation of law, and by an agreement of the assessing officers with vessel owners in the city of Port Huron. This was not only a fraud upon the complainant, but upon every other tax-payer, vessel owners excepted, in the municipality. It would seem very clear that equity ought to take cognizance of this fraud and redress it. . . . If the whole tax thus assessed against complainant is not void, he is certainly entitled to such a reduction in his taxes as will make the burden of taxation no more than it would have been had this \$400,000 of vessel property been assessed, as it ought to have been, at its fair cash value. . . . We cannot agree with the authorities cited by defendants to sustain the proposition that a willful or intentional violation of the law, by the omission of property from assessment or its deliberate undervaluation, must be treated the same in equity, as regards the assessment and valuations of property for taxation, as an accidental omission or an honest mistake in judgment, because the result is the same in both cases. Fraud is ever open to remedy in a court of equity, and there can exist no good reason why relief against fraud in taxation, which in the end deprives a man of his property without due process of law, cannot be granted as well as against any other fraud."

To fraudulently omit mortgages from the assessment-roll, in violation of law, is such fraud as will entitle tax-payers to be relieved in equity of the tax in excess of that which is just and legal, upon payment of that which is due: *Welch v. City of Astoria*, 26 Or. 89, 37 Pac. 66; *Hamblin Real Estate Co. v. City of Astoria*, 26 Or. 599, 40 Pac. 230.



assessment and levy.<sup>139</sup> It has been held that it is not necessary to show that the assessor intended to discriminate against the complainant. It is sufficient to show that he intended to violate the law, and that the natural and inevitable effect of that violation was the increase of complainant's share of the burden.<sup>140</sup> But every presumption is in favor of the propriety of the action of the taxing officers. The proof must be clear and convincing that a systematic discrimination is being made against complainant before equity will interfere.<sup>141</sup>

§ 1808. (§ 385.) **Same—Limitations on This Rule.**—An assessment is not fraudulent merely because it is excessive. Hence the mere fact that complainant's assessment is higher in proportion than others is not ground for equitable relief.<sup>142</sup> In many states the legislatures

<sup>139</sup> *Hallett v. Board of Comm'rs of Arapahoe County*, 40 Colo. 308, 90 Pac. 678.

<sup>140</sup> *Atchison, Topeka & S. F. R'y Co. v. Sullivan*, 173 Fed. 456, 97 C. C. A. 1.

<sup>141</sup> *Louisville Trust Co. v. Stone*, 107 Fed. 305, 46 C. C. A. 299; *Pioneer Iron Co. v. City of Negaunee*, 116 Mich. 430, 74 N. W. 700.

<sup>142</sup> *Southern R'y Co. v. North Carolina Corp. Commission*, 104 Fed. 700; *Western Union Tel. Co. v. Wright*, 158 Fed. 1004; *Jackson Lumber Co. v. McCrimmon*, 164 Fed. 759; *Lacy v. McCafferty*, 215 Fed. 352, 131 C. C. A. 494; *City of Jeffersonville v. Louisville & Jefferson Bridge Co.*, 169 Ind. 645, 83 N. E. 337; *Royal Salt Co. v. Board of Comm'rs of Ellsworth County*, 82 Kan. 203, 107 Pac. 640; *Board of Comm'rs of Finney Co. v. Bullard*, 77 Kan. 349, 16 L. R. A. (N. S.) 807, 94 Pac. 129; *Citizens' Nat. Bank v. Board of Comm'rs of Lyon County*, 83 Kan. 376, 111 Pac. 496; *McDonald v. City of Escanaba*, 62 Mich. 555, 29 N. W. 93; *Western Union Tel. Co. v. Douglas Co.*, 76 Neb. 666, 107 N. W. 985; *Fast v. Rogers*, 30 Okl. 289, 119 Pac. 241; *Oregon & C. R. Co. v. Jackson County*, 38 Or. 589, 64 Pac. 307, 65 Pac. 369; *Clark v. Burschell*, 220 Pa. St. 435, 69 Atl. 900; *Doty Lumber & Shingle Co. v. Lewis County*, 60 Wash. 428, *Ann. Cas.* 1912B, 870, 111 Pac. 562; *Credson v. Nefsy Co.*, 14 Wyo. 61, 82 Pac. 1; *Wyoming Cent. Irr. Co. v. Farlow*, 19 Wyo. 68,

have provided adequate remedies for such inequalities by appeals to boards of equalization; and such remedies, in the absence of fraud, are exclusive. The state has a right to demand that parties aggrieved by alleged errors of assessment shall have their rights measured, tested and determined by the rules provided in the statutes; and it would have the effect of nullifying the law for courts of equity to assume jurisdiction in such a case.<sup>143</sup> Moreover, it is not the function of a court of equity to levy or assess taxes; and upon general principles applicable to public officers, equity will not interfere with the exercise of discretion except in case of clear abuse.

§ 1809. (§ 386.) **Multiplicity of Suits.**—The avoidance of a multiplicity of suits as a ground for equitable jurisdiction in tax cases has been so fully discussed elsewhere<sup>144</sup> that a brief summary only is here called for. The propriety of exercising this jurisdiction is seldom denied in the cases belonging to Professor Pomeroy's "Second Class"—where the complainant, in the absence of equitable interference, is exposed to repeated litiga-

114 Pac. 635, 116 Pac. 1021. The third edition of this work is cited to the effect that an assessment is not fraudulent merely because excessive in *People ex rel. Smith v. Hassler*, 262 Ill. 133, 104 N. E. 177.

A federal court should not enjoin the collection of a state tax on railroad property on the ground that other property in the state was greatly undervalued, unless there is a showing of a scheme or agreement to undervalue, or there is a clear adoption of a fundamentally wrong principle: *Chicago, B. & Q. R. Co. v. Babcock*, 204 U. S. 585, 51 L. Ed. 636, 27 Sup. Ct. 326. Compare *Jackson Lumber Co. v. McCrimmon*, 164 Fed. 759; *Western Union Tel. Co. v. Wright*, 158 Fed. 1004.

<sup>143</sup> *Fast v. Rogers*, 30 Okl. 289, 119 Pac. 241. See, also, *Southern Oregon Co. v. Coos County*, 39 Or. 185, 64 Pac. 646; *West Portland Park Ass'n v. Kelly*, 29 Or. 412, 45 Pac. 901.

<sup>144</sup> See 1 Pom. Eq. Jur., 4th ed., §§ 258-260, 265, 266, 270, and notes.

tion with the same defendant<sup>145</sup>—or in those of the “Fourth Class,”—where the single complainant would be compelled to bring or defend numerous suits against different parties, all involving the same questions of fact or law.<sup>146</sup> The exercise of the jurisdiction in the

145 Suits to enjoin collection of a tax, the invalidity of which had been established at law, were upheld on this ground in *Pater-son etc. R. R. Co. v. Jersey City*, 9 N. J. Eq. 434; *Bank of Kentucky v. Stone*, 88 Fed. 383; *Union & Planters' Bank v. Memphis*, 111 Fed. 561, 49 C. C. A. 455; see 1 Pom. Eq. Jur., § 253, notes 2 and (c).

But it has been held that the plaintiff must show that the danger of repeated suits by the state is “a probable, and not possible danger. . . . Whatever the rule may be in the case of natural persons, the court will presume that a state is incapable of such a vulgar passion, and, until the fact is shown to be otherwise, will act on the assumption that a state will not bring any more suits than are fairly necessary to establish and maintain its rights”: *Pacific Exp. Co. v. Seibert*, 44 Fed. 310; see 1 Pom. Eq. Jur., 4th ed., § 251¾, note (c).

146 See 1 Pom. Eq. Jur., 4th ed., § 261, note (b), “Class Fourth,” pp. 466, 467. A common instance is where a railroad or telegraph company is exposed to tax suits in different counties, all involving a common question; especially where such companies are assessed by a state board on all of their property within the state, and proportionate parts of this assessment are certified for collection to the tax officials of the various counties in which the company operates: *Union Pac. R. R. Co. v. McShane*, 3 Dill. 303, Fed. Cas. No. 14,382, affirmed, 22 Wall. 444, 22 L. Ed. 747; *Union Pac. R. R. Co. v. Cheyenne*, 113 U. S. 516, 28 L. Ed. 1098, 5 Sup. Ct. 601; *Northern Pac. R. R. Co. v. Walker*, 47 Fed. 681; *Western Union Tel. Co. v. Poe*, 61 Fed. 449, 453; *Sanford v. Poe*, 69 Fed. 546, 548, 60 L. R. A. 641, 16 C. C. A. 305; *Western Union Tel. Co. v. Norman*, 77 Fed. 13, 21; *Railroad & Telephone Cos. v. Board of Equalizers*, 85 Fed. 302; *Taylor v. Louisville & N. R. R. Co.*, 88 Fed. 350, 31 C. C. A. 537; *Coulter v. Weir*, 62 C. C. A. 429, 127 Fed. 897; *Philadelphia, W. & B. R. Co. v. Neary*, 5 Del. Ch. 600; *Mobile & O. R. R. Co. v. Moseley*, 52 Miss. 127, 137; *Chesapeake & O. R. R. Co. v. Miller*, 19 W. Va. 408. Again, where a bank or other corporation is required by law to pay the taxes assessed on all of its shares, and reimburse itself by withholding proportionate parts of the dividends

“Third Class” of Professor Pomeroy’s analysis is a question on which the cases are more evenly divided. In this class, it will be remembered, “a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone.”<sup>147</sup> The equity in this class of cases arises from two considerations; first, the public convenience and economy in determining, in a single equitable issue, a question that, without such determination, might

from its shareholders, it may enjoin an illegal tax, since its payment thereof would subject it to a suit by each shareholder: *Cummings v. Merchants’ Nat. Bank*, 101 U. S. 153, 25 L. Ed. 903, and other cases cited; 1 Pom. Eq. Jur., 4th ed., § 261, p. 466. *Contra*, see *Equitable Guarantee & T. Co. v. Donahoe* (Del.), 45 Atl. 583, in 1 Pom. Eq. Jur., § 266, note (a).

<sup>147</sup> 1 Pom. Eq. Jur., § 245. Among the cases of this class supporting the jurisdiction are, *Greedup v. Franklin County*, 30 Ark. 101; *Keese v. City of Denver*, 10 Colo. 113, 15 Pac. 825 (special assessment); *Dumars v. City of Denver*, 16 Colo. App. 375, 65 Pac. 580 (special assessment); *Bode v. New England Inv. Co.*, 6 Dak. 499, 42 N. W. 658, 45 N. W. 197; *Carlton v. Newman*, 77 Me. 408, 1 Atl. 194; *Sherman v. Benford*, 10 R. I. 559; *McTwiggan v. Hunter*, 18 R. I. 776, 30 Atl. 962, 2 Ames’s Cas. Eq. Jur., 71, 73, and notes; *Quimby v. Wood*, 19 R. I. 571, 35 Atl. 149; *McMickle v. Hardin*, 25 Tex. Civ. App. 222, 61 S. W. 322 (but no injunction after suits have already been begun for the collection of taxes); *McClung v. Livesay*, 7 W. Va. 329; *Doonan v. Board of Education*, 9 W. Va. 246; *Corrothers v. Board of Education*, 16 W. Va. 527; *Williams v. Grant County Court*, 26 W. Va. 488, 53 Am. Rep. 94 (an exhaustive discussion of the subject); *Blue Jacket Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 514. In states of the second type, also, where the mere illegality of the tax is a ground for its injunction at the suit of the single plaintiff, the avoidance of a multiplicity of suits is recognized as a further ground: See *infra*, Illinois and Missouri. See, also, cases collected in 1 Pom. Eq. Jur., § 260.



lead to innumerable trials of the same question in separate suits at law; and secondly, the practical failure of justice that must result from leaving each member of the community to obtain redress at law for his small share of the injury suffered by all alike. To the vast majority of tax-payers, a suit to recover back illegal taxes paid is, of course, an adequate remedy in theory only; the amount recovered is not worth the expense of litigation.<sup>148</sup> In the view of many courts, however, these considerations of economy and convenience, both to the community as a body and to all its individuals, do not outweigh the "other reasons of policy, founded on the necessity of speedy collection of taxes, which ought to prevent a court of chancery from suspending these [tax] proceedings, except upon the clearest grounds."<sup>149</sup> It is to be observed that the jurisdiction arises, in cases of this class, only "when the illegality extends to the whole tax, so that the question involved is the validity of the whole tax and its assessment on every person taxed";<sup>150</sup> where, for example, the question is one of the exemption from taxation of the separate property of several owners, no "multiplicity of suits" is avoided by the attempt to consolidate the various issues in a single case in equity, since "each complainant must make his own case upon the facts" peculiar to him.<sup>151</sup>

<sup>148</sup> See, especially, the passages from the opinions in *Greedup v. Franklin County*, 30 Ark. 109; *Ranney v. Bader*, 67 Mo. 476, 480; *Carlton v. Newman*, 77 Me. 408, 1 Atl. 194; and *Knopf v. First Nat. Bank*, 173 Ill. 331, 50 N. E. 660, quoted in 1 Pom. Eq. Jur., 4th ed., § 260, note (d).

<sup>149</sup> *Dodd v. City of Hartford*, 25 Conn. 232. See cases cited in 1 Pom. Eq. Jur., §§ 265, 266. This view appears to obtain in Connecticut, Delaware, District of Columbia, Idaho, Michigan, Mississippi, New York, Wisconsin, and possibly in other states.

<sup>150</sup> *McTwiggan v. Hunter*, 18 R. I. 776, 30 Atl. 962.

<sup>151</sup> *Schulenberg-Boeckeler Lumber Co. v. Town of Hayward*, 20 Fed. 422, 424; see 1 Pom. Eq. Jur., 4th ed., § 251½, note (d). Of

§ 1810. (§ 387.) **Cloud on Title—In General.**—Taxes on realty generally, and sometimes those on personalty as well, are made a lien upon real estate. Accordingly, if the proceedings are valid on their face, every such tax will cast a cloud upon the title to land. The prevention and removal of such clouds on title are well established and familiar grounds of equitable jurisdiction. Consequently, equity will interfere by injunction to prevent and remove the cloud cast by such an illegal or invalid tax.<sup>152</sup> Thus, where an illegal tax on the stock of a

course, in many states the fact that property is by law exempt from taxation is an independent ground for injunction: See *post*, §§ 393–395.

<sup>152</sup> **Federal Courts.**—*Tilton v. Oregon C. M. R. Co.*, 3 Sawy. 22, Fed. Cas. No. 14,055; *Taylor v. Louisville & N. R. Co.*, 88 Fed. 350, 31 C. C. A. 537; *Ogden City v. Armstrong*, 168 U. S. 224, 18 Sup. Ct. 98; *Kansas City, Ft. S. & M. R. Co. v. King*, 120 Fed. 615; *People's Sav. Bank v. Layman*, 134 Fed. 635; *Gregg v. Sanford*, 65 Fed. 151, 12 C. C. A. 525; *Union Pac. R'y Co. v. Cheyenne*, 113 U. S. 516, 28 L. Ed. 1098, 5 Sup. Ct. 601; *King County v. Northern Pac. R'y Co.*, 196 Fed. 323, 116 C. C. A. 143.

**California.**—*Woodruff v. Perry*, 103 Cal. 611, 37 Pac. 526; *San Diego Realty Co. v. Cornell*, 150 Cal. 637, 89 Pac. 603; *Las Animas & S. J. Land Co. v. Preciado*, 167 Cal. 580, 140 Pac. 239 (tax levied by defectively organized school district).

**Colorado.**—*Dumars v. City of Denver*, 16 Colo. App. 375, 65 Pac. 580.

**Florida.**—*Bloxham v. Consumers' etc. R. R. Co.*, 36 Fla. 519, 51 Am. St. Rep. 44, 29 L. R. A. 507, 18 South. 444.

**Idaho.**—*Bramwell v. Guheen*, 3 Idaho, 347, 29 Pac. 110.

**Minnesota.**—*Lindbergh v. Morrison County*, 116 Minn. 504, 134 N. W. 126.

**New Mexico.**—*Town of Albuquerque v. Zeiger*, 5 N. M. 674, 27 Pac. 315.

**New York.**—*Mutual Ben. Life Ins. Co. v. Supervisors*, 2 Abb. Pr., N. S., 233; *Litchfield v. City of Brooklyn*, 13 Misc. Rep. 693, 34 N. Y. Supp. 1090.

**Oregon.**—*Hughes v. Linn County*, 37 Or. 111, 60 Pac. 843.

national bank is made a lien on its real estate, its collection or enforcement may be enjoined.<sup>153</sup> And where an illegal tax against a common carrier is made a lien on its realty, although personalty is to be resorted to first, equitable relief will be allowed.<sup>154</sup> Likewise, it will be allowed where a settlement of illegal back taxes will, when the proper steps are taken, constitute a lien on real estate,<sup>155</sup> or where an assessment willfully made in disregard of a statute is made a lien on realty,<sup>156</sup> although a board of equalization has refused relief. Where an assessment is void because not authorized by the electors of a district, as required by statute an injunction is proper.<sup>157</sup> Where there is an adequate remedy at law by statute, however, an injunction will not issue.<sup>158</sup>

§ 1811. (§ 388.) **Same—Proceedings Defective on Their Face.**—Where the proceedings are defective on their face, it is generally held that there is no cloud to remove, the argument being that no injury can result from an instrument which, upon its face, confers no valid right. While the reasoning appears faulty, the decided weight of authority is on its side; and accordingly it is

**West Virginia.**—*Powell v. City of Parkersburg*, 28 W. Va. 698; *Tygart's Val. Bank v. Town of Philippi*, 38 W. Va. 219, 18 S. E. 489.

**Wisconsin.**—*Milwaukee Iron Co. v. Town of Hubbard*, 29 Wis. 51; *A. H. Stange Co. v. City of Merrill*, 134 Wis. 514, 115 N. W. 115.

*Contra: Connecticut.*—*Rowland v. First School Dist.*, 42 Conn. 30; *Waterbury Savings Bank v. Lawler*, 46 Conn. 243, 246.

<sup>153</sup> *Brown v. French*, 80 Fed. 166.

<sup>154</sup> *Southern R'y Co. v. Asheville*, 69 Fed. 359.

<sup>155</sup> *Sanford v. Gregg*, 58 Fed. 620.

<sup>156</sup> *California & O. Land Co. v. Gowen*, 48 Fed. 771.

<sup>157</sup> *Woodruff v. Perry*, 103 Cal. 611, 37 Pac. 526.

<sup>158</sup> *Boyd v. City of Selma*, 96 Ala. 144, 16 L. R. A. 729, 11 South. 393.

held that no injunction will issue.<sup>159</sup> Thus, where an assessment is levied under a repealed law, the defect is apparent, and an injunction will be denied.<sup>160</sup> An assessment levied without authority is said to be not even an apparent lien.<sup>161</sup> If the law purporting to authorize the assessment is unconstitutional, the invalidity is also apparent, and relief will be denied.<sup>162</sup> In New York, it is held that to warrant relief it must not only be shown that the proceedings are regular on their face and invalid only because of defects *dehors* the record, but also that the defect will not necessarily appear in proceedings to enforce the lien.<sup>163</sup> The rule is sometimes stated that where the same record which must be introduced to establish the title claimed will show that there is no title, there is no cloud for equity to remove.<sup>164</sup> Stated conversely, if as defendant in ejectment the complainant

<sup>159</sup> **Federal Courts.**—*Hannewinkle v. City of Georgetown*, 15 Wall. 547, 21 L. Ed. 231.

**California.**—*Burr v. Hunt*, 18 Cal. 303.

**Colorado.**—*Wason v. Major*, 10 Colo. App. 181, 50 Pac. 741.

**Delaware.**—*Murphy v. City of Wilmington*, 6 Houst. 108, 22 Am. St. Rep. 345.

**Idaho.**—*Bramwell v. Guheen*, 3 Idaho, 347, 29 Pac. 110.

**Minnesota.**—*Scribner v. Allen*, 12 Minn. 148 (Gil. 85).

**New York.**—*Alvord v. City of Syracuse*, 163 N. Y. 158, 57 N. E. 310, and cases cited in following notes.

See, generally, on this subject, *post*, chapter on Cloud on Title.

<sup>160</sup> *Burr v. Hunt*, 18 Cal. 303.

<sup>161</sup> *Heywood v. City of Buffalo*, 14 N. Y. 534.

<sup>162</sup> *Wason v. Major*, 10 Colo. App. 181, 50 Pac. 741. See *post*, § 396.

<sup>163</sup> *Alvord v. City of Syracuse*, 163 N. Y. 158, 57 N. E. 310; *Trowbridge v. Horan*, 78 N. Y. 439; *Van Rensselaer v. Kidd*, 4 Barb. (N. Y.) 17; *Van Doren v. New York*, 9 Paige (N. Y.), 388.

<sup>164</sup> *Hannewinkle v. City of Georgetown*, 15 Wall. 547, 21 L. Ed. 231.



would have to offer evidence to prevent a recovery, the defect is not apparent on the face of the proceedings.<sup>165</sup>

§ 1812. (§ 389.) **Same — Same — Injunction may be Granted on Other Grounds.**—But where some other ground of equity jurisdiction appears, the mere fact that the proceedings are void on their face will not warrant a refusal of relief. “While void proceedings cast no cloud upon title to real estate, and a single individual, moving only in his own behalf, and for his own purposes, to restrain such proceedings, will be remitted to his remedy at law, yet where a number of persons are similarly affected, and the rights of all may be adjusted in one proceeding, a court of equity will assume jurisdiction, notwithstanding there is no cloud to remove, and the ground of its jurisdiction is the prevention of a multiplicity of suits.”<sup>166</sup>

§ 1813. (§ 390.) **Same—At What Stage Granted.**—In the matter of granting relief against a cloud on title, a court of equity will go no further than is necessary to protect the rights of the property owner, and will not to any greater extent impede the officers of the state in the performance of their duties.<sup>167</sup> It is sometimes said that a tax deed is *prima facie* evidence of the regularity of the proceedings under which it is issued. It is clear that when such a deed, valid on its face, is about to be issued, an injunction is proper.<sup>168</sup> But the issuance of the deed must be threatened. The mere levying of a tax

<sup>165</sup> *City of Ensley v. McWilliams*, 145 Ala. 159, 117 Am. St. Rep. 26, 41 South. 296.

<sup>166</sup> *Dumars v. City of Denver*, 16 Colo. App. 375, 65 Pac. 580. “Class Third” is thus distinctly recognized: See 1 Pom. Eq. Jur., 4th ed., § 260, note (b).

<sup>167</sup> *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102.

<sup>168</sup> *Jenkins v. Board of Supervisors of Rock County*, 15 Wis. 11; and see *Dean v. City of Madison*, 9 Wis. 402; *Litchfield v. City of Brooklyn*, 13 Misc. Rep. 693, 34 N. Y. Supp. 1090.

for which the land might be sold and such a deed given is not a sufficient threat to warrant an injunction.<sup>169</sup> While it is not possible in a treatise of this nature to discuss the various steps of the tax procedure, it may be laid down generally that no act on the part of officers required by law to be performed in the execution of the revenue measures will be stayed by injunction, unless that act is of such a nature, and will have such an effect, as to irreparably injure the property owner, or in itself cast a cloud on title.<sup>170</sup>

§ 1814. (§ 391.) **Same—Injunction After Sale.**—In Virginia, an injunction has been granted to restrain a county clerk from conveying lands sold to the state for illegal taxes to an applicant for purchase, on the ground that such conveyance would cast a cloud on title.<sup>171</sup> In South Dakota, where a tax deed is set aside for defects not affecting the validity of the tax, a decree that the party attacking shall reimburse the purchaser is within the equitable powers of the court.<sup>172</sup> The fact that property is wrongfully sold after the commencement of the suit does not deprive equity of jurisdiction.<sup>173</sup>

§ 1815. (§ 392.) **Same — Preliminary Injunction.** — Where it is reasonably probable that plaintiff will succeed in an action to prevent a cloud on the title to his real estate, a court of equity has power, pending the suit, to issue a preliminary injunction restraining the collec-

<sup>169</sup> *Scribner v. Allen*, 12 Minn. 148 (Gil. 85).

<sup>170</sup> *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102. Compare *Security Savings Bank v. Carroll*, 128 Iowa, 230, 103 N. W. 379 (will not issue to restrain assessor from investigating to determine whether property is assessable, nor from making the assessment).

<sup>171</sup> *Baker v. Briggs*, 99 Va. 360, 38 S. E. 277, 3 Va. Sup. Ct. Rep. 252.

<sup>172</sup> *McKinney v. Minnehaha County*, 17 S. D. 407, 97 N. W. 15.

<sup>173</sup> *Colorado Farm & Live Stock Co. v. Beerbohm*, 43 Colo. 464, 96 Pac. 443.

tor from taking proceedings to collect the tax.<sup>174</sup> The rights of the public can be protected in such a case by requiring the plaintiff to give a bond.

§ 1816. (§ 393.) **Exempt Property—In States of the First Class.**—In states of the first class, an injunction will frequently issue when property exempt from taxation is assessed, and the case is otherwise brought under some recognized ground of equity jurisdiction.<sup>175</sup> In Arkansas, an injunction will issue to restrain the collection of a tax on exempt property, provided irreparable injury would follow refusal. Thus, an injunction has been granted against a sale of exempt railroad property for non-payment of a tax, the court saying: "The illegality of the taxes alone could not give the court jurisdiction to restrain the sale, but the sale of the road would most probably, if not necessarily, result in the stoppage of its trains and the suspension of its business for an indefinite time, and until the company could regain possession; an injury which, because the actual damages by reason of their uncertain nature, could not be ascertained, would be irreparable, and to prevent which it was the duty of the court to interpose by injunction."<sup>176</sup> In South Carolina an injunction will issue when a tax on exempt property will cast a cloud on title.<sup>177</sup> In Ari-

<sup>174</sup> *A. H. Stange Co. v. City of Merrill*, 134 Wis. 514, 115 N. W. 115.

<sup>175</sup> *Sindall v. Mayor etc. of Baltimore*, 93 Md. 526, 49 Atl. 645; *Valentine v. City of Hagerstown*, 86 Md. 486, 38 Atl. 931. In *Joesting v. Mayor*, 97 Md. 589, 55 Atl. 456, an injunction was granted restraining the collection of an assessment on property not subject thereto. See, also, *City of Staunton v. Mary Baldwin Seminary*, 99 Va. 653, 3 Va. Sup. Ct. Rep. 468, 39 S. E. 596. The rule seems to be even broader in Colorado: *Colorado Farm & Live Stock Co. v. Beerbohm*, 43 Colo. 464, 96 Pac. 443.

<sup>176</sup> *Oliver v. Memphis etc. R. R. Co.*, 30 Ark. 128.

<sup>177</sup> *Vesta Mills v. City Council of Charleston*, 60 S. C. 1, 38 S. E. 226. But by Code 1902, § 412, Rev. Stats. 1893, § 339, "collection

zona, an injunction has issued to restrain the collection of a tax on corporation stock assessed at a place other than the residence of the owner.<sup>178</sup> In Michigan the converse rule has been applied—where the assessing officers purposely, in violation of law, exempt property from taxation, so that the burden rests unequally, an injunction may issue.<sup>179</sup>

§ 1817. (§ 394.) **Same—In States of the Second Class.**—In States of the second class, an assessment of exempt property is generally held to make the assessment illegal and to warrant injunctive relief.<sup>180</sup> In Georgia it has been held that an injunction will issue to restrain a tax collector who is attempting to collect an amount claimed to be due for taxes upon property which is not required by law to be returned for taxation in the county in which he holds his office.<sup>181</sup> But a party claiming relief on account of an exemption must make the invalidity as to him clearly and unequivocally appear.<sup>182</sup> And a party who has failed to make oath as to the exemption, as required by law, is not entitled to relief.<sup>183</sup>

§ 1818. (§ 395.) **Same—Rule in Illinois.**—In Illinois, a court of equity will grant relief, by way of injunction,

of taxes shall not be stayed or prevented by any injunction, writ or order”: *Western Union Tel. Co. v. Town of Winnsboro* (S. C.), 50 S. E. 870.

<sup>178</sup> *National Bank of Arizona v. Long*, 6 Ariz. 311, 57 Pac. 639.

<sup>179</sup> *Walsh v. King*, 74 Mich. 350, 41 N. W. 1080.

<sup>180</sup> *St. Mary's Gas Co. v. Elk County*, 191 Pa. St. 458, 43 Atl. 321; *Lehigh Coal & Nav. Co. v. Miller*, 155 Pa. St. 542, 26 Atl. 660; *Wey v. Salt Lake City*, 35 Utah, 504, 101 Pac. 381. See, also, *Valle v. Ziegler*, 84 Mo. 214 (bonds kept out of the state, and shares of stock in manufacturing companies); *Mechanics' Bank v. City of Kansas*, 73 Mo. 555 (exempt real property).

<sup>181</sup> *Penick v. High Shoals Mfg. Co.*, 113 Ga. 592, 38 S. E. 973. See, also, *Linton v. Lucy Cobb Institute*, 117 Ga. 678, 45 S. E. 53.

<sup>182</sup> *L. B. Price Co. v. City of Atlanta*, 105 Ga. 358, 31 S. E. 619.

<sup>183</sup> *Wilson v. Wiggins*, 7 Okl. 517, 54 Pac. 716.



against the imposition of a tax upon property exempt from taxation.<sup>184</sup> In cases where a tax is assessed upon property, some of which is exempt, equity will enjoin the collection of that part of the tax which is assessed upon the exempt property, if it is possible to ascertain what part of the tax assessed upon the whole property is assessed upon the property which is exempt from taxation;<sup>185</sup> but the complainant must show that the property claimed to be exempt was included in the assessment.<sup>186</sup>

The owner has a right to assume that the exemption will be respected, and is not required to take notice of its illegal assessment and valuation, nor to appear before the local tribunals in that regard.<sup>187</sup> He must, however, be prepared to maintain his claimed right of exemption by clear and satisfactory proof.<sup>188</sup> If he has elected to pursue his statutory remedy by application to the board of review, and their decision is adverse, his further remedy is by appeal from that decision, not by bill in chancery to enjoin the collection of the tax.<sup>189</sup>

**§ 1819. (§ 396.) Unconstitutionality of Taxing Act.**  
Ordinarily, the unconstitutionality of a taxing statute

<sup>184</sup> *Siegfried v. Raymond*, 190 Ill. 424, 60 N. E. 868, and cases cited; *Rosehill Cemetery Co. v. Kern*, 147 Ill. 483, 35 N. E. 240; *Illinois Central R. R. Co. v. Hodges*, 113 Ill. 323; *Huck v. Chicago & A. R. Co.*, 86 Ill. 360.

<sup>185</sup> *Siegfried v. Raymond*, 190 Ill. 424, 60 N. E. 868, and cases cited. The court will not enjoin the collection of the whole tax because in determining the valuation of an aggregate property exempt property may have been included as a factor; it is incumbent on the plaintiff to show that it is injured, and to what extent, by the fact of such inclusion, as the exempt property may be of no value, or of a purely nominal value: *Huck v. Chicago & A. R. Co.*, 86 Ill. 360.

<sup>186</sup> *Siegfried v. Raymond*, 190 Ill. 424, 60 N. E. 868.

<sup>187</sup> *Rosehill Cemetery Co. v. Kern*, 147 Ill. 483, 35 N. E. 240; *Illinois Central R. R. Co. v. Hodges*, 113 Ill. 323.

<sup>188</sup> *Rosehill Cemetery Co. v. Kern*, 147 Ill. 483, 35 N. E. 240.

<sup>189</sup> *Preston v. Johnson*, 104 Ill. 625.

would seem, in theory at least, to be apparent on the face of the proceedings. Hence, in states of the first class it forms no ground for equitable relief unless some independent feature of equitable jurisdiction other than cloud on title appears.<sup>190</sup> Thus, in New York, when a statute is unconstitutional, the sheriff is a mere trespasser when he attempts to levy upon the tax-payer's property, and hence the remedy at law is amply sufficient.<sup>191</sup> And the fact that the remedy at law has been lost by laches gives the court no jurisdiction. In states of the second class, it would seem that such illegality should be ground for relief, although it is not always so held.<sup>192</sup> But the fact that the statute under which the assessor made an analysis of the assessment is unconstitutional is not a ground for injunction, where the taxes are authorized and there is no irreparable injury to complainant; a court of law is as competent as a court of equity to try the question of constitutionality.<sup>193</sup>

<sup>190</sup> *City of Ensley v. McWilliams*, 145 Ala. 159, 117 Am. St. Rep. 26, 41 South. 296; *United Lines Tel. Co. v. Grant*, 137 N. Y. 7, 32 N. E. 1005; *Postal Tel. Cable Co. v. Grant*, 58 Hun, 603, 11 N. Y. Supp. 323, 33 N. Y. St. Rep. 997; *Thomas v. Rowe* (Va.), 22 S. E. 157; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 30 L. Ed. 1035, 12 Sup. Ct. 250; *Allen v. Pullman's Palace Car Co.*, 139 U. S. 661, 35 L. Ed. 304, 11 Sup. Ct. 682; *Shelton v. Platt*, 139 U. S. 596, 35 L. Ed. 276, 11 Sup. Ct. 646; *Singer Sewing Mach. Co. v. Benedict*, 229 U. S. 481, 57 L. Ed. 1288, 33 Sup. Ct. 942. And see cases in following notes.

<sup>191</sup> *United Lines Tel. Co. v. Grant*, 63 Hun, 634, 18 N. Y. Supp. 534; *Mercantile Nat. Bank v. City of New York*, 27 Misc. Rep. 32, 57 N. Y. Supp. 254. In South Dakota, the collection of a state inspection tax will not be restrained simply because the act authorizing it may be unconstitutional, for if such prove to be the case, the officer enforcing it will be a mere trespasser, and plaintiff will have an adequate remedy at law: *Franklin v. Appel*, 10 S. D. 391, 73 N. W. 259.

<sup>192</sup> Compare the street assessment cases, *post*. Relief on this ground was refused in *Franklin v. Appel*, 10 S. D. 391, 73 N. W. 259.

<sup>193</sup> *Ayers v. Widmayer*, 188 Ill. 121, 58 N. E. 956.

§ 1820. (§ 397.) **Want of Jurisdiction in Taxing Body.**—Occasionally injunctions have been granted to restrain the collection of a tax on the ground that the body attempting to make the levy has no jurisdiction over the subject-matter. Thus, in Virginia it has been held that an injunction will issue to restrain the collection of a tax by a town which has not been legally incorporated.<sup>194</sup> In North Carolina and Oregon, injunctions have been allowed to restrain towns from collecting taxes on territory illegally annexed.<sup>195</sup> But in Kansas such relief is refused on the ground that it amounts to a collateral attack upon the annexation proceedings.<sup>196</sup>

§ 1821. (§ 398.) **Taxes in Excess of the Legal Limit.** In states of the second class, it is sometimes held that the property owner may have relief by injunction as to city or county taxes which are levied in excess of a legal limit.<sup>197</sup> But only the excess will be enjoined.<sup>198</sup>

§ 1822. (§ 399.) **Equity will not Consider Intent to Misapply Funds.**—Where there is jurisdiction to levy a tax, a court of equity will not inquire into the purposes to which the money may be put, in a suit to enjoin the tax. Thus, in Oklahoma, an injunction will not be granted merely because the municipal authorities may intend to misapply the funds.<sup>199</sup> In North Dakota, a taxpayer cannot enjoin a tax levy on the ground that it is to be used in part in the payment of an illegal claim.<sup>200</sup>

<sup>194</sup> *Campbell v. Bryant*, 104 Va. 509, 52 S. E. 638.

<sup>195</sup> *Lutterloh v. City of Fayetteville*, 149 N. C. 65, 62 S. E. 758; *Thurber v. McMinville* (Henderson), 63 Or. 410, 128 Pac. 43.

<sup>196</sup> *Gardner v. Benn*, 81 Kan. 442, 905, 105 Pac. 435.

<sup>197</sup> *Arnold v. Hawkins*, 95 Mo. 569, 8 S. W. 718; *Overall v. Ruenzi*, 67 Mo. 203. See, also, *Jordan v. City of Logansport*, 171 Ind. 280, 86 N. E. 47.

<sup>198</sup> *Lewis v. Village of Boguechitto*, 76 Miss. 356, 24 South. 875.

<sup>199</sup> *Bardrick v. Dillon*, 7 Okl. 535, 54 Pac. 785.

<sup>200</sup> *Torgrinson v. Norwich School Dist.* No. 31, 14 N. D. 10, 103 N. W. 414.

In Michigan, an injunction will not issue against the collection of a general tax on the ground that the money is needed only to replace money unlawfully expended from the public treasury.<sup>201</sup>

§ 1823. (§ 400.) **Special Rules in Some States—Connecticut.**—In Connecticut, it is held that the prevention of a multiplicity of suits is no ground for enjoining the collection of a tax, when each individual will have an adequate remedy at law.<sup>202</sup> And even a threatened cloud upon the title to real property is not recognized as a ground for enjoining proceedings to collect an illegal tax.<sup>203</sup> Indeed, it is laid down in the most sweeping terms that “the extraordinary remedy by injunction cannot be invoked to hinder or interfere with a collector of taxes in the discharge of his public duty.”<sup>204</sup> But under special circumstances, where a town is proceeding to collect a tax by selling the property instead of suing to collect, an injunction may issue.<sup>205</sup>

§ 1824. (§ 401.) **Same—Georgia.**—The Political Code of Georgia provides: “No replevin shall lie, nor any judicial interference be had, in any levy or distress for taxes under the provisions of this code; but the party injured shall be left to his proper remedy in a court of law having jurisdiction thereof.” In construing this section the supreme court of Georgia has held that “for an officer to exact money, under the name of a tax, where there is no law to warrant the exaction, is not an attempt to collect taxes, but an attempt to collect something else; and the

<sup>201</sup> *Clee v. Village of Trenton*, 108 Mich. 293, 66 N. W. 48.

<sup>202</sup> *Sheldon v. Centre School District*, 25 Conn. 224; *Dodd v. City of Hartford*, 25 Conn. 232.

<sup>203</sup> *Rowland v. School District*, 42 Conn. 30; *Waterbury Savings Bank v. Lawler*, 46 Conn. 243, 246.

<sup>204</sup> *Waterbury Savings Bank v. Lawler*, 46 Conn. 243, 246; *Arnold v. Middleton*, 39 Conn. 406.

<sup>205</sup> *City of New London v. Perkins*, 87 Conn. 229, 87 Atl. 724.



rule which excludes interference in the collection of taxes does not apply.”<sup>206</sup>

§ 1825. (§ 402.) **Same — Illinois — In General.**—The grounds of the jurisdiction to enjoin the collection of taxes were at an early date formulated in a definite rule, to which the courts of Illinois have consistently adhered. “A court of equity will not entertain a bill to enjoin the collection of a tax, except where the tax is unauthorized by law, or when it is assessed upon property which is exempt from taxation, or when property has been fraudulently assessed at too high a rate,”<sup>207</sup> or according to a few cases, when the injunction is necessary to prevent irreparable injury.<sup>208</sup> In Illinois, collection of taxes on personal property may be enjoined, in the cases enumerated above, notwithstanding the existence of the legal remedy to recover back the amount of the tax paid, and notwithstanding that the proceedings for collection of the tax may constitute only a case of ordinary trespass.<sup>209</sup>

That the statute under which the assessor made an analysis of the assessment is unconstitutional is not a ground for injunction, where the taxes are authorized and there is no irreparable injury to complainant; a

<sup>206</sup> *Decker et al. v. McGowan*, 59 Ga. 805. In general, see *Atlantic Postal Tel. Cable Co. v. City of Savannah*, 133 Ga. 66, 65 S. E. 184.

<sup>207</sup> *Seigfried v. Raymond*, 190 Ill. 424, 60 N. E. 868; *Coxe Bros. v. Salomon*, 188 Ill. 571, 59 N. E. 422; *White v. Raymond*, 188 Ill. 298, 58 N. E. 976; *Earl v. Raymond*, 188 Ill. 15, 59 N. E. 19; *Kochersperger v. Larned*, 172 Ill. 86, 49 N. E. 988; *Illinois Central R. R. Co. v. Hodges*, 113 Ill. 323; *Porter v. Rockford etc. R. Co.*, 76 Ill. 561 (596) (a leading case); *Chicago, B. & Q. R. Co. v. Cole*, 75 Ill. 591; *McConkey v. Smith*, 73 Ill. 313; *Vieley v. Thompson*, 44 Ill. 9; *Munson v. Miller*, 66 Ill. 380; *Union Trust Co. v. Weber*, 96 Ill. 346, 357; *First Nat. Bank of Urbana v. Holmes*, 246 Ill. 362, 92 N. E. 893.

<sup>208</sup> *Deming v. James*, 72 Ill. 78; *Vieley v. Thompson*, 44 Ill. 9.

<sup>209</sup> *Searing v. Heavysides*, 106 Ill. 85.

court of law is as competent as a court of equity to try the question of constitutionality.<sup>210</sup>

The court will not enjoin the collection of taxes for mere irregularities in the assessment, levying, or collection.<sup>211</sup>

Where the tax collector levied upon property of one for the taxes of another, and the collector was insolvent, and replevin would not lie, and the use of the article levied upon was indispensable to the complainant's business, an injunction was held proper.<sup>212</sup>

§ 1826. (§ 403.) **Same — Illinois — Illegality.** — The courts of Illinois have gone further than most courts in restraining the collection of taxes alleged to be illegal, but have always professed to recognize the universal rule that relief of that kind cannot be granted except upon some ground of equity jurisdiction.<sup>213</sup> The rule is laid down that "when the law has conferred no power to levy a tax, or in case a person or officer not authorized by law to exercise such a power, shall levy a tax, or when the proper persons shall make the levy for purposes on the face of the levy, not authorized, or for fraudulent purposes, a court of equity may stay its collection by injunction."<sup>214</sup>

<sup>210</sup> *Ayers v. Widmayer*, 188 Ill. 121, 58 N. E. 956.

<sup>211</sup> *Chicago, B. & Q. R. Co. v. Frary*, 22 Ill. 34; *Huck v. Chicago & A. R. Co.*, 86 Ill. 352, 360; *Union Trust Co. v. Weber*, 96 Ill. 346, 351, 357.

<sup>212</sup> *Deming v. James*, 72 Ill. 78. The decision appears to rest upon the general ground that the injury is irreparable.

<sup>213</sup> *Williams v. Dutton*, 184 Ill. 608, 56 N. E. 868.

<sup>214</sup> *Town of Ottawa v. Walker*, 21 Ill. 605, 610, 71 *Am. Dec.* 121, approved in *Knopf v. First Nat. Bank*, 173 Ill. 331, 50 N. E. 660. See, also, *Chicago & M. Electric R'y Co. v. Vollman*, 213 Ill. 609, 73 N. E. 360; *Hanberg v. Western Cold Storage Co.*, 231 Ill. 32, 82 N. E. 842; *Robinson v. McKenney*, 239 Ill. 343, 88 N. E. 264; *Moline Water Power Co. v. Cox*, 252 Ill. 348, 96 N. E. 1044; *Herschbach v. Kaskaskia Island Sanitary & Levee Dist.*, 265 Ill. 388, 106 N. E. 942.

As to the stage of the tax proceedings at which the court may interfere, it is held that a court of equity will never restrain the extension of a tax unless it is wholly unauthorized and void in all its parts. If any portion of the tax is valid, then the court will never interpose until the taxes have been extended on the collector's books.<sup>215</sup>

The statute providing that the township board of review is authorized to raise complainant's assessment only after giving notice in writing, the collection of the increase of tax based on an increased assessment made without such notice will be enjoined on the ground that the assessment is void as to the increase, and this without reference to the fairness or unfairness of the valuation.<sup>216</sup>

A tax levied wholly without authority of law may be enjoined; as when an assessor, in assessing a party's personal property and credits, went back three years, and raised the amount of his credits for those years seven thousand dollars, which was entered on the books, and assessed against the party as for such prior years;<sup>217</sup> or where a county board of review, in equalizing the valuation between the different towns, makes a material increase in the aggregate amount of all the towns, beyond what is actually necessary or incidental,<sup>218</sup> or where taxes for several years previous are extended upon the assessment of the current year, instead of upon the assessments for the several years for which the levies were made, in violation of the constitutional provision that all taxes shall be levied by valuation.<sup>219</sup>

<sup>215</sup> *Ottawa Glass Co. v. McCaleb*, 81 Ill. 562.

<sup>216</sup> *Huling v. Ehrich*, 183 Ill. 315, 55 N. E. 636, and cases cited; and see *First Nat. Bank of Shawneetown v. Cook*, 77 Ill. 622; *Darling v. Gunn*, 50 Ill. 424.

<sup>217</sup> *Allwood v. Cowen*, 111 Ill. 431. See, also, *Cox v. Hawkins*, 199 Ill. 68, 64 N. E. 1093 (illegal increase of assessment on personal property enjoined).

<sup>218</sup> *Kimball v. Merchants' S. L. & T. Co.*, 89 Ill. 611.

<sup>219</sup> *Town of Lebanon v. Ohio & M. R'y Co.*, 77 Ill. 539.

§ 1827. (§ 404.) **Same — Illinois — Illegal Municipal Taxes.**—Where bonds have been issued by a township to a railroad company, under a vote at an election held without authority of law, both state and local officers may be enjoined from attempting to cause a tax to be levied for the payment of the principal or interest of such bonds.<sup>220</sup>

A municipality may be enjoined at the suit of a taxpayer, from the levy and collection of a tax for the purpose of paying an indebtedness incurred in excess of the constitutional limit of five per cent of the valuation of taxable property,<sup>221</sup> or for the payment of indebtedness incurred in the purchase of land for a private purpose;<sup>222</sup> or for the payment of bounties to volunteer soldiers, etc., where the terms of the statute authorizing a special tax for such a purpose have not been complied with in essential particulars,<sup>223</sup> or the tax is unauthorized by statute.<sup>224</sup>

When a bill is filed to stay the collection of a tax levied to pay county orders issued for bounties, a portion of which are authorized, and a portion unauthorized by law, the court should ascertain the amount the unauthorized bear to those authorized, and reduce the levy by the proportion the former bears to the latter, and require the remainder to be collected and applied to the payment of those legally issued.<sup>225</sup> But the general rule prevails in Illinois, that when a bill is filed to enjoin the collection of taxes, on the ground that they are in part illegal, the bill must show to what extent they are, in order that the court may enjoin only the illegal portion, or must show

<sup>220</sup> *Rutz v. Calhoun*, 100 Ill. 392.

<sup>221</sup> *Howell v. City of Peoria*, 90 Ill. 104; *City of Springfield v. Edwards*, 84 Ill. 626; *Dollahon v. Whittaker*, 187 Ill. 84, 58 N. E. 301.

<sup>222</sup> *Sherlock v. Village of Winnetka*, 59 Ill. 389, 68 Ill. 530.

<sup>223</sup> *Vieley v. Thompson*, 44 Ill. 9.

<sup>224</sup> *Drake v. Phillips*, 40 Ill. 388.

<sup>225</sup> *Briscoe v. Allison*, 43 Ill. 291.



that they are so levied that it is impossible to discriminate between the legal and illegal portions.<sup>226</sup>

§ 1828. (§ 405.) **Same—Illinois—Illegal Taxes; Parties Plaintiff.**—It is held that the illegal tax, as an entirety, may be enjoined either where the suit is by a number of tax-payers on behalf of themselves and others similarly situated, or by one suing on behalf of all others, or even where the suit is by one suing for himself alone, where the effect would be to settle the rights of all;<sup>227</sup> and this for the purpose of avoiding a multiplicity of actions by different tax-payers, although there is no privity or legal relation of common property or common right as between the tax-payers, and the only common interest between them is in the question of the legality of the tax, and in the fact that all are injured by the same wrongful and illegal act of levying the tax.<sup>228</sup> But the right of a single tax-payer should be limited to himself, and he should not be permitted to enjoin the entire tax, in a case where it could not be presumed that the other tax-payers desired to stop the administration of the government, and where such disastrous consequence would surely result.<sup>229</sup>

§ 1829. (§ 406.) **Same—Illinois—Fraudulent Increase in Assessment.**—The determination of the value to be

<sup>226</sup> Taylor v. Thompson, 42 Ill. 9.

<sup>227</sup> Knopf v. First Nat. Bank, 173 Ill. 331, 50 N. E. 660, reviewing the Illinois cases. In this case the suit was by a single tax-payer, "but the necessary effect is to determine the right of every tax-payer in the district, and it would be an irrelevant distinction that the bill does not, in set phrase, purport to be on behalf of all others having individual and separate interests of the same character." See German Alliance Ins. Co. v. Van Cleve, 191 Ill. 410, 61 N. E. 94 (action by forty-two complainants).

<sup>228</sup> Knopf v. First Nat. Bank, 173 Ill. 331, 50 N. E. 660.

<sup>229</sup> Board of Supervisors of Du Page County v. Jenks, 65 Ill. 275, as explained in Knopf v. First Nat. Bank, 173 Ill. 331, 50 N. E. 660.

fixed on property liable to be assessed is not, in the absence of fraud, subject to the supervision of the judicial department of the state, under a provision of the constitution of Illinois.<sup>230</sup> Where, however, the valuation is so grossly out of the way as to show that the assessor could not have been honest in his valuation, and must have known of its excessive character, such valuation will be accepted as proof of a fraud upon his part against the tax-payer, and in such case a court of equity will grant relief; but the excessive valuation by itself does not establish fraud, the question depending largely upon the attending circumstances.<sup>231</sup> Thus, where the property of the complainant was assessed at two and a half times its cash value, as part of a general plan of dishonest spoliation, by which complainant and others were selected as victims from whom bribes might be obtained, the assessment should be set aside, unless the complainant is barred of relief in equity by submitting to be sent away from the statutory board of review without a hearing and decision.<sup>232</sup> And where the assessor, after he had accepted from the owner a list and valuation of his property, arbitrarily and without notice materially in-

<sup>230</sup> *Burton Stock-Car Co. v. Traeger*, 187 Ill. 9, 58 N. E. 418, and cases cited; *New Haven Clock Co. v. Kochersperger*, 175 Ill. 383, 51 N. E. 629, and cases cited ("value is largely a matter of opinion, and the opinion of these officers, when honestly exercised and applied upon a basis authorized by the law, cannot be reviewed or revised by the courts"); *Kochersperger v. Larned*, 172 Ill. 86, 49 N. E. 988; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602 (bill must state facts distinctly showing fraud); *Porter v. Rockford etc. R. Co.*, 76 Ill. 561, 595; *Chicago, B. & Q. R. R. Co. v. Cole*, 75 Ill. 591; *Ottawa Glove Co. v. McCaleb*, 81 Ill. 556; *Union Trust Co. v. Weber*, 96 Ill. 346, 352.

<sup>231</sup> *Burton Stock-Car Co. v. Traeger*, 187 Ill. 9, 58 N. E. 418; *New Haven Clock Co. v. Kochersperger*, 175 Ill. 383, 51 N. E. 629; *Sanitary District of Chicago v. Gifford*, 257 Ill. 424, 100 N. E. 953; *Bates v. Parker*, 227 Ill. 120, 81 N. E. 334.

<sup>232</sup> *New Haven Clock Co. v. Kochersperger*, 175 Ill. 383, 51 N. E. 629.

creased the valuation, and this increase did not come to the owner's knowledge until after the time allowed for legal redress, an injunction was proper.<sup>233</sup> Where the state board of equalization, in assessing the property and franchises of a railroad, undertakes to fix valuations through prejudice or a reckless disregard of duty, in opposition to what must necessarily be the judgment of all persons of reflection, it is the duty of the courts to interfere.<sup>234</sup>

§ 1830. (§ 407.) **Same—Indiana.**—An injunction will not be granted at the suit of a tax-payer because of irregularities in the proceedings of the county officers, where there was authority to levy the tax. It is only in cases where the record shows a clear invasion of the rights of the citizens by void acts, and they have no remedy by the ordinary processes of the law, that the court will interfere by injunction.<sup>235</sup>

A court of equity will not interfere to protect a person from the payment of a just tax,<sup>236</sup> nor will it give relief where he is not prejudiced in a substantial right.<sup>237</sup>

There can be no injunction when the acts alleged amount to no more than a simple threat to commit a trespass; as where the complaint does not aver that the tax duplicate is in the hands of the treasurer, without which, having no power to levy, the act of levying would be a mere trespass.<sup>238</sup>

<sup>233</sup> *First Nat. Bank of Shawneetown v. Cook*, 77 Ill. 622; *McConkey v. Smith*, 73 Ill. 313; *Cleghorn v. Postlewaite*, 43 Ill. 428.

<sup>234</sup> *Chicago, B. & Q. R. Co. v. Cole*, 75 Ill. 591.

<sup>235</sup> *Yocum v. First Nat. Bank (Ind.)*, 38 N. E. 599. See notes below for instances of illegal taxes enjoined; also, *Knight v. Turnpike Co.*, 45 Ind. 134 (illegal tax for benefit of a turnpike company which had not been incorporated); *Toledo etc. R. Co. v. City of Lafayette*, 22 Ind. 262.

<sup>236</sup> *Reynolds v. Bowen*, 138 Ind. 434, 36 N. E. 756, 37 N. E. 962.

<sup>237</sup> *Miller v. Vollmer*, 153 Ind. 26, 53 N. E. 949.

<sup>238</sup> *Anthony v. Sturgis*, 86 Ind. 479. See, also, *Smith v. Smith*,

Where an attempt to annex territory to a city is invalid, a municipal tax on property situated in such district may be enjoined.<sup>239</sup>

Where a person resides in a town in Indiana, and his personal property belongs elsewhere, such town has no authority to assess taxes upon such property, and the collection of the same will be enjoined.<sup>240</sup>

The sale of lands, for the payment of delinquent taxes thereon, where the owner has leviable personal property within the county sufficient to pay the taxes assessed against him, may be enjoined.<sup>241</sup>

A tax unauthorized by law, against the capital stock of a foreign corporation, may be enjoined.<sup>242</sup>

A reason for the free exercise of the remedy of injunction to restrain the collection of an illegal and void tax, regardless of whether the case presents some peculiar ground for equity jurisdiction, as the prevention of a multiplicity of suits, or the removal of a cloud upon title, or the inadequacy of an action at law, is found in the abolishment of the distinctions between actions at law and suits in equity.<sup>243</sup>

Courts will not give relief against erroneous assessments by the state board of equalization, except on the ground of fraud.<sup>244</sup>

Where the statute gives persons aggrieved by the acts of the board of county commissioners the right to ap-

159 Ind. 388, 65 N. E. 183, where suit before threat to levy was held premature.

<sup>239</sup> *City of Logansport v. La Rose*, 99 Ind. 117; *Windman v. City of Vincennes*, 58 Ind. 480; *City of Peru v. Bearss*, 55 Ind. 576.

<sup>240</sup> *Ewersole v. Cook*, 92 Ind. 222; and see *Luke v. Sheridan*, 26 Ind. App. 529, 60 N. E. 359; *Stephens v. Smith*, 30 Ind. 120, 65 N. E. 546. Compare *Nyce v. Schmoll*, 40 Ind. App. 555, 82 N. E. 539.

<sup>241</sup> *Abbott v. Edgerton*, 53 Ind. 196.

<sup>242</sup> *Riley v. Western Union Tel. Co.*, 47 Ind. 511.

<sup>243</sup> *City of Delphi v. Bowen*, 61 Ind. 29, 37.

<sup>244</sup> *Cleveland, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 513, 18 L. R. A. 729, 33 N. E. 421.



peal, an injunction will not be granted to prevent the collection of a tax levied by such board;<sup>245</sup> this has been frequently held of acts of such boards in passing upon a petition for county aid in the construction of railroads.<sup>246</sup> But when a tax in aid of railroads is levied in excess of the amount authorized by statute, the collection of the excess may be enjoined by one who has paid the part of the tax legally due.<sup>247</sup>

The right to enjoin an illegal tax may be lost by laches.<sup>248</sup>

§ 1831. (§ 408.) **Same—Kansas.**—The Kansas code provides that “an injunction may be granted to enjoin the illegal levy of any tax, charge, or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same; and any number of persons whose property is affected by a tax or assessment so levied may unite in the petition filed to obtain such injunction.”<sup>249</sup> The supreme court of the state has held that this gives an enlarged or additional remedy to the tax-payer, but that the jurisdiction is to be exercised

<sup>245</sup> *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124; *Senour v. Matchett*, 140 Ind. 636, 40 N. E. 122; *Pittsburgh, C. C. & St. L. R. Co. v. Harden*, 137 Ind. 486, 37 N. E. 324; otherwise, where the order levying a special tax is an administrative one, from which there is no appeal: *Board of Commissioners of Owens Co. v. Spangler*, 159 Ind. 575, 65 N. E. 743.

<sup>246</sup> See cases in last note; *Faris v. Reynolds*, 70 Ind. 359; *s. c. sub nom. Reynolds v. Faris*, 80 Ind. 14; *Board of Commissioners v. Hall*, 70 Ind. 469; *Goddard v. Stockman*, 74 Ind. 400; *Hill v. Probst*, 120 Ind. 528, 22 N. E. 664; *Bell v. Maish*, 137 Ind. 226, 36 N. E. 358, 1118.

<sup>247</sup> *Miles v. Ray*, 100 Ind. 166.

<sup>248</sup> *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124; *Vickery v. Blair*, 134 Ind. 554, 32 N. E. 880; *Montgomery v. Wasem*, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184 (drainage assessment).

<sup>249</sup> Code, § 253. See *Bunker v. City of Hutchinson*, 74 Kan. 651, 87 Pac. 884.

upon equitable principles.<sup>250</sup> An injunction will therefore issue at the suit of interested parties to restrain the collection of an illegal tax as against themselves. Thus, where an assessor illegally raises an assessment on personal property after a proper return has been made, an injunction will issue.<sup>251</sup> Likewise, where a railroad is assessed at its full value while other property is rated at only twenty-five per cent, the company may obtain an injunction against the collection of the illegal excess upon tendering the amount legally due.<sup>252</sup>

§ 1832. (§ 409.) **Same — Kansas — Parties.** — Under the statute any one or more of a number of persons, whose property is affected by an illegal tax or assessment, may maintain an action to enjoin the collection of such tax or assessment so far as it affects his or their property, without joining others as plaintiffs whose property may also be affected.<sup>253</sup> This does not authorize, however, one to maintain an action for the benefit of all.<sup>254</sup> And where the plaintiff is a municipal corporation it will not be allowed to maintain the action for the benefit of its citizens.<sup>255</sup> In such a case there is a double reason for refusing relief, for the corporation has no such direct interest as to give it a standing in court to enjoin any part of the tax, for it is not a tax-payer. The statute does not give the right to two or more persons to unite in an action to enjoin two illegal taxes severally assessed against each of them. When the tax is illegal in

<sup>250</sup> *Stewart v. Commissioners of Wyandotte Co.*, 45 Kan. 708, 23 Am. St. Rep. 746, 26 Pac. 683.

<sup>251</sup> *Gibbins v. Adamson*, 44 Kan. 203, 24 Pac. 51.

<sup>252</sup> *Chicago, B. & Q. R. Co. v. Board of Commissioners*, 54 Kan. 781, 39 Pac. 1039. Compare *Citizens' Nat. Bank v. Board of Commissioners of Lyon County*, 83 Kan. 376, 111 Pac. 496.

<sup>253</sup> Code, § 253; *Gilmore v. Fox*, 10 Kan. 509.

<sup>254</sup> *Wyandotte & K. C. Bridge Co. v. Board of Commissioners*, 10 Kan. 326.

<sup>255</sup> *Center Township v. Hunt*, 16 Kan. 430.

itself, then as many as have property within the district may join. But when a tax is valid, and becomes illegal only as applied to particular persons or property, or to particular cases, then each person severally interested must sue alone.<sup>256</sup>

In actions to restrain the collection of municipal taxes, it is generally held that the taxing corporation is a necessary party defendant.<sup>257</sup> The reason for the rule is that such corporation is interested in the outcome, and should not be deprived of its rights without a hearing. Where, however, the suit is to enjoin the sale of property under a tax warrant, and the only question is whether the property is subject to levy, the sheriff may be made sole defendant.<sup>258</sup>

§ 1833. (§ 410.) **Same — Kentucky.** — In Kentucky, an injunction will issue to restrain the collection of an illegal and void tax upon the ground of the inadequacy of the remedy at law. "The officer, acting in good faith and under the color of right, is justified by his process, and is not liable as a trespasser; and, as suit would not lie against the state directly, the only complete remedy is by injunction."<sup>259</sup> Thus, an injunction will be granted to restrain the collection of a tax based on an assessment which has been illegally raised without notice to the taxpayer.<sup>260</sup> Likewise, the injunction will issue to restrain the collection of a municipal tax based on an assessment void because the assessor acts under the instruction of

<sup>256</sup> *Missouri River, F. S. & G. R. Co. v. Morris*, 7 Kan. 210.

<sup>257</sup> *Gilmore v. Fox*, 10 Kan. 509; *Jeffries Ba Som v. Nation*, 63 Kan. 247, 65 Pac. 226.

<sup>258</sup> *Cook v. Condon*, 6 Kan. App. 574, 51 Pac. 587.

<sup>259</sup> *Gates v. Barrett*, 79 Ky. 295; *Negley v. Henderson Bridge Co.*, 107 Ky. 414, 54 S. W. 171. In general, see *Ryan v. City of Louisville*, 133 Ky. 714, 118 S. W. 992; *Mt. Sterling Oil & Gas Co. v. Ratliff*, 127 Ky. 1, 104 S. W. 993.

<sup>260</sup> *Negley v. Henderson Bridge Co.*, 107 Ky. 414, 54 S. W. 171.

the local legislative body and copies the assessment from the county roll instead of making one himself.<sup>261</sup> And the mere fact that the assessment includes a valid poll-tax is no ground for refusing the injunction when it appears that the tax-payer has sufficient personal property out of which it might be satisfied.<sup>262</sup> But the injunction will not be granted merely because the plaintiff thinks the assessment excessive.<sup>263</sup>

An injunction will not issue, however, to restrain the collection of a tax on the ground that property not taxable has been assessed, unless the statutory mode of correction has been tried first.<sup>264</sup> In such a case there is an adequate remedy at law.

Not only will the injunction issue against the collection of an illegal tax, but where the county judge is proceeding to assess property for taxation to which it is not legally liable, he may be restrained from so assessing, because his action is final.<sup>265</sup> Where, however, the assessment is being made by an ordinary taxing officer from whom an appeal may be taken, an injunction will not issue to restrain the mere making of the assessment.

A *quasi*-public corporation, such as a water company which supplies a municipality, may enjoin the seizure of its property for taxes, where such seizure would deprive the public of the benefits to be derived from it. Such a corporation, however, is not entitled to escape taxation, and therefore the court will require it to pay the money into court, or to place the management in the hands of a receiver, in order that the burden may be discharged.<sup>266</sup>

<sup>261</sup> *Turner v. Town of Pewee Valley*, 100 Ky. 288, 38 S. W. 143, 688.

<sup>262</sup> *Id.*

<sup>263</sup> *Royer Wheel Co. v. Taylor County*, 104 Ky. 741, 47 S. W. 876; *Ryan v. City of Louisville*, 133 Ky. 714, 118 S. W. 992.

<sup>264</sup> *Bell County Coke & Imp. Co. v. Board of Trustees etc.*, 19 Ky. Law Rep. 789, 42 S. W. 92.

<sup>265</sup> *Baldwin v. Shine*, 84 Ky. 510, 2 S. W. 164.

<sup>266</sup> *Louisville Water Co. v. Hamilton*, 81 Ky. 517.



In an action to enjoin the collection of a tax the presumption is in favor of its legality, and therefore the burden of proof is upon the plaintiff to show its illegality.<sup>267</sup>

If the tax-payer is unsuccessful in his application for an injunction, judgment will be entered against him for the amount of the tax.<sup>268</sup>

§ 1834. (§ 411.) **Same—Massachusetts.**—The collection of illegal taxes, whether on real or on personal property, is not subject to injunction in this state. A taxpayer who has been illegally assessed has an adequate and complete remedy at law by paying the tax and suing to recover it back.<sup>269</sup> “The legislature has evidently regarded this remedy as adequate and complete, having regard to a prompt and unembarrassed assessment and collection of taxes for the maintenance of the government.”<sup>270</sup>

§ 1835. (§ 412.) **Same — Mississippi.** — The Mississippi code provides that “the chancery court shall have jurisdiction of suits by one or more tax-payers in any county, city, town or village, to restrain the collection of any taxes levied or attempted to be collected without authority of law.”<sup>271</sup> Before the issuance of the injunction the plaintiff must enter into a bond conditioned for

<sup>267</sup> Board of Councilmen of City of Frankfort v. Mason & Foard Co., 100 Ky. 48, 37 S. W. 290.

<sup>268</sup> Town of Central Covington v. Park, 21 Ky. Law Rep. 1847, 56 S. W. 650.

<sup>269</sup> Brewer v. City of Springfield, 97 Mass. 152; Loud v. City of Charlestown, 99 Mass. 208; Macy v. Nantucket, 121 Mass. 351 (interpleader not maintainable to determine in which town plaintiff is liable to be taxed; but the objection may be waived: Forest River Lead Co. v. Salem, 165 Mass. 193, 202, 42 N. E. 802); Kelley v. Barton, 174 Mass. 396, 54 N. E. 860.

<sup>270</sup> Loud v. City of Charlestown, 99 Mass. 208.

<sup>271</sup> Code, § 483.

the prompt payment of the taxes enjoined, and damages and costs, in case the injunction be dissolved.<sup>272</sup> Upon dissolution, a decree must be entered against the plaintiff and his bondsmen for the amount of the taxes, ten per cent penalty, and costs.<sup>273</sup> These sections have been construed as allowing the injunction whenever the tax is without authority of law.<sup>274</sup> The injunction will not be granted, however, until the proceedings have gone far enough to enable the court to tell the amount for which a decree against the plaintiff must be entered in case of dissolution, and therefore an injunction will not issue to restrain the mere assessment of an *ad valorem* tax.<sup>275</sup>

Where a tax levy is in excess of the legal limit, only the excess will be enjoined.<sup>276</sup>

§ 1836. (§ 413.) **Same — Montana.** — The Political Code of Montana prohibits injunctions to restrain the collection of a tax or the sale of property for non-payment of a tax, except where the tax is illegal, or not authorized by law, or where the property is exempt from taxation.<sup>277</sup> Where a tax is absolutely void, as where a school tax is levied upon a party whose place of business is not within the district, the injunction will be granted.<sup>278</sup>

§ 1837. (§ 414.) **Same—Nebraska.**—In Nebraska, it is provided by statute that “no injunction shall be granted by any court or judge in this state to restrain the collection of any tax or any part thereof, hereafter levied,

<sup>272</sup> Code, § 561.

<sup>273</sup> Code, § 484.

<sup>274</sup> *Yazoo & M. V. R. Co. v. Adams*, 73 Miss. 648, 19 South. 91.

<sup>275</sup> *Yazoo & M. V. R. Co. v. Adams*, 73 Miss. 648, 19 South. 91.

<sup>276</sup> *Lewis v. Village of Boguechitto*, 76 Miss. 356, 24 South. 875.

<sup>277</sup> Mont. Pol. Code, §§ 4023-4026.

<sup>278</sup> *Green Mountain Stock Ranching Co. v. Savage*, 15 Mont. 189, 38 Pac. 940; *Montana Ore Purchasing Co. v. Maher*, 32 Mont. 480, 81 Pac. 13.

nor to restrain the sale of any property for the non-payment of any such tax except such tax, or the part thereof enjoined, be levied or assessed for an illegal or unauthorized purpose."<sup>279</sup> Hence, a tax-payer may obtain an injunction to restrain the levying of a tax to pay the principal or interest on void bonds.<sup>280</sup>

The courts have construed this and similar statutes, however, in such a manner as to make the rule really broader. It is held that the section has no reference to taxes wholly void, that a void tax is no tax, and that, therefore, it would be beyond the power of the legislature to take away the equitable remedy in such a case; for such an act would be in conflict with the constitutional provision giving the courts general equity jurisdiction.<sup>281</sup> Another theory upon which the broader rule has been supported is that a tax levied without authority of law is levied for an unauthorized purpose.<sup>282</sup> At any rate, it may be safely laid down as a general rule that an injunction will be granted when a void tax or assessment is sought to be collected.<sup>283</sup> Thus, where a tax is levied on property without the jurisdiction of the taxing district,<sup>284</sup> or where the property is situated in

<sup>279</sup> Comp. Stats., art. I, c. 77, § 144. See construction in *Philadelphia Mtg. & Tr. Co. v. City of Omaha*, 63 Neb. 280, 93 *Am. St. Rep.* 442, 56 *L. R. A.* 150, 88 *N. W.* 523, 65 *Neb.* 93, 90 *N. W.* 1005; *Union Pac. R'y Co. v. Cheyenne County*, 64 *Neb.* 777, 90 *N. W.* 917.

<sup>280</sup> *Morton v. Carlin*, 51 *Neb.* 202, 70 *N. W.* 966.

<sup>281</sup> *Touzalín v. City of Omaha*, 25 *Neb.* 817, 41 *N. W.* 796; *Chicago, B. & Q. R. Co. v. Cass County*, 51 *Neb.* 369, 70 *N. W.* 955; *Rothwell v. Knox County*, 62 *Neb.* 50, 86 *N. W.* 903; *Grand Island & M. C. R. Co. v. Dawes County*, 62 *Neb.* 44, 86 *N. W.* 834. In general, see *Brown v. Douglas County*, 98 *Neb.* 299, 152 *N. W.* 545; *Barkley v. City of Lincoln*, 82 *Neb.* 181, 130 *Am. St. Rep.* 659, 18 *L. R. A.* (N. S.) 392, 117 *N. W.* 398; *Darr v. Dawson County*, 93 *Neb.* 93, 139 *N. W.* 852.

<sup>282</sup> *Earl v. Duras*, 13 *Neb.* 234, 13 *N. W.* 206.

<sup>283</sup> *Morris v. Merrell*, 44 *Neb.* 423, 62 *N. W.* 865.

<sup>284</sup> *Sioux City Bridge Co. v. Dakota County*, 61 *Neb.* 75, 84 *N. W.* 607.

territory which the taxing municipality has ineffectually tried to annex,<sup>285</sup> the injunction will issue. Likewise, where a statute authorizes a tax of nine mills and the taxing body levies a tax of twelve mills,<sup>286</sup> an injunction is proper.

§ 1838. (§ 415.) **Same — Ohio.** — The Revised Statutes of Ohio are very explicit as to injunctions in tax cases. "Courts of common pleas and superior courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either . . . without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."<sup>287</sup> "Actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation or person for whose use or benefit the levy is made; and if the levy would go upon the county duplicate the county auditor must be joined in the action."<sup>288</sup> "Actions to enjoin the collection of taxes and assessments must be brought against the officer whose duty it is to collect the same."<sup>289</sup> "If the plaintiff in an action to enjoin the collection of taxes or assessments admit a part thereof to have been legally levied, he must first pay or tender the sum admitted to be due; if an order of injunction be allowed, an undertaking must be given as in other cases; and the injunction shall be a justification of the officer charged with the collection of such taxes or assessments for not collecting the same."<sup>290</sup>

<sup>285</sup> *Chicago, B. & W. R. Co. v. City of Nebraska City*, 53 Neb. 453, 73 N. W. 952.

<sup>286</sup> *Grand Island & W. C. R. Co. v. Dawes County*, 62 Neb. 44, 86 N. W. 834.

<sup>287</sup> *Ohio Rev. Stats.*, § 5848.

<sup>288</sup> *Ohio Rev. Stats.*, § 5849.

<sup>289</sup> *Ohio Rev. Stats.*, § 5850.

<sup>290</sup> *Ohio Rev. Stats.*, § 5851.



“When the power to tax in any particular case is challenged, the citizen has the right to be heard in court as to the legality of the tax; but when the power to tax is conceded, and the complaint is only as to the valuation, a valuation made in good faith, and according to the best judgment of the taxing officer, will not be disturbed by the courts in the absence of gross mistake.”<sup>291</sup> Thus, an injunction will be granted at suit of a tax-payer when the tax is levied without authority of law,<sup>292</sup> as where levied for an illegal object. It will also be granted to restrain the sale of realty for an illegal tax, when such sale would cast a cloud on title.<sup>293</sup> It has been held that an injunction will not issue to restrain the collection of a tax when the action of the collecting officer amounts to a mere trespass for which there is an adequate remedy at law; and the mere fact that a number of persons are in the same condition as the plaintiff is not sufficient to warrant the relief.<sup>294</sup>

§ 1839. (§ 416.) **Same—Oklahoma.**—In Oklahoma it is provided by statute that “an injunction may be granted to enjoin the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same, and any number of persons, whose property is affected by a tax or assessment so levied may unite in the petition filed to obtain such injunction.”<sup>295</sup> In construing this provision, the supreme court of the territory has held that it enlarges the remedy by injunction in tax cases, and clearly gives the complaining party a right to injunction in every case when the tax or assessment levied against

<sup>291</sup> Hagerty v. Huddleston, 60 Ohio St. 149, 53 N. E. 960.

<sup>292</sup> Moss v. Board of Education, 58 Ohio St. 354, 50 N. E. 921; Jones v. Davis, 35 Ohio St. 474.

<sup>293</sup> Burnet v. Cincinnati, 3 Ohio, 73, 17 Am. Dec. 582.

<sup>294</sup> McCoy v. Chillicothe, 3 Ohio, 370, 17 Am. Dec. 607.

<sup>295</sup> Okl. Stats. 1893, § 4143.

him is illegal.<sup>296</sup> Thus the question to be decided in most of the cases is simply whether the tax is illegal.

Under the provision of the statute that any proceeding to enforce an illegal tax may be enjoined, it has been held that an injunction will issue to restrain a county treasurer from issuing a warrant to the sheriff to levy on the tax-payer's property to satisfy an illegal tax.<sup>297</sup>

Taxes have also been held illegal when the rate is higher than necessary for the purposes for which the tax is levied;<sup>298</sup> and where a township assessor has attempted to assess property within the limits of an incorporated town.<sup>299</sup> Hence in such cases an injunction will be granted.

*Parties Plaintiff.*—It will be noticed that the statute provides that any number of persons whose property is affected by an illegal assessment may join in an action for an injunction. This statute, however, does not authorize one tax-payer to maintain the action for the benefit of all.<sup>300</sup> It applies only where a tax is illegal in the

<sup>296</sup> *Bardrick v. Dillon*, 7 Okl. 535, 54 Pac. 785. It is difficult to reconcile this statement with language used by the same court in a decision filed the same day. Thus, in *Wilson v. Wiggins*, 7 Okl. 517, 54 Pac. 716, the court says expressly that the statute does not substantially enlarge the remedy, and that such relief cannot be invoked unless the party brings himself within the general principles of equitable relief, in addition to establishing the illegality complained of. Apparently the only effect of this holding is that an injunction will not be granted because of a mere irregularity not making the tax illegal, unless the case is brought under some equitable head; and it will be noticed that such a case does not come within the terms of the statute. The rule as embodied in the text seems to be the true one. *Wallace v. Bullen*, 6 Okl. 17, 52 Pac. 954, tends to sustain the text.

<sup>297</sup> *Gray v. Stiles*, 6 Okl. 455, 49 Pac. 1083.

<sup>298</sup> *Atchison, T. & S. F. R'y Co. v. Wiggins*, 5 Okl. 477, 49 Pac. 1019.

<sup>299</sup> *Durham v. Linderman*, 10 Okl. 570, 64 Pac. 15.

<sup>300</sup> *Stiles v. City of Guthrie*, 3 Okl. 26, 41 Pac. 383; *Caffrey v.*

abstract, illegal in and of itself, illegal as applied to every owner of taxable property in the county or district.<sup>301</sup> But when the tax, as a tax, is valid, but becomes illegal only as applied to particular persons or property, or to particular cases, as where there is an overassessment, then each person severally interested must sue alone.<sup>302</sup>

§ 1840. (§ 417.) **Same—Oklahoma—Increase of Assessment.**—Many of the cases have grown out of the action of boards of equalization in raising assessments. It has been held that the territorial board of equalization has no power to raise all of the assessments in the territory, that if it attempts to do so its action is illegal, and that therefore an injunction will issue.<sup>303</sup> And when the tax-payer makes a return of his property at the true cash value, as required by statute, he may enjoin the collection of any increase ordered by a board of equalization.<sup>304</sup> It is held that such a board is not vested with judicial powers, and that therefore when property is overvalued to such an extent as to raise the presumption that it was overestimated from design, a court of equity will determine the true valuation, and will enjoin the collection of the illegal excess.<sup>305</sup> And the injunction will be granted whether or not the tax-payer appeared before the board to protest against its action.<sup>306</sup> But the injunction will not be granted unless it appears that the

Overholser, 8 Okl. 202, 57 Pac. 206; *Martin v. Clay*, 8 Okl. 46, 56 Pac. 715.

<sup>301</sup> *Bardrick v. Dillon*, 7 Okl. 535, 54 Pac. 785.

<sup>302</sup> *Bardrick v. Dillon*, 7 Okl. 535, 54 Pac. 785; *Weber v. Dillon*, 7 Okl. 568, 54 Pac. 894.

<sup>303</sup> *Gray v. Stiles*, 6 Okl. 455, 49 Pac. 1083, overruling *Wallace v. Bullen*, 6 Okl. 17, 52 Pac. 954.

<sup>304</sup> *Caffrey v. Overholser*, 8 Okl. 202, 57 Pac. 206; *Cranmer v. Williamson*, 8 Okl. 683, 59 Pac. 249.

<sup>305</sup> *Bardrick v. Dillon*, 7 Okl. 535, 54 Pac. 785.

<sup>306</sup> *Wiggins v. A. T. & S. F. R. Co.*, 9 Okl. 118, 59 Pac. 248.

increased assessment is greater than the actual cash value, for unless it is, the assessment is not illegal,<sup>307</sup> nor will it be granted unless the plaintiff has listed and returned the property to the assessor at its actual cash value, as required by statute.<sup>308</sup>

§ 1841. (§ 418.) **Same — Oklahoma — Tender.**—It is provided by statute that in all actions to enjoin the collection of a tax, “the true and just amount of taxes due upon such property or by such person if in dispute, must be ascertained and paid before the judgment prayed for.”<sup>309</sup> But further than this, it is held that before the plaintiffs can be heard to question in a court of equity, the legality of any portion of the taxes, they must pay, or offer to pay, that part over which there is no dispute, if any there be, and at least offer in their petition to pay such portion as the court may determine to be legal and just.<sup>310</sup> It is suggested in one case that the reason for this latter requirement is that as the court cannot otherwise compel the payment of the tax found to be legal the offer in the petition to pay whatever is found to be due must be made, so that full justice may be done.<sup>311</sup> But where it is clear that a part of the tax is legal, an actual tender must be made before suit. An averment of readiness and willingness to pay is not sufficient.<sup>312</sup> Thus, where an injunction is sought on the ground of excess, tender must be made of the amount legally due.<sup>313</sup>

<sup>307</sup> *Streight v. Durham*, 10 Okl. 361, 61 Pac. 1096; *Rose v. Durham*, 10 Okl. 373, 61 Pac. 1100.

<sup>308</sup> *Alva State Bank v. Renfrew*, 10 Okl. 26, 62 Pac. 285.

<sup>309</sup> Okl. Stats. 1893, § 5671.

<sup>310</sup> *Collins v. Green*, 10 Okl. 244, 62 Pac. 813; *Halff v. Green*, 10 Okl. 338, 62 Pac. 816; *Russell v. Green*, 10 Okl. 340, 62 Pac. 817; *McIntyre v. Williamson* (Okl.), 54 Pac. 928.

<sup>311</sup> *Lasater v. Green*, 10 Okl. 335, 62 Pac. 816.

<sup>312</sup> *State Nat. Bank v. Carson* (Okl.), 50 Pac. 990.

<sup>313</sup> *McIntyre v. Williamson* (Okl.), 54 Pac. 928.



§ 1842. (§ 419.) **Same—Rhode Island.**—In Rhode Island, equity will not enjoin the collection of a tax at the suit of an individual tax-payer on the ground of illegality, when the illegality affects him alone, unless special equities are shown.<sup>314</sup> And it has been held that the cloud upon title to land cast by a sale under a void tax is too easily dispelled to warrant the court in taking jurisdiction on that ground.<sup>315</sup> But when the illegality extends to the whole tax, so that the question involved is the validity of the whole tax and its assessments on every person taxed, equity will take jurisdiction at the suit of one or more tax-payers, suing in behalf of all the tax-payers as well as in his or their own behalf for the purpose of preventing a multiplicity of suits.<sup>316</sup>

An injunction will not lie against a tax-collector to prevent a mode of levy authorized by statute because some other mode may be more equitable.<sup>317</sup>

§ 1843. (§ 420.) **Same—Texas.**—In Texas an injunction will issue to restrain the collection of an illegal or fraudulent tax. Thus, where the property of an individual is about to be sold to satisfy a tax levied against him on property which he does not own,<sup>318</sup> as, for instance, where a bank is assessed upon its own stock which is the property of its stockholders,<sup>319</sup> or where real property is about to be sold for an illegal tax on personal property,<sup>320</sup> an injunction will issue to prevent the wrong. Any illegality not apparent on the face of the proceed-

<sup>314</sup> *Greene v. Mumford*, 5 R. I. 472, 73 Am. Dec. 79.

<sup>315</sup> *Id.*; *Sherman v. Leonard*, 10 R. I. 469.

<sup>316</sup> *McTwiggan v. Hunter*, 18 R. I. 776, 30 Atl. 962; *Tefft v. Lewis* (R. I.), 60 Atl. 243; *Sherman v. Benford*, 10 R. I. 559; *Quimby v. Wood*, 19 R. I. 571, 35 Atl. 149.

<sup>317</sup> *People's Sav. Bank v. Tripp*, 13 R. I. 621.

<sup>318</sup> *Davis v. Burnett*, 77 Tex. 3, 13 S. W. 613.

<sup>319</sup> *Waco National Bank v. Rogers*, 51 Tex. 606.

<sup>320</sup> *Court v. O'Connor*, 65 Tex. 339.

ings,<sup>321</sup> such as a case of double taxation,<sup>322</sup> is sufficient to warrant the court in granting the relief. And where an illegal tax affecting numerous persons is sought to be enforced, any one or more of the parties sought to be subjected to the imposition may, in the same suit, restrain its collection.<sup>323</sup> Thus, any number of tax-payers may join in an action to restrain the collection of an illegal poll-tax.<sup>324</sup>

An injunction will not issue to restrain the collection of a municipal tax on the ground of the invalidity of the municipal incorporation, although both the corporation and its officers are insolvent.<sup>325</sup>

§ 1844. (§ 421.) **Same—Utah.**—In Utah it is provided by statute that “no injunction shall be granted by any court or judge to restrain the collection of any tax or any part thereof, nor to restrain the sale of any property for the nonpayment of the tax, except, first, where the tax, or any part thereof sought to be enjoined is illegal, or is not authorized by law. If the payment of a part of a tax is sought to be enjoined, the other part must be paid or tendered before action can be commenced.”<sup>326</sup> In construing this, the supreme court has held that the remedy should not be invoked, except in clear cases,

<sup>321</sup> *Cook v. Galveston, H. & S. A. R. Co.*, 5 Tex. Civ. App. 644, 24 S. W. 544; *Blessing v. City of Galveston*, 42 Tex. 641. In general, see *Cochran v. Kennon* (Tex. Civ. App.), 161 S. W. 67; *Sullivan v. Bitter*, 51 Tex. Civ. App. 604, 113 S. W. 193; *Langlay v. Smith*, 59 Tex. Civ. App. 584, 126 S. W. 660.

<sup>322</sup> *Schmidt v. Galveston, H. & S. A. R. Co.* (Tex. Civ. App.), 24 S. W. 547.

<sup>323</sup> *Morris v. Cummings*, 91 Tex. 618, 45 S. W. 383.

<sup>324</sup> *Id.* But injunction does not lie after suits have already been begun for the collection of the taxes: *McMickle v. Hardin*, 25 Tex. Civ. App. 222, 61 S. W. 322.

<sup>325</sup> *Troutman v. McCleskey*, 7 Tex. Civ. App. 561, 27 S. W. 173.

<sup>326</sup> *Laws 1896*, p. 465, § 179.

based upon unquestionable facts, coming within the clear terms, letter, and spirit of the statute.<sup>327</sup>

Before the enactment of the statute quoted above, it was held that an injunction will not issue to restrain the collection of an illegal tax on the ground that it casts a cloud on title to real estate, when personal property has already been levied upon to satisfy it.<sup>328</sup> The presumption is that the levy is sufficient to satisfy the tax, and hence the cloud is removed.

§ 1845. (§ 422.) **Same—Wisconsin—In General.**—It is the settled doctrine in Wisconsin that it is not enough to avoid a tax in equity to show that the proceedings were irregular, or even void, but, in addition, it must be shown that the taxes were inequitable, and that it will be against conscience to let them go on.<sup>329</sup>

From the general principle that equity possesses no power to revise, control, or correct the action of public, political or executive officers, at the suit of a private person, except as incidental and subsidiary to the protection of some private right, or the prevention of some private wrong, the mere fact that the voters of a town have voted

<sup>327</sup> *Mercur Gold M. & M. Co. v. Spry*, 16 Utah, 222, 52 Pac. 382. As to the right to maintain a statutory suit to quiet title against an invalid tax, see *Wey v. Salt Lake City*, 35 Utah, 504, 101 Pac. 381.

<sup>328</sup> *Mercur Gold M. & M. Co. v. Spry*, 16 Utah, 222, 52 Pac. 382.

<sup>329</sup> *Wells v. Western Paving etc. Co.*, 96 Wis. 116, 70 N. W. 1071; *Chicago & N. W. R. Co. v. Forest County*, 95 Wis. 80, 70 N. W. 77; *Hayes v. Douglas County*, 92 Wis. 429, 53 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482; *Hixon v. Oneida County*, 82 Wis. 531, 52 N. W. 445; *Bond v. City of Kenosha*, 17 Wis. 286 (no injunction where the irregularity diminished rather than increased plaintiff's taxes); *Warden v. Board of Supervisors of Fond du Lac County*, 14 Wis. 618 (same; a leading case). *Marsh v. Supervisors of Clark County*, 42 Wis. 502, *Goff v. Supervisors of Outagamie County*, 43 Wis. 55, and *Schettler v. City of Fort Howard*, 43 Wis. 48, so far as they may be considered as having departed from this principle, have since been overruled: See *Hixon v. Oneida County*, *supra*.

an illegal tax is not sufficient ground for an injunction, in advance of any invasion of the legal rights of the plaintiff.<sup>330</sup>

A court of equity has no jurisdiction to restrain the collection of taxes illegally or improperly assessed upon personal property, inasmuch as the party injured has an ample remedy by action against the municipal corporation to which the money is paid or for which it is collected.<sup>331</sup>

§ 1846. (§ 423.) **Same — Wisconsin — Defects Going to the Validity of the Assessment.**—The doctrine was laid down by the supreme court of Wisconsin at an early day, that a court of equity will not interfere to declare a tax invalid and restrain its collection, unless the objections to the proceedings are such as go to the very groundwork of the tax, and necessarily affect materially its principle, and show that it must necessarily be unjust and unequal.<sup>332</sup> When the objection is a mere non-compliance with some direction of the statute, notwithstanding which the tax may have been entirely just or equal, it ought not to have the effect of rendering the whole tax invalid.

Where the assessment-roll was unverified, and all the rules established by law to govern the assessment of property had been violated, and one of the assessors testified that he could not make the oath required by law

<sup>330</sup> Judd v. Town of Fox Lake, 28 Wis. 583.

<sup>331</sup> Van Cott v. Board of Supervisors of Milwaukee County, 18 Wis. 259.

<sup>332</sup> Hixon v. Oneida County, 82 Wis. 531, 52 N. W. 445, and cases cited; Wisconsin Central R. Co. v. Ashland County, 81 Wis. 10, 50 N. W. 937; Canfield v. Bayfield County, 74 Wis. 60, 64, 41 N. W. 437, 42 N. W. 100; Hart v. Smith, 44 Wis. 217; Kaehler v. Dobberpuhl, 56 Wis. 480, 14 N. W. 644; Marsh v. Supervisors of Clark County, 42 Wis. 502, 512; Mills v. Johnson, 17 Wis. 598, 602; Warden v. Supervisors of Fond du Lac County, 14 Wis. 618; Mills v. Gleason, 11 Wis. 470, 497, 78 Am. Dec. 721.



without being guilty of perjury, the assessment was held to be necessarily unequal and the whole tax vitiated,<sup>333</sup> so, where there was an arbitrary classification of lands by rules that disregarded the principles laid down by statute to guide the assessor in making valuations.<sup>334</sup> A complaint alleging a corrupt and fraudulent assessment, to the great injury of the plaintiff, in that the assessors, in violation of law, intentionally assessed vacant lands at a much greater sum in proportion to their value than improved lands, states a defect going to the validity of the assessment and affecting the groundwork of the tax.<sup>335</sup> The intentional omission, as exempt property, of property not exempt, goes to the groundwork of the whole tax.<sup>336</sup> It has been held that where the assessor adopted a rule of valuation based on what he thought the lands would bring at a forced sale, in violation of the statutory rule that lands should be assessed at the value which could ordinarily be obtained therefor at private sale, the whole tax is vitiated, and an injunction is proper;<sup>337</sup> so, where the assessment was made on a basis of one-third of the real value.<sup>338</sup>

§ 1847. (§ 424.) **Same—Wisconsin—Defects not Going to the Validity of the Assessment.**—A complaint alleging that in making the levy one item was for a certain sum for “the general fund,” and that the city had no

<sup>333</sup> *Marsh v. Supervisors of Clark County*, 42 Wis. 502, as explained in *Fifield v. Marinette County*, 62 Wis. 532, 538, 22 N. W. 705.

<sup>334</sup> *Hersey v. Board of Supervisors of Barron County*, 37 Wis. 75.

<sup>335</sup> *Anderson v. Douglas County*, 98 Wis. 393, 74 N. W. 109.

<sup>336</sup> *Green Bay & M. Canal Co. v. Outagamie County*, 76 Wis. 587, 45 N. W. 536; *Hersey v. Board of Supervisors of Milwaukee County*, 16 Wis. 186, 82 *Am. Dec.* 713; *Weeks v. City of Milwaukee*, 10 Wis. 242.

<sup>337</sup> *Goff v. Supervisors of Outagamie County*, 43 Wis. 55.

<sup>338</sup> *Schettler v. City of Fort Howard*, 43 Wis. 48. Doubt has been cast upon these two cases, however, by later decisions: See *Hixon v. Oneida County*, 82 Wis. 531, 52 N. W. 445.

authority to levy for such a fund, does not state a defect going to the validity of the assessment.<sup>339</sup> The fact that the resolution of a town for raising taxes fails to designate the specific purposes for which the taxes were to be raised does not "go to the groundwork" of the tax, and necessarily affect materially its principle, so as to be available in a court of equity to enjoin or restrain its collection.<sup>340</sup> The honest opinion and judgment of the assessor and of the board of review must be conclusive, unless the inequalities or overvaluations are shown to be so gross as to be evidence of bad faith or arbitrary judgment.<sup>341</sup> The mere failure of the assessor to verify the assessment-roll as required by law, does not necessarily render the taxes apportioned upon such assessment unequal or unjust.<sup>342</sup> All reasonable presumptions must be made in favor of the regularity of proceedings of the board of review; and a complaint which merely states that the plaintiff testified before the board as to the value of the land, and that the board refused to reduce the valuation in accordance with his testimony, without stating that this was the only evidence presented on the subject, does not show that the board acted arbitrarily, in disregard of all the evidence before it, so as to sustain an injunction.<sup>343</sup>

§ 1848. (§ 425.) **Same—Wisconsin—Cloud on Title.** Under the Wisconsin statutes, a tax upon lands, where the proceedings are not void upon their face, is a lien

<sup>339</sup> *Anderson v. Douglas County*, 98 Wis. 393, 74 N. W. 109.

<sup>340</sup> *Chicago & N. W. R'y Co. v. Forest County*, 95 Wis. 80, 70 N. W. 77.

<sup>341</sup> *Green Bay & M. Canal Co. v. Outagamie County*, 76 Wis. 587, 45 N. W. 536.

<sup>342</sup> *Fifield v. Marinette County*, 62 Wis. 532, 22 N. W. 705, criticising language used in *Marsh v. Supervisors of Clark County*, 42 Wis. 502.

<sup>343</sup> *Tainter v. Lucas*, 29 Wis. 375.

thereon from the time of the assessment; and, if illegal, it constitutes a cloud upon the title, before as well as after the tax sale. Equity will therefore interfere, not only after the sale to cancel the certificate, but before a sale, to declare the assessment void and restrain the collection.<sup>344</sup> The statute making the tax deed *prima facie* evidence of the regularity of all the proceedings, illegalities that would probably not appear on the face of the tax deed, and could only be shown by proof *dehors* the deed, render the deed a cloud on title, and its issuance should be enjoined.<sup>345</sup>

It is not an abuse of discretion to refuse to restrain by preliminary injunction a sale of lands for taxes pending the determination of a controversy as to their validity, when the controversy can be finally concluded before plaintiff's title can be disturbed or injuriously clouded by a tax deed.<sup>346</sup>

Where jurisdiction has attached for the purpose of canceling a tax certificate as a cloud on title, the court may go on and give complete relief by restraining the sale of personal property which had been seized for the tax, although for the latter purpose alone a court of equity would not have interfered by injunction.<sup>347</sup>

But one person cannot maintain an action to set aside any tax upon real estate, except upon such as he owns, or has some interest in; and two persons cannot properly be joined as plaintiffs in the same action to set aside taxes which are a lien upon their separate property only.<sup>348</sup>

<sup>344</sup> Milwaukee Iron Co. v. Town of Hubbard, 29 Wis. 51.

<sup>345</sup> Jenkins v. Board of Supervisors of Rock County, 15 Wis. 11; and see Dean v. City of Madison, 9 Wis. 402.

<sup>346</sup> Chicago & N. W. R. Co. v. Langlade County, 104 Wis. 373, 80 N. W. 598.

<sup>347</sup> Hamilton v. City of Fond du Lac, 25 Wis. 490.

<sup>348</sup> Gilkey v. City of Merrill, 67 Wis. 459, 30 N. W. 733; Newcomb v. Horton, 18 Wis. 566; Barnes v. Beloit, 19 Wis. 93.

§ 1849. (§ 426.) **Jurisdiction of Federal Courts—To Enjoin Federal Taxes.**—Under federal statutes no injunction can issue to restrain the collection of taxes levied by the federal government.<sup>349</sup> The only remedy of the tax-payer is to pay the money and then sue to recover it back. The only cases where federal courts can enjoin taxation are those where state taxes are involved. Therefore, an injunction requiring a collector of internal revenue to accept an export bond and to allow the withdrawal of goods without payment of a tax thereon, will not issue, for it in effect would restrain the collection of internal revenue taxes.<sup>350</sup>

§ 1850. (§ 427.) **Same—State Taxes.**—Of course the federal courts will not interfere with state taxation unless the case presents some features which make it of federal cognizance. So long as a state, by its laws prescribing the mode and subject of taxation does not intrench upon the legitimate authority of the Union, nor violate any right secured by the Constitution of the United States, the federal court, as between the state and its citizen, can afford no relief, no matter how unjust, oppressive or onerous the tax may be.<sup>351</sup>

If the claim to relief clearly within the federal jurisdiction is fair and colorable, not fictitious and fraudulent, jurisdiction attaches, although the ultimate decision may be against the right claimed. When the jurisdiction has properly attached, it extends to the whole case, and to all the issues involved, whether of a federal or non-federal character, and the court has power to de-

<sup>349</sup> U. S. Rev. Stats., § 3224; *Snyder v. Marks*, 109 U. S. 189, 27 L. Ed. 901, 3 Sup. Ct. 157; *Burgdorf v. District of Columbia*, 7 App. D. C. 405.

<sup>350</sup> *Miles v. Johnson*, 59 Fed. 38. A stockholder of a corporation cannot enjoin the corporation from paying an alleged invalid federal income tax: *Straus v. Abrast Realty Co.*, 200 Fed. 327.

<sup>351</sup> *Kirkland v. Hotchkiss*, 100 U. S. 497, 25 L. Ed. 558.



cide upon all questions involved. Therefore, when the court has obtained jurisdiction on some ground, it may go ahead and examine into the legality of a state tax, whether or not it involves a federal question, and if it finds there is not an adequate remedy at law in the state courts, it may grant an injunction.<sup>352</sup> Thus, it has been held that the statutes of Kentucky do not afford an adequate remedy when capital stock of a corporation is illegally assessed, and therefore an injunction may issue.<sup>353</sup>

A suit to enjoin the collection of a tax imposed by a state is not a suit against a state within the meaning of the Eleventh Amendment of the federal constitution. It is rather a suit against individuals, seeking to enjoin them from doing certain acts which they assert to be by the authority of the state, but which the complainant avers to be without lawful authority.<sup>354</sup>

§ 1851. (§ 428.) **Same—Adequate Remedy in State Courts.**—The federal courts are not ousted of their jurisdiction to grant injunctions in tax cases, where federal questions are involved, because a state furnishes an adequate statutory remedy in its own courts.<sup>355</sup> And this is true, even though the state statute provides that its remedy shall be exclusive and forbids injunctions.<sup>356</sup>

<sup>352</sup> *Louisville Trust Co. v. Stone*, 107 Fed. 305, 46 C. C. A. 299.

<sup>353</sup> *Id.*

<sup>354</sup> *Taylor v. Louisville & N. R. Co.*, 88 Fed. 350, 31 C. C. A. 537; *Gregg v. Sanford*, 65 Fed. 151, 12 C. C. A. 525; *Ex parte Tyler*, 149 U. S. 164, 39 L. Ed. 689, 13 Sup. Ct. 785; *Ex parte Ayers*, 123 U. S. 443, 31 L. Ed. 216, 8 Sup. Ct. 164. This decision distinguishes between this class of cases and those where breach of contract by the state is involved. See, also, *Union Pac. R. Co. v. Alexander*, 113 Fed. 347.

<sup>355</sup> *Brown v. French*, 80 Fed. 166; *Ex parte Tyler*, 149 U. S. 164, 39 L. Ed. 689, 13 Sup. Ct. 785; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. Ed. 903.

<sup>356</sup> *Taylor v. Louisville & N. R. Co.*, 88 Fed. 350, 31 C. C. A. 537.

Where a valid state statute gives a right of appeal to the courts from an assessment, and no federal question is involved, it is an adequate remedy for any error or illegality. Therefore, a tax-payer who does not avail himself of such remedy cannot maintain a suit in the United States courts to enjoin the collection of a tax illegally assessed.<sup>357</sup> Likewise, where state laws provide for an appeal to a board of equalization for redress against an excessive tax, a party who fails to resort to such a tribunal cannot obtain relief in the federal courts.<sup>358</sup> And it is for the state court to determine whether or not the statutory remedy is exclusive.<sup>359</sup> Where a Colorado statute provides a remedy by suit to recover back an illegal tax, a federal equity court will not take jurisdiction.<sup>360</sup> And a remedy by *certiorari* in a state court has been held adequate.<sup>361</sup>

§ 1852. (§ 429.) **Same — Grounds of the Equitable Jurisdiction.**—A federal court of equity will not enjoin the collection of a state tax, “except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked.” “The illegality of the tax and the threatened sale . . .

<sup>357</sup> Pittsburgh, C., C. & St. L. R’y Co. v. Board of Public Works, 172 U. S. 32, 43 L. Ed. 354, 19 Sup. Ct. 90.

<sup>358</sup> Altschul v. Gittings, 86 Fed. 200; Dundee Mortgage Trust Inv. Co. v. Charlton, 13 Sawy. 25, 32 Fed. 192.

<sup>359</sup> Northern Pac. R. R. Co. v. Patterson, 154 U. S. 130, 38 L. Ed. 934, 14 Sup. Ct. 977.

<sup>360</sup> Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 57 L. Ed. 1288, 33 Sup. Ct. 942; Union Pac. R. Co. v. Board of Commissioners of Weld County, 217 Fed. 540, 133 C. C. A. 392.

<sup>361</sup> Union Pac. R. Co. v. Flynn, 180 Fed. 565.

for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction.'<sup>362</sup>

§ 1853. (§ 430.) **Same—Irreparable Injury.**—When the remedy at law for an illegal tax is inadequate in the state courts, a federal court may, after acquiring jurisdiction, interfere by injunction to prevent irreparable injury. Thus, under the Kentucky law, an action to recover illegal taxes paid will not lie unless they are paid under duress, and yet in certain cases a penalty of fifty dollars per day is provided where payment is delayed. The legal remedy, therefore, of defending a tax suit is attended with a great and oppressive burden of risk, and is entirely inadequate. Hence, an injunction may issue.<sup>363</sup> Upon the same principle an injunction will issue when the collection of an illegal tax will destroy a corporate franchise. This rule was laid down by Chief Justice Marshall in the case of *Osborn v. Bank of the United States*.<sup>364</sup> In that case, the state of Ohio had imposed an illegal tax upon the Bank of the United States with the avowed intention of driving it from the state. The agent whose duty it was to collect could not properly respond in damages. Consequently, the franchise of the bank would have been of no effect so far as it authorized the transaction of business in Ohio unless the injunction had been granted. Therefore, the injunction was allowed, to prevent irreparable injury. The United States may enjoin the enforcement of a state tax on lands

<sup>362</sup> *Dows v. City of Chicago*, 11 Wall. (U. S.) 108, 20 L. Ed. 65.

<sup>363</sup> *Bank of Kentucky v. Stone*, 88 Fed. 383. Affirmed, *Stone v. Bank of Kentucky*, 174 U. S. 799, 43 L. Ed. 1177, 19 Sup. Ct. 881; *First Nat. Bank v. City of Covington*, 103 Fed. 523.

<sup>364</sup> 9 Wheat. 738, 6 L. Ed. 204.

allotted in severalty, and which it holds in trust for Indians, for the legal remedy is inadequate.<sup>365</sup>

§ 1854. (§ 431.) **Same—Valuation Resulting in Unjust Discrimination.**—To the general rule there seems to be one exception. “When the overvaluation of property has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction, and operates unequally, not merely on a single individual, but on a large class of individuals or corporations, a party aggrieved may resort to equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due.”<sup>366</sup> So, where a standard of valuation results in discrimination, the parties injured may obtain an injunction.<sup>367</sup> Likewise, an injunction will be issued when state officers, by a systematic, intentional and illegal undervaluation of other property, make an unjust discrimination against the plaintiff, the federal jurisdiction arising because of the equal protection of the laws guaranteed by the Fourteenth Amendment.<sup>368</sup> But the proof of discrimination must be clear and convincing before the injunction will issue.<sup>369</sup> If it appears, however, that the assessing officers intentionally and habitually violate the law in this regard, it need not

<sup>365</sup> *United States v. Rickert*, 188 U. S. 432, 47 L. Ed. 532, 23 Sup. Ct. 478.

<sup>366</sup> *Stanley v. Supervisors*, 121 U. S. 535, 30 L. Ed. 1000, 7 Sup. Ct. 1234; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. Ed. 903; *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. Ed. 901; *German Nat. Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469.

<sup>367</sup> *Trustees Cincinnati Southern R'y v. Guenther*, 19 Fed. 395.

<sup>368</sup> *Louisville Trust Co. v. Stone*, 107 Fed. 305, 46 C. C. A. 299; *Southern R'y Co. v. North Carolina Corp. Com.*, 104 Fed. 700; *Nashville, C. & St. L. R'y Co. v. Taylor*, 86 Fed. 168.

<sup>369</sup> *Coulter v. Louisville & N. R. Co.*, 196 U. S. 599, 49 L. Ed. 615, 25 Sup. Ct. 342; *Michigan Railroad Tax Cases*, 138 Fed. 223, 244-248; *Louisville Trust Co. v. Stone*, 107 Fed. 305, 46 C. C. A. 299.



affirmatively appear that they do so with intent to injure the complainant and his class of tax-payers.<sup>370</sup>

§ 1855. (§ 432.) **Same—Multiplicity of Suits.**—This ground of jurisdiction has met with abundant recognition in cases of the “Second Class” and of the “Fourth Class,”<sup>371</sup> but appears to have been rejected in one case of the “Third Class,”<sup>372</sup> where the equity arises from the fact that the burden of an illegal tax falls on numerous individuals in the same way. This class is, at any rate, confined to cases where the tax as a whole is invalid;<sup>373</sup> and in any event the jurisdiction is asserted to prevent a probable, not a possible, multiplicity of suits.<sup>374</sup>

§ 1856. (§ 433.) **Same—Cloud on Title.**—Where an invalid tax, valid on its face, casts a cloud on the title of the plaintiff’s real estate, an injunction will issue.<sup>375</sup> Thus, where an illegal tax on the stock of a national bank is made a lien on its real estate, its collection or enforcement may be enjoined.<sup>376</sup> And where an illegal tax against a common carrier is made a lien on its realty, although personalty is to be resorted to first, equitable relief will be allowed.<sup>377</sup> Likewise, it will be allowed

<sup>370</sup> Taylor v. Louisville & N. R. Co., 88 Fed. 350, 31 C. C. A. 537.

<sup>371</sup> See *ante*, § 386, notes 145, 146.

<sup>372</sup> People’s Nat. Bank v. Marye, 107 Fed. 570.

<sup>373</sup> See *ante*, § 386, note 151.

<sup>374</sup> See *ante*, § 386, note 145.

<sup>375</sup> Tilton v. Oregon C. M. R. Co., 3 Sawy. 22, Fed. Cas. No. 14,055; Taylor v. Louisville & N. R. Co., 88 Fed. 350, 31 C. C. A. 537; Ogden City v. Armstrong, 168 U. S. 224, 18 Sup. Ct. 98; Kansas City Ft. S. & M. R. Co. v. King, 120 Fed. 615; People’s Sav-Bank v. Layman, 134 Fed. 635; Gregg v. Sanford, 65 Fed. 151, 12 C. C. A. 525; Union Pac. R’y Co. v. Cheyenne, 113 U. S. 516, 28 L. Ed. 1098, 5 Sup. Ct. 601.

<sup>376</sup> Brown v. French, 80 Fed. 166.

<sup>377</sup> Southern R’y Co. v. Asheville, 69 Fed. 359.

where a settlement of illegal back taxes will, when the proper steps are taken, constitute a lien on real estate;<sup>378</sup> or where an assessment willfully made in disregard of a statute is made a lien on realty,<sup>379</sup> although a Board of Equalization has refused relief.

§ 1857. (§ 434.) **Same—State Tax in Violation of Contract.**—Where a state imposes a tax on a corporation in violation of the terms of its charter, a federal court may issue an injunction because of the violation of contract.<sup>380</sup> And where the corporation itself refuses to sue, the suit may be brought by a stockholder, the corporation being made a party defendant.<sup>381</sup>

§ 1858. (§ 435.) **Same—Injunction Warranted by State Laws.**—Where the federal court acquires jurisdiction of the case and facts are shown which, under the state law, warrant the issuance of an injunction, such relief may be awarded, whether the facts are such as ordinarily warrant such relief in federal courts, or not. Thus, under section 5848 of the Ohio statutes providing that the illegal levy of taxes and assessments, or either, may be enjoined, a federal court may enjoin an increase in the assessment of a national bank, illegal because made by a board of equalization without notice.<sup>382</sup> Under the same statute, the federal court may enjoin the collection of any tax found to be illegal,<sup>383</sup> such, for instance, as a tax on federal bonds which are exempt from

<sup>378</sup> *Sanford v. Gregg*, 58 Fed. 620.

<sup>379</sup> *California & O. Land Co. v. Gowen*, 48 Fed. 771.

<sup>380</sup> *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Detroit, G. H. & M. R. Co. v. Powers*, 138 Fed. 264. See, also, *University of the South v. Jetton*, 155 Fed. 182.

<sup>381</sup> *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401.

<sup>382</sup> *Mercantile Nat. Bank v. Hubbard*, 105 Fed. 809, 45 C. C. A. 66.

<sup>383</sup> *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. Ed. 903; *Brinckerhoff v. Brumfield*, 94 Fed. 422.

taxation.<sup>384</sup> Likewise, where, under the decisions of the supreme court of Kansas an injunction will issue when one class of property is intentionally assessed in greater proportion than another, federal courts, in like cases coming from that state, will grant an injunction.<sup>385</sup> And, following the supreme court of Washington, an injunction will be granted where there has been an unjust discrimination.<sup>386</sup>

§ 1859. (§ 436.) **Same—Property in Hands of Federal Receiver.**—When property is in the hands of a receiver appointed by a federal court, an injunction may issue *pendente lite* forbidding state taxing officers to collect disputed taxes levied against it.<sup>387</sup> The property being in custody of the court, any charge against it, even for taxes, can be enforced against it only through the orders of the court. Therefore the court may well insist that the hands of the executive officers be tied until the issue can be determined.

§ 1860. (§ 437.) **Special or Local Assessments—In General.**—Special or local assessments, for the purpose of defraying the expense of local improvements, such as the opening, paving, or repairing of streets, and levied by municipal authority upon the property owners embraced within a limited district, are a form of taxation, subject to equitable control upon the same principles which regulate the injunction of general taxation. Such assessments are based upon benefits accruing to land from local improvements. In many states they are enforced by suit of the contractor who performs the work.

<sup>384</sup> Grether v. Wright, 75 Fed. 742, 23 C. C. A. 498.

<sup>385</sup> Chicago, B. & Q. R. Co. v. Board of Commissioners of Republic Co., 67 Fed. 411, 14 C. C. A. 456.

<sup>386</sup> First Nat. Bank v. Hungate, 62 Fed. 548.

<sup>387</sup> Clark v. McGhee, 87 Fed. 789; Ex parte Chamberlain, 55 Fed. 704; Ex parte Tyler, 149 U. S. 164, 37 L. Ed. 689, 13 Sup. Ct. 785. See, also, *ante*, chapter IV, § 163.

While there is, therefore, not the same reason for the reluctance of equity to take jurisdiction, viz., the interference with the collection of public revenues, still the courts quite generally apply the same rules. Owing to the difference in the nature of the levy, the application of these rules frequently gives rise to difficult questions. In many of the states it is stated that mere illegality of the assessment is not ground for relief. The case must be brought under some recognized head of equity jurisdiction.<sup>388</sup>

§ 1861. (§ 438.) **Same—Cloud on Title.**—The “recognized head of equity jurisdiction” under which these cases are nearly always brought is, the prevention of a cloud on the title to real property. The proceedings, therefore, against which relief is sought, must not be invalid upon their face, since otherwise, according to the usual definition, no “cloud” will be cast upon the complainant’s title.<sup>389</sup> The principal question, therefore, in many of the cases is whether the defect is such as to be apparent on the face of the proceedings. It is difficult to

<sup>388</sup> *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. Ed. 444, 18 Sup. Ct. 98; *Dean v. Davis*, 51 Cal. 406; *Wilson v. Town of Philippi*, 39 W. Va. 75, 19 S. E. 553; *Douglass v. Town of Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548.

<sup>389</sup> In general, see *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. Ed. 444, 18 Sup. Ct. 98; *Bucknall v. Story*, 36 Cal. 67; *Byrne v. Drain*, 127 Cal. 663, 60 Pac. 433; *Chase v. City Treasurer*, 122 Cal. 540, 55 Pac. 414; *Verdin v. City of St. Louis*, 131 Mo. 106, 33 S. W. 480, 36 S. W. 52; *Mayor etc. of City of Brooklyn v. Meserole*, 26 Wend. (N. Y.) 132; *Van Doren v. New York*, 9 Paige (N. Y.), 388; *Milwaukee Iron Co. v. Town of Hubbard*, 29 Wis. 51. In New York, where a resolution fails to specify which of two plans on file is to be followed, the illegality is apparent, and no injunction will issue: *Copeutt v. City of Yonkers*, 83 Hun, 178, 31 N. Y. Supp. 659. In Vermont, an assessment which did not affirmatively show, as required by the city charter, that it was made “according to special benefits” to the property assessed is void on its face and will not be enjoined: *Blanchard v. City of Barre*, 77 Vt. 420, 60 Atl. 970.



lay down any general rule by which this matter can be determined. Certain principles, however, seem to be established in many of the states; and they are briefly considered in the following sections.

§ 1862. (§ 439.) **Same—Cloud on Title—Apparent Defects.**—It is said that when the defect “must be shown by evidence *aliunde*, so that the record would make out a *prima facie* right in one who should become a purchaser, and the evidence to rebut this case may possibly be lost, or become unavailable from death of witnesses, or when a deed given on a sale of the lands for the tax would be presumptive evidence of a good title in the purchaser, so that the purchaser might rely upon the deed for a recovery of the lands until the irregularities were shown, the courts of equity regard the case as coming within their jurisdiction, and have extended relief on the ground that a cloud on the title existed or was imminent.”<sup>390</sup> Most of the cases come within the latter part of the rule, for a large proportion of the defects in special assessment proceedings are apparent on the face of some part thereof. For instance, in California, where the deed is made *prima facie* evidence of the regularity of the proceedings, a defect consisting of the publication of a resolution of intention in a paper other than that designated by the city council has been held sufficient to give equity jurisdiction;<sup>391</sup> although the defect, of course, would appear to the casual observer from a cursory examination of the proceedings. But it is held that where proceedings are taken under the general law in-

<sup>390</sup> *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. Ed. 444, 18 Sup. Ct. 98.

<sup>391</sup> *Chase v. City Treasurer*, 122 Cal. 540, 55 Pac. 414. In Massachusetts, where the property has been sold for non-payment and the recitals would in a short time become *prima facie* evidence of the facts stated in the deed, equity may interfere to remove the cloud on title: *White v. Gove*, 183 Mass. 333, 67 N. E. 359.

stead of under a city charter applicable thereto, the proceedings are void on their face and constitute no cloud on title.<sup>392</sup> Confusion frequently comes from failing to recognize that there are two branches of the rule. Reversing the order of the definition, it is submitted that the test, under the decisions, should be: (1) If the part of the proceedings sought to be enjoined constitutes *prima facie* evidence of regularity, or (2) if it does not, if the defect is not apparent on the face of the proceedings, then there is a cloud on title which equity may remove. Or, stated still more simply, if the property owner must introduce evidence to overcome the assessment, whether the defect be apparent or not, there is a cloud on title.

§ 1863. (§ 440.) **Same—Mere Irregularities will not Warrant an Injunction.**—Mere irregularities in an assessment, as distinguished from jurisdictional defects, furnish no ground for equitable relief.<sup>393</sup> The courts are far from agreed, however, as to what matters are jurisdictional. In Colorado, the fact that the city engineer has made the assessment instead of the assessor, when it is based upon an arithmetical calculation, is not sufficient to warrant an injunction.<sup>394</sup> In Indiana, the facts that

<sup>392</sup> *Byrne v. Drain*, 127 Cal. 663, 60 Pac. 433.

<sup>393</sup> *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. Ed. 444, 18 Sup. Ct. 98; *Florer v. McAfee*, 135 Ind. 540, 35 N. E. 277; *Hoffman v. Shell*, 151 Mich. 669, 115 N. W. 979; *Dubbert v. City of Cedar Falls*, 149 Iowa, 489, 128 N. W. 947; *City of Abilene v. Lambing*, 78 Kan. 484, 96 Pac. 838; *Township of Flynn v. Woolman*, 133 Mich. 508, 95 N. W. 567; *Hensley v. City of Butte*, 33 Mont. 206, 83 Pac. 481; *Campbell v. Youngson*, 80 Neb. 322, 114 N. W. 415; *Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819; *Bemis v. McCloud*, 4 Neb. (Unof.) 731, 97 N. W. 828; *Gleason v. Waukesha County*, 103 Wis. 225, 79 N. W. 249; *Hennessy v. Douglas County*, 99 Wis. 129, 74 N. W. 983; *Wells v. Western Paving etc. Co.*, 96 Wis. 116, 70 N. W. 1071; *Parkes v. City of Milwaukee*, 148 Wis. 84, 134 N. W. 152. Compare *Tucker v. Sellers*, 130 Ind. 514, 30 N. E. 531.

<sup>394</sup> *Keese v. City of Denver*, 10 Colo. 112, 15 Pac. 825.

boards of commissioners of two counties sat separately and not conjointly, or that viewers obtained an extension of time in which to make their report,<sup>395</sup> or that the work is not completed according to plans and specifications,<sup>396</sup> furnish no ground for relief. In Ohio, the fact that the proceedings do not show affirmatively that benefits were considered, when the land, as a matter of fact, has been benefited, will not warrant an injunction.<sup>397</sup> In Illinois, a deviation from the terms of an ordinance in the performance of work thereunder causing no injury to the complainant is not ground for enjoining the assessment.<sup>398</sup> In Missouri, an injunction will not issue to restrain the collection of an assessment to pay for land acquired for street purposes by condemnation on the ground that the city already had title, when the property owners were duly notified of the assessment proceedings.<sup>399</sup> Nor will it be granted on the ground that the city has made a contract that such property should be exempt from such assessments, for such a contract is invalid.<sup>400</sup> Again, it is not authorized merely because other property is exempted from the assessment, especially when it does not appear that the complainant is assessed more than his share.<sup>401</sup> In Oregon, where the proceedings for the improvement of a street are regular, the fact that independent proceedings for fixing the

<sup>395</sup> *Sarber v. Rankin*, 154 Ind. 236, 56 N. E. 225.

<sup>396</sup> *Studabaker v. Studabaker*, 152 Ind. 89, 51 N. E. 933; *Muncey v. Joest*, 74 Ind. 409. The same rule prevails in Ohio: *Putnam Co. Comm'rs v. Krauss*, 53 Ohio St. 628, 42 N. E. 831.

<sup>397</sup> *Schroder v. Overman*, 61 Ohio St. 1, 47 L. R. A. 156, 55 N. E. 158.

<sup>398</sup> *Rossiter v. City of Lake Forest*, 151 Ill. 489, 38 N. E. 359.

<sup>399</sup> *Michael v. City of St. Louis*, 112 Mo. 610, 20 S. W. 666; *Buddecke v. Ziegenhein*, 122 Mo. 239, 26 S. W. 696.

<sup>400</sup> *Verna v. City of St. Louis*, 164 Mo. 146, 64 S. W. 180.

<sup>401</sup> *Page v. City of St. Louis*, 20 Mo. 137.

grade are irregular or invalid will not warrant an injunction against the collection of an assessment.<sup>402</sup>

It is no ground for an injunction that the statute does not provide for notice, when notice has in fact been given.<sup>403</sup> In Wisconsin, the property owner must show that some injustice has been done to him by the defect before equity will interfere.<sup>404</sup>

§ 1864. (§ 441.) **Same — Jurisdictional Defects.** — Where the defect in the proceeding pertains to a matter held to be jurisdictional, equity may grant relief if the case is otherwise brought under some recognized head of equity jurisdiction.<sup>405</sup> Thus, where a statute requires publication of the ordinance creating an assessment district within five days, no jurisdiction to make a levy attaches unless such publication is made; and an injunction may issue to restrain the collection of an assessment based thereon.<sup>406</sup> In California a failure to publish a notice of the passage of a resolution of intention in a

<sup>402</sup> *Wingate v. City of Astoria*, 39 Or. 603, 65 Pac. 982. To the same effect, see *Barnes v. City of Parsons*, 77 Kan. 311, 94 Pac. 151.

<sup>403</sup> *Shannon v. City of Portland*, 38 Or. 382, 62 Pac. 50.

<sup>404</sup> *Gleason v. Waukesha County*, 103 Wis. 225, 79 N. W. 249; *Hennessy v. Douglas County*, 99 Wis. 129, 74 N. W. 983; *Wells v. Western Paving etc. Co.*, 96 Wis. 116, 70 N. W. 1071; *Lawton v. City of Racine*, 137 Wis. 593, 119 N. W. 331.

<sup>405</sup> In general, see *City of Birmingham v. Coffman*, 173 Ala. 213, *Ann. Cas.* 1914A, 889, 55 South. 500; *Coffman v. St. Francis Drainage District*, 83 Ark. 54, 103 S. W. 179; *Studabaker v. Studabaker*, 152 Ind. 89, 51 N. E. 933; *De Puy v. City of Wabash*, 133 Ind. 336, 32 N. E. 1016; *Comstock v. Eagle Grove City*, 133 Iowa, 589, 111 N. W. 51; *Andrews v. Love*, 50 Kan. 701, 31 Pac. 1094; *Hoffman v. Shell*, 151 Mich. 669, 115 N. W. 979; *Hensley v. City of Butte*, 33 Mont. 206, 83 Pac. 481; *Schneider v. Plum*, 86 Neb. 129, 124 N. W. 1132; *Morris v. Merrell*, 44 Neb. 423, 62 N. W. 865; *Joyce v. Barron*, 67 Ohio St. 264, 65 N. E. 1001; *Jonas v. Cincinnati*, 18 Ohio, 318; *Cain v. City of Elkins*, 57 W. Va. 9, 49 S. E. 898; *Fraser v. Mulany*, 129 Wis. 377, 109 N. W. 139.

<sup>406</sup> *Crane v. City of Siloam Springs*, 67 Ark. 30, 55 S. W. 955.



newspaper designated by a city council has been held such a defect as to warrant an injunction.<sup>407</sup> In Colorado, when a majority do not petition for the improvement, as required by statute, the defect is jurisdictional, even though the resolution states that a majority have petitioned.<sup>408</sup> In Indiana, an injunction is proper where an assessment is levied for the purpose of improving a public market, although the statute authorizes such assessments only for streets and highways;<sup>409</sup> or where the city engineer improperly assesses property not abutting on the street improved;<sup>410</sup> or where the preliminary estimate which is a requisite of jurisdiction is omitted;<sup>411</sup> or where the work is of absolutely no benefit to plaintiff's land;<sup>412</sup> or where the municipal body intends to assess the total cost, irrespective of benefits, against the abutting owner.<sup>413</sup> In Iowa, where the city council neglects to determine, in advance of the publication of notice, the kind of material to be used, as required by statute, an injunction may issue.<sup>414</sup> In Kansas, where a city council inserts in a contract an unwarranted provision that the contractor shall keep the streets in repair for a number of years, an injunction may issue.<sup>415</sup> In Michigan an assessment levied according to superficial area without regard to benefits may be enjoined.<sup>416</sup>

407 *Chase v. City Treasurer*, 122 Cal. 540, 55 Pac. 414.

408 *Keese v. City of Denver*, 10 Colo. 112, 15 Pac. 825. The same rule applies in Maryland: *Kuenzel v. City of Baltimore*, 93 Md. 750, 49 Atl. 649.

409 *City of Fort Wayne v. Shoaf*, 106 Ind. 66, 5 N. E. 403.

410 *City of Terre Haute v. Mack*, 139 Ind. 99, 38 N. E. 468.

411 *Goring v. McTaggart*, 92 Ind. 200.

412 *Millikan v. Wool*, 133 Ind. 51, 32 N. E. 828.

413 *McKee v. Town of Pendleton*, 154 Ind. 652, 57 N. E. 532.

414 *Coggeshall v. Des Moines*, 78 Iowa, 235, 41 N. W. 617, 42 N. W. 650.

415 *City of Kansas City v. Hanson*, 8 Kan. App. 290, 55 Pac. 513.

416 See *Thomas v. Gain*, 35 Mich. 155, 156, 24 Am. Rep. 535; *Wreford v. City of Detroit*, 132 Mich. 348, 93 N. W. 876.

§ 1865. (§ 442.) **Same — Continued.** — In Missouri, where an ordinance for street improvements provides for an unauthorized maintenance of the street, and the assessment levied is a lien on realty, an injunction is a proper remedy.<sup>417</sup> Likewise, it is proper when a hearing is denied to the property owners,<sup>418</sup> or where the assessment is to pay for property condemned when the condemnation proceedings are invalid;<sup>419</sup> or where the ordinance providing for the improvement is fraudulent and oppressive, and imposes a burden without any corresponding benefit.<sup>420</sup> In Nebraska, the statute authorizing local improvements must be strictly complied with, and if any of the substantial requirements, such as the petition of the owners of a majority of the frontage,<sup>421</sup> or the publication of the ordinance<sup>422</sup> are not fulfilled, the assessment is beyond the authority of the legislative body, and an injunction will issue. In New York, it is proper where the assessment is invalid because the assessors adopt the wrong rule in apportionment,<sup>423</sup> or when land benefited by an improvement is excluded from the assessment district, for there is an illegality not apparent on the face which creates a cloud on title;<sup>424</sup> but it will be presumed that the assessment is apportioned ac-

<sup>417</sup> *Verdin v. City of St. Louis*, 131 Mo. 106, 33 S. W. 480, 36 S. W. 52.

<sup>418</sup> *Dennison v. City of Kansas*, 95 Mo. 430, 8 S. W. 429.

<sup>419</sup> *Leslie v. City of St. Louis*, 47 Mo. 474.

<sup>420</sup> *Skinker v. Heman*, 148 Mo. 349, 49 S. W. 1026.

<sup>421</sup> *Harmon v. City of Omaha*, 53 Neb. 164, 73 N. W. 671; *Morse v. City of Omaha*, 67 Neb. 426, 93 N. W. 734.

<sup>422</sup> *Ives v. Ireys*, 51 Neb. 136, 70 N. W. 961.

<sup>423</sup> *Clark v. Village of Dunkirk*, 12 Hun, 181; affirmed, 75 N. Y. 612.

<sup>424</sup> *Copcutt v. City of Yonkers*, 83 Hun, 178, 31 N. Y. Supp. 659; *Providence Retreat v. City of Buffalo*, 29 App. Div. 160, 51 N. Y. Supp. 654; affirmed, 31 App. Div. 635, 53 N. Y. Supp. 1113; *Hassan v. City of Rochester*, 67 N. Y. 528.

cording to benefits until the contrary is shown.<sup>425</sup> In Oregon, an injunction may issue where proper publication has not been made.<sup>426</sup> In Texas, an injunction may issue when an estimate of the cost is not first made by the city authorities, as required by statute.<sup>427</sup> In Wisconsin, a court of equity will interfere to prevent a cloud on the plaintiff's title, where his lands are threatened to be sold on a void tax or assessment, whenever the defect complained of is not merely formal, but is substantial and important, and would not appear on the face of the tax deed.<sup>428</sup> Equity will restrain a sale of land under a special assessment that is void for want of authority in the city council to make it. It is not necessary to show, as in the case of general taxes, in order to obtain equitable relief, that the assessment was not only invalid, but inequitable.<sup>429</sup>

§ 1866. (§ 443.) **Same—Assessment Under Unconstitutional Statute.**—The unconstitutionality of an assessment statute may furnish ground for an injunction against the enforcement of an assessment levied under it.<sup>430</sup> Such a defect is said not to be apparent on the

<sup>425</sup> *Denise v. Village of Fairport*, 11 Misc. Rep. 199, 32 N. Y. Supp. 97.

<sup>426</sup> *Ladd v. Spencer*, 23 Or. 193, 31 Pac. 474.

<sup>427</sup> *Kerr v. City of Corsicana* (Tex. Civ. App.), 35 S. W. 694.

<sup>428</sup> *Mitchell v. City of Milwaukee*, 18 Wis. 92, 97; *Myrick v. City of La Crosse*, 17 Wis. 442; *Jenkins v. Board of Supervisors of Rock County*, 15 Wis. 11.

<sup>429</sup> *Dietz v. City of Neenah*, 91 Wis. 422, 64 N. W. 299, 65 N. W. 500, distinguishing *Hixon v. Oneida County*, 82 Wis. 515, 52 N. W. 445. In the one case there is an antecedent duty or equitable burden against all property liable to taxation, and the power to raise money to meet public necessities and obligations; while in the case of the special assessment "the proceeding here initiated was to create such a charge or duty, and the law under which the common council acted was unconstitutional and void; so no duty or charge whatever was created."

<sup>430</sup> *Thomas v. Gain*, 35 Mich. 155, 156, 24 Am. Rep. 535; *Lewis*

face of the proceedings. A federal court may enjoin the enforcement of an assessment made under a rule or system in violation of the constitution of the United States.<sup>431</sup> Thus, an injunction is proper when the assessment is rested upon a basis which excludes any consideration of benefits.<sup>432</sup>

§ 1867. (§ 444.) **Same—Presumption of Regularity.** There is a presumption that the proceedings of municipal officers in imposing special assessments are regular. Therefore, a party seeking an injunction must set up in his complaint some substantial requirement of the statute which has not been complied with.<sup>433</sup> The burden is on the plaintiff to show the invalidity of the assessment.<sup>434</sup>

§ 1868. (§ 445.) **Same—Equity will not Interfere With Discretion of Officers.**—As a general rule, where a statute vests officers with discretion as to whether an improvement should be made or not, or as to what property is benefited, or as to the amount of assessment on any particular property, and the like; equity will not substitute its judgment for that of the officers to whom the discretion is given, and will refuse to interfere. Thus, where the statute authorizes certain street work when-

v. Symmes, 61 Ohio St. 471, 76 *Am. St. Rep.* 428, 56 N. E. 194; Arnold v. City of Knoxville, 115 Tenn. 195, 5 *Ann. Cas.* 881, 3 *L. R. A. (N. S.)* 837, 90 S. W. 469.

<sup>431</sup> Village of Norwood v. Baker, 172 U. S. 269, 43 *L. Ed.* 443, 19 Sup. Ct. 187; Craighill v. Lambert, 168 U. S. 611, 42 *L. Ed.* 599, 18 Sup. Ct. 217. See, also, Charles v. City of Marion, 98 Fed. 166.

<sup>432</sup> Village of Norwood v. Baker, 172 U. S. 269, 43 *L. Ed.* 443, 19 Sup. Ct. 187; Zehnder v. Barber Asphalt Co., 106 Fed. 103; Bidwell v. Huff, 103 Fed. 362; Lyon v. Town of Tonawanda, 98 Fed. 361.

<sup>433</sup> Phillips v. City of Sioux Falls, 5 S. D. 524, 59 N. W. 881. See, also, City of Birmingham v. Wills, 178 Ala. 198, *Ann. Cas.* 1915B, 746, 59 South. 173.

<sup>434</sup> Hildreth v. City of Longmont, 47 Colo. 79, 105 Pac. 107.



ever, "in the judgment of the city council of said city, the pavement has become worn out," a court of equity will not interfere with the exercise of the discretion of the municipal authorities.<sup>435</sup> In Illinois the question of the necessity of a local improvement is, by the law, committed to the city council, and courts have no right to interfere to prevent such improvement except in cases where it clearly appears that such discretion has been abused. The ground on which the courts interfere is that the ordinance is so unreasonable, unjust, and oppressive, as to render it void.<sup>436</sup> Where a contract for a public improvement is regularly let and the work is accepted by the proper board, an injunction will not issue to restrain the levying of an assessment to pay therefor on the ground that the work has been improperly done.<sup>437</sup> Such questions are for the legislative body to decide in the exercise of its discretion. The mere fact that the assessment is in excess of benefits, where there is no claim that any land benefited is not assessed nor that there was any fraud in making the assessment, will not warrant an injunction.<sup>438</sup> In Oregon, where property has received any benefit from a local improvement, courts will not measure the amount, and hence an injunction will not issue merely because the assessment is in excess of benefits. Where, however, the property is so

<sup>435</sup> *Regenstein v. City of Atlanta*, 98 Ga. 167, 25 S. E. 428; *Rice v. Macon*, 117 Ga. 401, 43 S. E. 773. In general, see *Richardson v. City of Omaha*, 78 Neb. 79, 110 N. W. 648; *Graham v. City of Grand Rapids*, 179 Mich. 378, *Ann. Cas.* 1915D, 380, 146 N. W. 248.

<sup>436</sup> *Field v. Village of Western Springs*, 181 Ill. 186, 54 N. E. 929; *Walker v. Village of Morgan Park*, 175 Ill. 570, 51 N. E. 636.

<sup>437</sup> *Dixon v. City of Detroit*, 86 Mich. 516, 49 N. W. 628; *Motz v. City of Detroit*, 18 Mich. 495. But see *Lodor v. McGovern*, 48 N. J. Eq. 275, 27 *Am. St. Rep.* 446, 22 Atl. 199. That a slight and harmless variance in the performance from the precise terms of the contract is not a ground for restraining such payment, see *McCartan v. Inhabitants of City of Trenton*, 57 N. J. Eq. 571, 41 Atl. 830.

<sup>438</sup> *Hoffeld v. City of Buffalo*, 130 N. Y. 387, 29 N. E. 747.

situated that it could not possibly derive any benefit, the court will interfere and grant an injunction.<sup>439</sup> Questions as to the durability of the proposed pavement, its cost, and the expense of maintenance are all left to the discretion of the local authorities.<sup>440</sup>

§ 1869. (§ 446.) **Same—Abuse of Discretion.**—Courts of equity may interfere even with matters of discretion where there has been a clear abuse. Thus, in Washington, where the assessment is manifestly unequal, an injunction is proper. Thus, where the value of the abutting property is made the basis for the assessment and it appears that plaintiff's property is taken for a distance of a thousand feet back from the street for purpose of assessment while other property is assessed for a much less distance, an injunction is proper.<sup>441</sup> And in such a case it is immaterial that the plaintiff has petitioned for the improvement. An injunction is also proper when the work has been done in such a manner that it is a detriment rather than a benefit to the property. Where this appears it is immaterial whether or not the work has been accepted by the proper board.<sup>442</sup> And in Wisconsin there is a plain ground of equity jurisdiction to set aside the sale of lots made to enforce a void assessment for the purpose of changing the grade of a street, when it is found that the lots are greatly injured and rendered less valuable by the change of grade.<sup>443</sup>

<sup>439</sup> *Oregon & C. R. Co. v. City of Portland*, 25 Or. 229, 22 L. R. A. 713, 35 Pac. 452.

<sup>440</sup> *Cramton (Crampton) v. City of Montgomery*, 171 Ala. 478, 55 South. 122. The fact that the work can be done for less gives no right to relief: *Carter v. Board of Drainage Commissioners*, 156 N. C. 183, 72 S. E. 380.

<sup>441</sup> *Howell v. City of Tacoma*, 3 Wash. 711, 28 Am. St. Rep. 83, 24 Pac. 449.

<sup>442</sup> *Hasch v. City of Seattle*, 10 Wash. 435, 38 Pac. 1131.

<sup>443</sup> *Liebermann v. City of Milwaukee*, 89 Wis. 336, 61 N. W. 1112.

§ 1870. (§ 447.) **Same—Time of Equitable Interference.**—Equity will not, as a rule, interfere with an assessment until injury is actually threatened. Thus, a petition for an injunction is premature when filed before steps have been taken to make the assessment.<sup>444</sup> In Massachusetts, no injunction will issue before there is a threat to collect.<sup>445</sup> In Wisconsin, a void assessment may be canceled, and proceedings to collect it enjoined, although the proceedings have not been carried so far as to make the tax a lien on the plaintiff's lots; since the proceedings will necessarily create a cloud on the plaintiff's title.<sup>446</sup> On the other hand, a petition is too late when not filed until after the assessment has been paid voluntarily.<sup>447</sup>

§ 1871. (§ 448.) **Same—Multiplicity of Suits.**—The cases frequently state that an injunction may issue to prevent a multiplicity of suits.<sup>448</sup> Thus, in Missouri, one property owner may maintain a suit, on behalf of himself and others similarly situated, to restrain the execution of an ordinance, illegally passed, for the improvement of a street at the expense of the property owners, in order to prevent a multiplicity of suits.<sup>449</sup> In Massachusetts, danger of multiplicity of suits to collect installments of the assessment is not ground for relief, when

<sup>444</sup> *Lutman v. Lake Shore & M. S. R'y Co.*, 56 Ohio St. 433, 47 N. E. 248. In *Pitser v. City of Pawnee*, 47 Okl. 559, 149 Pac. 201, a suit prior to awarding contract for the work was held premature.

<sup>445</sup> *Clark v. City of Worcester*, 167 Mass. 81, 44 N. E. 1082.

<sup>446</sup> *Beaser v. City of Ashland*, 89 Wis. 28, 61 N. W. 77. So, the issue of a certificate to the contractor for work done may be restrained, the assessment being wholly invalid: *Johnson v. City of Milwaukee*, 40 Wis. 315, 327.

<sup>447</sup> *State v. Bader*, 56 Ohio St. 718, 47 N. E. 564.

<sup>448</sup> *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. Ed. 444, 18 Sup. Ct. 98.

<sup>449</sup> *Dennison v. City of Kansas*, 95 Mo. 416, 430, 8 S. W. 429.

these may be avoided by payment of the whole and a single suit to recover back.<sup>450</sup>

§ 1872. (§ 449.) **Same—Fraud as Ground for Relief.** It is sometimes stated that fraud in the making of the assessment, whereby the property owner is damaged, is ground for injunctive relief.<sup>451</sup> But fraud without damage cannot be made the basis of an action. Hence, in California, the fact that interested parties are appointed commissioners gives no right to relief when it is not shown that the plaintiff's assessment is too high.<sup>452</sup> And of course, fraud is not ground for relief when there is an adequate remedy at law.<sup>453</sup>

§ 1873. (§ 450.) **Same—No Injunction When Statute Provides an Adequate Remedy.**—It is stated quite generally that equity will not interfere with an assessment when there is an adequate statutory remedy.<sup>454</sup> While there is no dispute as to the general principle, there is great difference of opinion as to what remedies are adequate. In Minnesota, an injunction will be refused when

<sup>450</sup> *Greenhood v. MacDonald*, 183 Mass. 342, 67 N. E. 336.

<sup>451</sup> *Troost v. Fellows*, 169 Mich. 66, 134 N. W. 1011; *Hinkley v. Bishopp*, 152 Mich. 256, 114 N. W. 676; *Spence v. City of Milwaukee*, 132 Wis. 669, 113 N. W. 38.

<sup>452</sup> *United Real Estate & Trust Co. v. Barnes*, 159 Cal. 242, 113 Pac. 167.

<sup>453</sup> *Swan v. City of Indianola*, 142 Iowa, 731, 121 N. W. 547.

<sup>454</sup> In general, see *City of Birmingham v. Abernathy*, 178 Ala. 221, 59 South. 180; *Cosgrove v. City of Chicago*, 235 Ill. 358, 85 N. E. 599; *Michael v. City of St. Louis*, 112 Mo. 610, 20 S. W. 666; *Shulz (Schulz) v. City of Albany*, 42 App. Div. 437, 59 N. Y. Supp. 235; affirming 27 Misc. Rep. 51, 57 N. Y. Supp. 963; *Strelan v. City of Seattle*, 85 Wash. 255, 147 Pac. 1144. In *Cramton (Crampton) v. City of Montgomery*, 171 Ala. 478, 55 South. 122, it is said that the specter of costs and expenses that may be incurred in defending at law can hardly be regarded as a good ground for transferring the case to equity, where the same evil is sure to follow liens with probable aggravation.



a local assessment cannot be enforced without giving the owner a full and adequate opportunity to be heard in court; or when the statute gives a right to be heard in the assessment proceeding itself.<sup>455</sup> But the relief may be granted if the city does not object to the matter being presented in court.<sup>456</sup> In Georgia, there is an adequate remedy by an affidavit of illegality filed in the proceedings.<sup>457</sup> In Massachusetts, there is an adequate remedy for overassessment by a revision to be made by a jury, and therefore an injunction will not issue.<sup>458</sup> On the other hand, in Missouri it is held that the mere right to interpose an equitable defense to any action of ejectment which might be brought on the strength of a sheriff's deed is not an adequate remedy, for such action might not be brought promptly; and in such event, the title to plaintiff's land would be so clouded as to prevent a sale.<sup>459</sup>

§ 1874. (§ 451.) **Same—Effect of Provisions for Appeal.**—The statutes of a number of the states provide a right of appeal to the legislative body from erroneous assessments, overvaluations and the like. It is held in some jurisdictions that this remedy is adequate for matters which can be corrected on appeal, and that it pre-

<sup>455</sup> See *Kelly v. Minneapolis City*, 57 Minn. 294, 47 *Am. St. Rep.* 605, 26 *L. R. A.* 92, 59 *N. W.* 304; *Albrecht v. City of St. Paul*, 47 Minn. 531, 50 *N. W.* 608; *Fajder v. Aitkin*, 87 Minn. 445, 92 *N. W.* 332, 934.

<sup>456</sup> *Albrecht v. City of St. Paul*, 47 Minn. 531, 50 *N. W.* 608.

<sup>457</sup> *Rice v. Macon*, 117 *Ga.* 401, 43 *S. E.* 773; *Regenstein v. City of Atlanta*, 98 *Ga.* 167, 25 *S. E.* 428.

<sup>458</sup> *Whiting v. Mayor and Aldermen of Boston*, 106 *Mass.* 89.

<sup>459</sup> *Verdin v. City of St. Louis*, 131 *Mo.* 26, 33 *S. W.* 480, 36 *S. W.* 52; *Skinker v. Heman*, 148 *Mo.* 349, 49 *S. W.* 1026. See, also, *Parks v. People's Bank*, 97 *Mo.* 130, 10 *Am. St. Rep.* 295, 11 *S. W.* 41; *Verdin v. City of St. Louis*, 131 *Mo.* 26, 33 *S. W.* 480, 36 *S. W.* 52.

cludes a resort to equity.<sup>460</sup> Thus, in Indiana, an injunction will not issue because an assessment will be greater than the actual benefits, when the statute provides an adequate remedy by hearing before a special tribunal,<sup>461</sup> nor because the requisite petition with the signatures of the owners of a majority of the frontage has not been filed when no appeal has been taken as provided by statute.<sup>462</sup> In such a case it is held that the fact that others have appealed and have succeeded in having the assessment declared void will not avail. Likewise, an injunction will not issue against the collection of an amount spent for drainage purposes upon the ground that the requisite petition was not filed, for the statute provides an adequate remedy in all cases where the preliminary notice has been given.<sup>463</sup> And the relief will of course be denied when the owner has unsuccessfully prosecuted his legal remedy.<sup>464</sup> In Iowa, it is held that

<sup>460</sup> *Ogden City v. City of Armstrong*, 168 U. S. 224, 42 L. Ed. 444, 18 Sup. Ct. 98; *Brown v. Drain*, 112 Fed. 582; *Spalding v. City of Denver*, 33 Colo. 172, 80 Pac. 126; *Hildreth v. City of Longmont*, 47 Colo. 79, 105 Pac. 107; *Lyman v. City of Chicago*, 211 Ill. 209, 71 N. E. 832; *Morrell v. Union Drainage District*, 118 Ill. 139, 8 N. E. 675; *Leonard v. Arnold*, 244 Ill. 429, 91 N. E. 534; *Anheier v. Fowler*, 53 Ind. App. 535, 102 N. E. 108; *Martindale v. Town of Rochester*, 171 Ind. 250, 86 N. E. 321; *Gardiner v. City of Bluffton*, 173 Ind. 454, **Ann. Cas.** 1912A, 713, 89 N. E. 853, 90 N. E. 898; *Alley v. City of Lebanon*, 146 Ind. 125, 44 N. E. 1003; *Clifton Land Co. v. City of Des Moines*, 144 Iowa, 625, 123 N. W. 340; *Owners' Realty Co. v. Baltimore*, 112 Md. 477, 76 Atl. 575; *Schumacher v. Board of Commissioners of Wright County*, 97 Minn. 74, 105 N. W. 1125; *Rowe v. Town of Hampton*, 75 N. H. 479, 76 Atl. 250; *Wilson v. City of Salem*, 24 Or. 504, 34 Pac. 9, 691; *Olson v. Town of Curran*, 137 Wis. 380, 119 N. W. 101. See, also, *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661.

<sup>461</sup> *Taylor v. City of Crawfordsville*, 155 Ind. 403, 58 N. E. 490; *McKee v. Town of Pendleton*, 162 Ind. 667, 69 N. E. 997.

<sup>462</sup> *Cason v. Harrison*, 135 Ind. 330, 35 N. E. 268.

<sup>463</sup> *Zimmerman v. Savage*, 145 Ind. 124, 44 N. E. 252.

<sup>464</sup> *Du Puy v. City of Wabash*, 133 Ind. 336, 32 N. E. 1016.

a statutory right to appeal to the court after decision by the legislative body is exclusive.<sup>465</sup> But the remedy is adequate only as to matters which can be corrected on such appeal. Where the proceedings are absolutely void, an appeal is said to be unnecessary, and equity will take jurisdiction.<sup>466</sup> And, of course, where the grievance is such that the relief given by the legislative body cannot be complete, equity retains jurisdiction.<sup>467</sup> In Wisconsin, it is said that where an assessment is arbitrary and fraudulent, the remedy by appeal is not exclusive.<sup>468</sup>

§ 1875. (§ 452.) **Same—Other Remedies.**—In some states an injunction will not issue to restrain the collection of a special assessment when the act provides an adequate remedy at law by suit to recover back after payment.<sup>469</sup> In all cases, however, the question depends upon the interpretation of the statute. Thus, an old statute of Utah authorized suit to recover back by “any party feeling aggrieved by any such special tax or assessment.” It was held that this applied to cases where there are only errors, irregularities, overvaluations, or

<sup>465</sup> *Nixon v. City of Burlington*, 141 Iowa, 316, 18 Ann. Cas. 1037, 115 N. W. 239. See, also, *Jones v. Gable*, 150 Mich. 30, 113 N. W. 577.

<sup>466</sup> *Gallaher v. Garland*, 126 Iowa, 206, 101 N. W. 867; *Fort Dodge Electric Light & Power Co. v. City of Fort Dodge*, 115 Iowa, 568; 89 N. W. 7; *Thayer Lumber Co. v. City of Muskegon*, 152 Mich. 59, 115 N. W. 957; *Howell v. City of Tacoma*, 3 Wash. 711, 28 Am. St. Rep. 83, 29 Pac. 447; *Spence v. City of Milwaukee*, 132 Wis. 669, 113 N. W. 38.

<sup>467</sup> *Hayes v. Douglas County*, 92 Wis. 429, 53 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482.

<sup>468</sup> *Kersten v. Milwaukee*, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 948, 1103.

<sup>469</sup> *Hilliard v. City of Asheville*, 118 N. C. 845, 24 S. E. 738; *Wilson v. Town of Philippi*, 39 W. Va. 75, 19 S. E. 553; *Hunnewell v. City of Charlestown*, 106 Mass. 350.

other defects which are not jurisdictional, but that where the council, not having jurisdiction to levy the tax, could not proceed under the statute, the tax-payers need not proceed under the statute to recover the money paid.<sup>470</sup> In Illinois, if the work, as performed by the contractor, is accepted by the city, and the contractor settled with and paid, the remedy to be invoked by the property holder, if the work is not done in substantial compliance with the provisions of the ordinance, is the writ of *mandamus* to compel the city authorities to complete the work as contemplated by the ordinance. An injunction will not be awarded in such case to restrain the collection of a special assessment.<sup>471</sup> Sometimes a remedy by *certiorari* is given;<sup>472</sup> but as this remedy only reviews the face of the record, where resort to extrinsic evidence is necessary, equity may take jurisdiction.<sup>473</sup>

§ 1876. (§ 453.) **Same—Effect of Statute Prohibiting or Limiting Resort to Equity.**—It is sometimes expressly provided that a party interested shall not resort to equity. By section 897 of the Consolidation Act (New York City) it is provided: “No suit or action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title, but owners of property shall be confined to their remedies in such cases to the proceedings under this title.”<sup>474</sup> Where this applies, it

<sup>470</sup> *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. Ed. 444, 18 Sup. Ct. 98.

<sup>471</sup> *Callister v. Kochersperger*, 168 Ill. 334, 48 N. E. 156; *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171; *Smith v. Kochersperger*, 180 Ill. 527, 54 N. E. 614.

<sup>472</sup> *Clinton Township v. Teachout*, 150 Mich. 124, 111 N. W. 1052; *Grandchamp v. McCormick*, 150 Mich. 232, 114 N. W. 80. Compare *McCormick v. Mayor etc. of New Brunswick*, 83 N. J. Eq. 1, 89 Atl. 1034.

<sup>473</sup> *Bilsborrow v. Pierce*, 101 Minn. 271, 112 N. W. 274.

<sup>474</sup> Laws 1882, c. 410.



has been held that no injunction can issue to prevent the sale of property for a void assessment, for to allow it would in substance be to vacate the assessment.<sup>475</sup> In Kansas, by statute it is provided that no suit to enjoin the making of a special assessment shall be brought after the expiration of thirty days from the time the amount due on each lot is ascertained.<sup>476</sup> Under this statute, it is held that an injunction will not issue when the suit is brought after the expiration of this time, especially if the proceedings are valid on their face.<sup>477</sup>

§ 1877. (§ 454.) **Same—Estoppel—Laches.**—The equitable doctrines of estoppel and acquiescence have a frequent application in cases of this class. Thus, in Kansas, a property owner, who lives in the neighborhood, who signs the petition for the improvement, and whose property is greatly benefited, is not entitled to an injunction to restrain the collection of an assessment levied therefor, although the improvement is made without any authority whatever.<sup>478</sup> And in Michigan, where a street is paved as a result of a petition signed by complainants, and no objection is made until the work is completed, an injunction against the assessment will be refused.<sup>479</sup>

<sup>475</sup> *Scudder v. Mayor etc. of New York*, 146 N. Y. 245, 40 N. E. 734; affirming, 79 Hun, 613, 29 N. Y. Supp. 422; *Sixth Ave. R. Co. v. City of New York*, 63 Hun, 271, 17 N. Y. Supp. 903. Compare *Jones v. Gable*, 150 Mich. 30, 113 N. W. 577.

<sup>476</sup> Gen. Stats. 1897, c. 32, § 212.

<sup>477</sup> *City of Kansas City v. Gray*, 62 Kan. 198, 61 Pac. 746; *Wahlgreen v. City of Kansas City*, 42 Kan. 243, 21 Pac. 1068; *City of Topeka v. Gage*, 44 Kan. 87, 24 Pac. 82; *Doran v. Barnes*, 54 Kan. 238, 38 Pac. 300; *City of Leavenworth v. Jones*, 69 Kan. 857, 77 Pac. 273. Compare *Martindale v. Town of Rochester*, 171 Ind. 250, 86 N. E. 321; *Anheier v. Fowler*, 53 Ind. App. 535, 102 N. E. 108.

<sup>478</sup> *Downs v. Wyandotte Co. Commissioners*, 48 Kan. 640, 29 Pac. 1077; *Stewart v. Commissioners*, 45 Kan. 708, 23 Am. St. Rep. 746, 26 Pac. 683; *Commissioners v. Hoag*, 48 Kan. 413, 29 Pac. 758.

<sup>479</sup> *Motz v. City of Detroit*, 18 Mich. 495. Compare *Cotzhausen (Von Cotzhausen) v. Dick*, 138 Wis. 127, 119 N. W. 822; *Lawton v. City of Racine*, 137 Wis. 593, 119 N. W. 331.

There is a sharp conflict of opinion as to the effect of merely standing by without objection while the work is being done. In some states such conduct apparently works an estoppel.<sup>480</sup> But in Nebraska, an injunction will not be refused because the abutting owner has allowed the work to be completed unless it appears, (1) that he knew the improvement was being made, (2) that he knew that an assessment was contemplated, (3) that he knew of the infirmity or defect, and (4) that some special benefit has accrued to his property.<sup>481</sup> Where these concur, the owner must pay what is justly due before he can obtain relief.<sup>482</sup> Relief will not be granted to one who, by covenants in his deed, has assumed the payment of the assessment.<sup>483</sup> In several states mere standing by without objection does not amount to such acquiescence as will bar relief when the proceedings are invalid.<sup>484</sup> In Oregon, a distinction is made between cases

<sup>480</sup> *Montgomery v. Wasem*, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184; *Muncey v. Joest*, 74 Ind. 409; *Martindale v. Town of Rochester*, 171 Ind. 250, 86 N. E. 321; *Menzie v. City of Greensburg*, 42 Ind. App. 657, 85 N. E. 484; *Walker Township v. Thomas*, 123 Mich. 290, 82 N. W. 48; *Lundbom v. City of Manistee*, 93 Mich. 170, 53 N. W. 161; *Byram v. City of Detroit*, 50 Mich. 56, 12 N. W. 912, 14 N. W. 698; *Farr v. City of Detroit (Mich.)*, 99 N. W. 19; *Gates v. City of Grand Rapids*, 134 Mich. 96, 95 N. W. 998; *Jones v. Gable*, 150 Mich. 30, 113 N. W. 577; *W. F. Stewart Co. v. City of Flint*, 147 Mich. 697, 111 N. W. 352, 353; *Shaw v. City of Ypsilanti*, 146 Mich. 712, 110 N. W. 40; *Geib v. Morrison County*, 119 Minn. 261, 138 N. W. 24; *City of Bartlesville v. Holm*, 40 Okl. 467, 139 Pac. 273; *Alstad v. Sim*, 15 N. D. 629, 109 N. W. 66. But the defense is not made out where the owner has protested at all stages of the proceedings: *Sharum v. City of Muskogee*, 43 Okl. 22, 141 Pac. 22.

<sup>481</sup> *Harmon v. City of Omaha*, 53 Neb. 164, 73 N. W. 671. For a case where it was held that the property owner was barred by his acquiescence, see *Redick v. City of Omaha*, 35 Neb. 125, 52 N. W. 847.

<sup>482</sup> *Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819.

<sup>483</sup> *Eddy v. City of Omaha (Neb.)*, 101 N. W. 25.

<sup>484</sup> *Keese v. City of Denver*, 10 Colo. 112, 15 Pac. 825; *Coggeshall v. Des Moines*, 78 Iowa, 235, 41 N. W. 617; rehearing denied

where the authorities have jurisdiction of the improvement and those where they have not. Where the municipal authorities have jurisdiction to improve a street, a property owner, who, with knowledge of such improvement, makes no objection until after the work has been completed, cannot enjoin the collection of the assessment on the ground that the proceedings have not been regular.<sup>485</sup> Where, however, there is no jurisdiction, as where the requisite petition is not filed, there is no estoppel, and the injunction will issue although no objection has been made until after completion.<sup>486</sup> It has been held that where an owner of land subject to a mortgage joins in a petition for the improvement, a subsequent owner who acquires title by foreclosure is not estopped from attacking the assessment.<sup>487</sup> When the complainant has been guilty of laches, injunctive relief will be denied. Thus, after an assessment has been levied for seven years it is too late to enjoin a threatened sale thereunder.<sup>488</sup>

§ 1878. (§ 455.) **Same—Tender.**—When an assessment is void, it is not necessary to make a tender as a condition to relief.<sup>489</sup> Where a part of the assessment

42 N. W. 650; *Verdin v. City of St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; *Lewis v. Symmes*, 61 Ohio St. 471, 76 Am. St. Rep. 428, 56 N. E. 194. For earlier Ohio cases stating another rule, see *Kellogg v. Ely*, 15 Ohio St. 64; *Commissioners of Putnam Co. v. Krauss*, 53 Ohio St. 628, 42 N. E. 831; *Teegarden v. Davis*, 36 Ohio St. 601.

<sup>485</sup> *Wingate v. City of Astoria*, 39 Or. 603, 65 Pac. 982; *Wilson v. City of Salem*, 24 Or. 504, 34 Pac. 9, 691; *Houck v. City of Roseburg*, 56 Or. 238, 108 Pac. 186.

<sup>486</sup> *Strout v. City of Portland*, 26 Or. 294, 38 Pac. 126; *Jones v. City of Salem*, 63 Or. 126, 123 Pac. 1096.

<sup>487</sup> *Lyon v. Town of Tonawanda*, 98 Fed. 361.

<sup>488</sup> *Ross v. City of Portland*, 105 Fed. 682.

<sup>489</sup> *Village of Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. 187; *Chase v. City Treasurer*, 122 Cal. 540, 55 Pac. 414; *Denver v. State Investment Co.*, 49 Colo. 244, 33 L. R. A. (N. S.) 395, 112 Pac. 789; *Lawrence v. City of Grand Rapids*, 166 Mich. 134,

is valid and a part invalid, a tender of the valid part is a prerequisite to an injunction against the invalid part.<sup>490</sup> In Missouri, where there is some irregularity in doing the work, or invalidity of some part of the contract for street improvements, an abutting owner will be required, as a condition precedent to an order enjoining the collection of a general tax, to make payment or tender of the sum justly due.<sup>491</sup> Thus, where the illegality results from a construction of the work under a valid ordinance and contract and the mistake consists in pointing out the lines of the street by the city authorities, the abutting owner will be compelled to do equity.<sup>492</sup> Where the doctrine of estoppel operates, a tender of the amount justly due must be made.<sup>493</sup> In Wisconsin, special taxes levied for local improvements are to be regarded as one of the constitutional methods of taxing the citizen for the benefit of the public, and any equitable rule which applies to other constitutional methods must, with equal propriety, be applied to it.<sup>494</sup> When the statutory requisites to the assessment of a tax for a street improvement upon abutting property are all complied with up to the time of filing the estimates or specifications for letting the work,—that is, when the assessment of benefits has been in all respects legally made, so

131 N. W. 581; *Hassan v. City of Rochester*, 67 N. Y. 528; *Ladd v. Spencer*, 23 Or. 193, 31 Pac. 474; *Hayes v. Douglas County*, 92 Wis. 429, 53 *Am. St. Rep.* 926, 31 *L. R. A.* 213, 65 N. W. 482.

<sup>490</sup> *Studabaker v. Studabaker*, 152 Ind. 89, 51 N. E. 933; *Montgomery v. Wasem*, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184; *Florer v. McAfee*, 135 Ind. 540, 35 N. E. 277; *Porter v. R. J. Boyd Paving & Construction Co.*, 214 Mo. 1, 112 S. W. 235.

<sup>491</sup> *Verdin v. City of St. Louis*, 131 Mo. 106, 33 S. W. 480, 36 S. W. 52.

<sup>492</sup> *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800.

<sup>493</sup> *Eddy v. City of Omaha*, 72 Neb. 550, 101 N. W. 25, 102 N. W. 70, 103 N. W. 692. Compare *City of Paola v. Russell*, 75 Kan. 826, 89 Pac. 651.

<sup>494</sup> *Mills v. Charleton*, 29 Wis. 400, 418; *Wells v. Western Paving etc. Co.*, 96 Wis. 116, 70 N. W. 1071.



as to determine a proper basis upon which to apportion the cost of the improvement properly chargeable to abutting property,—and the subsequent proceedings result in charging such property an excessive amount for any cause, the owner cannot wait until the improvement is completed, and his property has received the full benefit thereof, and then screen himself from the entire tax because of the illegal excess. If such excess can be determined by mere computation, or without proof, failure to tender or offer to pay the balance before suit will be fatal to any claim for costs, and failure to plead an offer to pay fatal to the cause of action. If such excess cannot be determined by computation, and without proof, the court should determine the same, as near as practicable, to a reasonable certainty, from the evidence produced on the trial, and require the payment of the balance as terms of granting relief against such excess.<sup>495</sup> The rule is not applied when the assessment of benefits requisite to jurisdiction to impose any tax on the abutting property for the improvement was not made,<sup>496</sup> as when the cost of the improvement is assessed on the abutting property in proportion to the front footage, without regard to the benefit secured thereby, as required by statute; since the defect goes to the very foundation of the assessment, and makes it necessarily unequal.<sup>497</sup>

<sup>495</sup> *Wells v. Western Paving etc. Co.*, 96 Wis. 116, 70 N. W. 1071. See, also, *Yates v. City of Milwaukee*, 92 Wis. 352, 66 N. W. 248; *Meggett v. City of Eau Claire*, 81 Wis. 326, 51 N. W. 566; *Cook v. City of Racine*, 49 Wis. 243, 5 N. W. 352 (the sum which plaintiff ought to pay being definitely ascertained by the proofs, judgment directed restraining collection of the assessment in case plaintiff, within a specified time, shall pay the proper amount, with interest); *Mills v. Charleton*, 29 Wis. 400, 418, 9 *Am. Rep.* 578 (excess being clearly ascertainable by computation, its collection restrained only on condition that the proper amount is paid).

<sup>496</sup> See *Hayes v. Douglas County*, 92 Wis. 429, 53 *Am. St. Rep.* 926, 31 *L. R. A.* 213, 65 N. W. 482.

<sup>497</sup> *Hayes v. Douglas County*, *supra*.









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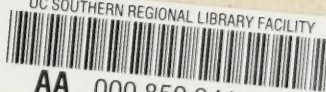
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